THE

Complete and Consolidated Digest

OF

INDIAN CIVIL CASES 1901 TO 1908.

Decided by the several Indian High Courts, and reported in the various authorised and unauthorised Law Reports and Publications of Allahabad, Bombay, Burma, (Upper and Lower), Calcutta, Central Provinces, Madras, Oudh, and Punjab.

BY

DHANI RAM KHANNAH, B. A., LL. B.

Vakil High Court U. P and First Grate Pleader Chief Court Punjab, Gurgaon.

(In two Volumes).

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To

SIR PRATUL CHANDRA CHATTERJI, M.A. D.L., C.I.E.

(Formerly Judge of the Punjab Chief Court)

Well known for his philanthropy and profound learning

AS A HUMBLE TOKEN

OF THE

MOST SINCERE ESTEEM AND REGARD

THE FOLLOWING

CONSOLIDATED DIGEST OF INDIAN

CIVIL CASES 1901 TO 1908

IS

BY HIS KIND PERMISSION

Most Respectfully dedicated

BY

HIS MOST SINCERE ADMIRER

DHANI RAM Khanna Vakil.

PREFACE.

A work like the present one requires no elaborate preface. Suffice it to say, that both the Bench and the Bar having to deal with the Civil Law of the land, have long felt the want of such a complete, comprehensive, consolidated, and universal Digest of Indian Civil Law, containing the recently decided and therefore not over ruled cases of the several High Courts of British India, quite separate from and not intermixed with the Criminal Case Law.

None of the Digests now extant meets this want. Almost all of them, end with the year 1900, and there is thereafter no single consolidated Digest of all-India-Civil-Law. It is not so much with a view of a pecuniary gain but rather to supply the badly felt want referred to above that this work has been undertaken.

Gentlemen might find some short comings in this work which are naturally met with in the first edition of a big book like the present one, and it is therefore hoped that they would kindly excuse them on that account.

The book is divided into two volumes. It is very well arranged into headings and sub headings for easy and ready reference. It contains the case Law from January 1901 upto December 1908. But the Oudh Rulings have been taken from 1898 and the Lower Burma Rulings for 1900 also, have been inserted.

I shall feel myself highly repaid if this work proves useful to those for whom it is intended.

DHANI RAM KHANNAH, B A., LL.B.,
Vakil High Court U. P. &
Pleader Chief Court Punjab.

GURGAON,
The 15th July, 1910

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THE

CONCISE AND CONSOLIDATED
DIGEST OF INDIAN CIVIL CASES
1901 to 1908

BOTH INCLUSIVE.

A

ABADI (Village Site).

(a) Alienations by non proprietors in village Abadi.

See Nos. 1 to 4.

1 *Custom—Alienation—Right of non-proprietors to transfer houses—Mauza Siwan, Karnal District.*

Held, that by the custom of the village of Siwan, Karnal District, a non-proprietor (who was a dyer in this case) could transfer his house built upon land originally belonging to the proprietary body and occupied by his family for several generations (in this case proved to be at least three) notwithstanding that the village *Waj b.ul-Arz* prepared long after his family's advent provided to the contrary. The Karnal Distt Gazetteer described Siwan as a town with 5000 population with no municipality and taxes. So non-proprietors were not on the footing of those living in villages. BADRI *v.* UDHO. **161 P L R 1903 =73 P R., 1903.**

2 *Landlord and Tenant-Abadi-Site-Alienation by tenant-Custom-*Wajib-ul-Arz *Entries in.*

Apart from any custom recorded in the *Wajib ul Arz* which forbids a tenant to sell the site of his house, a tenant has not, under the ordinary law, and in the absence of a custom giving to a tenant a transferable right in the land held by him, any right to convey the land under his house. BHAJAN LAL *v.* MUHAMMAD ABDUS SAMAD KHAN. **A W N 1905 P 90-27 A 556.**

See Landlord and Tenant col 1499 P II.

3 *Lanlord and Tenant-Abadi-Sale of building site in abadi by tenant-Custom-*Wajib-ul-Arz. *Entries in-Principal and agent-Aqcuiescence on the part of agent-Building.*

The plaintiff was the receiver of the estate of a minor Zamindar situated in the district of Bulandshahr. He lived in Calcutta and appointed a *Karinda* to look after and manage the property of the minor.

In 1894 two of the tenants of a village in

Abadi (Village Site) *Continued.*

the Zamindari sold their house in the *abadi*, and the purchaser, who was a *bania* of the same village, took possession of the house. During 1894 1896, he spent a large sum of money and built a masonary house on the site purchased by him. While the building was being erected the plaintiff's *Karinda* did not object to the building.

Entries in the *Wajib-al arz* of the last Settlement of the vallage were as follows-" Without our consent no body can settle in any place possessed by us, *i e*, the zamindars" and again, " A rayot occupying any house canu t be turned out of it by any body so long as he lives in it, but he is not empowered to alienate the site. He can remove and sell materials of the building constructed by him."

In 1902 the plaintiff brought the present suit against the defendant (purchaser), and prayed to be put in possession of the masonry house, and in the alternative he asked that the defendant might be ordered to remove the materials of the house within a time to be fixed by the Court.

Held, per Aikman, J.—That the suit must be dismissed, for the plaintiff was bound by the acquiescence of his *Karinda*. *L R, 1 E and I A., 129 and 20 All, 248*, and A W N 1881 P 114 *referred to.*

Per Knox acting, C J,—contra—That (1) the tenants had no right to sell anything except the materials of their house (2) that it was not shown that the land-holder knew of, or acquiesced in the building erected by the defendant and (3) that the *Karinda* had no authority to do any act signifying such acquiescence on his principal's behalf. RAJ NARIAN MITTAR *v.* BUDH SEN. **1 A L J 673=A W N 1904 P 240=27 A 338.**

4 *Landlord and tenant—Custom Tenant's right in house in* Abadi—Wajib-al arz—*Construction of.*

Held, that in the N W P a general custom is well established to the effect that a

Abadi (Village Site)—*Continued.*

person agriculturist or agricultural tenant, who is allowed by the zamindar to build a house for his occupation in the *abadi* obtains, if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house, that is, prevents it from falling down, and so long as he does not abandon the house by leaving the village. As such occupier of a house in the *abadi* occupying under the zamindar he has, unless he has obtained by special grant from the zamindar an interest which he can sell, no interest which he can sell by private sale or which can be sold in execution of a decree against him except his interest in the timber roofing and wood work of the house.

Held, also that the following clause in the *Wajib-ul-arz* of the village did not empower the tenant to mortgage without the zamindar's consent the house in *abadi* occupied by him :—

" Regarding construction of a new house. For the construction of a new house a tenant in every way depends upon the zamindar's consent. No particular fee is fixed. Only that which may be agreed on between the parties is given and taken. In case of a tenant leaving his house, the zamindar of the *thok* in which the house is situated will be considered its owner ; and the tenat, on his return, will not be entitled to get it back. If any tenant wishes to sell his house, the zamindar will be entitled to one fourth of the sale price received. A tenant can with the zamindar's permission take earth from a new place ; he is not competent to do so without his consent." MUHAMMAD RAFFI *v.* TELHU SINGH. **A W N 1902 P 140.**

(b) Non proprietor's right to erect building in Abadi.

(*See Nos. 5-8.*)

5 *Landlord and Tenant*-Abadi-*Rights of tenants in the village* abadi—*Suit to remove building erected by tenant without permission of zamindars.*

A dwelling house in a village *abadi* was let to a tenant. There was a shed in the yard of the house. A number of Muhammadans with the consent of the tenant used to say their prayers there. The tenants erected upon the site of the shed a permanent building as a mosque. The landlords prayed for the demolition of the building.

It was provided in the *Wajib-ul-arz* that no cultivator could build a house outside the compound of his house.

Held, that the suit must be decreed for the tenant was not entitled to erect a permanent mosque. BASA MAL *v.* GHAYAS UD-DIN. **2 A L J 27=A W N 1904 p. 276 =27 A 356.**

6 *Landlord and Tenant-House occupied by tenant of agricultural land for more than 12 years—Adverse possession. House in* Abadi.

Held, that the tenant's possession of the house in suit, situated in village *abadi*, built

Abadi (Village Site)—*Continued.*

by him about fourteen years prior to the suit and occupied by him since, could not be considered as adverse to the landlord and the latter was entitled to claim rent for its use or to require its demolition. *(1 A L J 479 distinguished.* JAIKISHUN SING *v.* MOTI CHAND. **3 A L J 627=W N. All. 1906 p. 258.**

7 *Custom*—Abadi—*Menial's right to build mosque.*

Held, that when a *kamin* gets land from the proprietary body, the implied understanding in the absence of a contract to the contrary is, that it is to be used for purposes of residence and for plying his trade. If the *kamin* devotes it to any other purpose the proprietors have a right to object. It is not competent to the *kamin* to build a mosque or a temple on it or anything that ostensibly prejudices the right of reversion of the owners when the *kamin* leaves the village. In this case the *Wajib ul-arz* stated that previously no *kamin* could alienate his house or site but lately some attachments and transfers took place without objection.

Held, that this stated facts and did not abrogate the custom. KALU *v.* WASAWA SINGH. **19 P R 1904.**

8 *Landlord and Tenant-Suit for possession of room in* abadi-*Appurtenant—Adverse possession.*

The plaintiff, landlord, brought a suit against the defendants, his tenants, to recover possession of a room in the *abadi* of the village. It was found that the defendants had been in possession of the room in question for a period of 30 years. Their tenancy was admittedly a subsisting agricultural tenancy.

Held, that either the tenants were entitled to the room as appurtenant to their holding, or, if it was not appurtenant to the holding they had acquired it by adverse possession. On either view the plaintiff's suit could not be maintained. NAZIR HASAN *v.* SHIBBA **A W N 1904, p. 168=27 A 81.**

(a) Abadi land in the city of Lucknow.

Lord Canning's Proclamation of 1858—Confiscation of land in Oudh-Abadi *land in the city of Lucknow obtained by Nazul under a Settlement decree, renunciation of right of Government, as to——Financial Commissioner's letter of August 7th 1868*

The plaintiff claimed title through one S who was recorded at the first regular settlement in the *khasra* of the *abadi* of village Khalispur known as Mohalla Hasanganj in the city of Lucknow, as the owner and occupant of a house which then stood on the plot in suit. His case was that after the general confiscation of 1858 the Government abandoned its rights thereunder throughout the city of Lucknow including Hasanganj. He relied upon a *Rubkar* or docket of the Financial Commissioner of August 7th 1869 to the effect that land occupied by, or appurtenant to, a house

Abadi (Village Site)—*Continued.*

in the city of Lucknow should not be recorded as *Nazul* property, but be considered to be the property of the owner of the house. The defence was that Khalispur was not part of the city of Lucknow and the *abadi* land thereof had been decreed by the Settlement Court in 1867 to the Lucknow Municipality representing the Nazul Department against certain claimants. The *abadi* portion of the village was entered in the *khewat* as "*patti Nazul Sarkar.*" The Settlement Officer acting on Financial Commissioner's docket of august 7th 1868 made extensive alterations in the records of the city, but Khalispur or Hasanganj was not included in the survey of the city proper and no alteration was made in the records relating to it in consequence of the said docket. The *wajib-ul arz* prepared in 1870 reaffirmed the right of the Nazul Department to Khalispur under the settlement decree of 1867.

Held, that the Financial Commissioner's docket of August 7th 1868 could not be treated as a renunciation of the rights of Government in the *abadi* of Khalispur and that the plaintiff had no title to the plot in suit. THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* BABU TARNI PRASANNO ROY. **9 O C P 249.**

(*See cols 1499 and 1500 P II.*)

ABANDONMENT.

See separate sub headings below (a) to (j) and cols 1500 P II and 1505 P II.

(a) By absentees.

The father and uncle of the plaintiff were shown as absentee owners in 1851, at which Settlement it was recorded that if absentees returned they could re claim their land. This entry was not repeated at the last Settlement of 1885, but the names of the plaintiff and his uncle continued to be shown up to the date of the suit. The plaintiff claimed to take his own share in the land as well as his uncle's. The persons holding land of the absentees in a sale deed executed in 1890 agreed with the vendee that if the absentees returned and claimed their shares they would make up the deficiency by giving other land out of their own share.

The defendants pleaded that the plaintiff's claim was barred by adverse possession of the defendants and the abandonment by the plaintiff and his predecessors.

Held, that there was no abandonment on the part of the plaintiff or his predecessors or adverse possession on the part of the defendants—*P R, 118 of 1889, 18 of 1888, 84 of 1888, 186 of 1888, 141, of 1883, 104 of 1889, 118 of 1893, 109 of 1892, 121 of 1884, 30 of 1901. referred to.* TABA *v* KALA. **146, P L R 1903.**

2 *Abandonment of land—Absentee—Suit for possession—Adverse possession.*

Held, that in the absence of a motive for or evidence of intention of abandonment or of adverse possession for the statutory period, the suit is not barred by arts 142 or 144 Limi-

Abandonment—*Continued.*

tation Act. Mere failure to cultivate unculturable land does not constitute abandonment (P R 109 of 1892, 16 O 373 P C, 105 P R 1901 referred to) SHAHBAL SHAH *v.* GANESH DAS. **P R 53 of 1907 = 39 P L R 1907.**

3 *Abandonment-Absentee-Adverse possession.*

Held, that each abandonment case is to be decided on its own set of facts. The presumption, arising from long continued absence and the omission to take steps to keep alive a once existing right, that the absentee has relinquished all claims to his land, is not affected by a promise on the part of the person in possession of the land to restore it on the return of the absentee to the village.

Plaintiff's residence in the village and yet delaying his claim points still more strongly to abandonment. In this case his father left the village Ambota before Una settlement of 1869 and lived and died in Kapurthala state. In that settlement defendants states to restore the land to this absentee or his off shiping on their return after calculation of loss and profit. Plaintiff sued then in 1899 when he was 40 years of age. Entry not repeat in 79 settlement. *P R 18 of 1886, 84 of 1888, 118 of 1889, 62 of 1890, 85 of 1882, 141 of 1883 referred to.* JODHA *v.* DHANI RAM. **30 P L R 1901.**

(b) Of Claim or Portion thereof.

See Civil Procedure Code O II R 2-S 43.

(c) By females in succession effect on reversioners.

4 *Abandonment-Effect of giving up of possession by successive females on reversioners. Limitation Act arts. 131, 144, adverse possession.*

The land in dispute belonged to one Ilahi Bakhsh, on whose death, his widow, Musst, Begam, succeded him. In 1879 she, being unable to pay the revenue, left the villlage and went away to her parents. The revenue was then in arrears for three harvests, and the land was lying uncultivated. The plaintiffs were asked by the Tahsildar to take up the land and to pay the revenue due which had been realized from the lambardar who was also a distant relation. They declined, saying that they would take steps to assert their rights when the widow died. The lambardar was put in possession of the land on his agreeing to give it up after cutting the standing crop whenever Musst. Begam re-paid him the arrears of revenue recovered from him. Musst. Begam was entered in the revenue papers as absent and the lambardar in possession. Shortly after Musst. Begam died without making any effort to regain the land In January 1886, the land was mutated in the name of Musst Bhari, the mother of her husband, also as an absentee, the lambardar being recorded in possession as before. Musst. Bhari died about ten years before the suit filed by the plaintiff in which they claimed possession from the heirs of the lambardar on payment of the losses that may have been paid by him on account of the land.

Abandonment—*Continued*

The defendant set up limitation and also abandonment of their rights by the plaintiffs when, on Musst. Begam's absconding, the land was offered to them by the Revenue officer.

Held, that abandonment, either by Musst. Begam or by the plaintiffs, was not established. The word abandonment means, if anything, a conscious renunciation of rights of ownership. Musst. Begam left the village on account of poverty and inability to pay revenue. Her going to her parents at a time of distress did not indicate any intention to give up her life-interest in her land and she did no other act which in the least showed any such intention. The natural presumption from the known facts probably was that she meant to resume her land when better times came. The plaintiffs were mere reversioners. In 1879, their title to possession had not accrued and this they did not abandon, but on the contrary expressly reserved it in their statement. A man cannot be held to abandon what he does not possess. The plaintiffs' right to possession accrued only ten years before suit on Mussammat Bhari's death and there could be no abandonment before that time. Abandonment would be insufficient to bar the claim before expiry of twelve years—*85 Punjab Record 1892 (F B)*

Plaintiffs could have estopped themselves from suing by promising not to sue when the right came into existence, but this was not what they said, but the reverse. Plaintiffs who did not derive their tight from, or through, Musst. Bhari, were not bound by any intention she may have had—which was not proved—of giving up her rights which only amounted to a life-interest.

Held, also that article 141 of the second schedule of Limitation Act was applicable to the case and the plaintiff's suit was not barred.

Article 142 would have applied if the original holder of the land in 1879 had been a male. When there are successive female heirs with limited rights entitled to succeed before the male reversioners, limitation does not begin to return until the death of the last female heir — *23, Cal 460.*

No question of adverse possession arose in this case, as it appeared that the lambardar's possession was at its inception not as owner on his own behalf, and was not then or at any time subsequently adverse to Musst. Bhari. *17 Cal 137, 23 P R 1890 P C, 19 All 357, 20 All 42, 22 Cal 445, 9 Cal 934, 14 All 156, 9 W R 505, 21 Cal 8, 20 Mad 493, 23 Bom 725, 79 P R 1898, 21 Bom 646, 74 P R 1895, 11 P R 1899 referred to.* BAZKHAN v. SULTAN MALIK. **P R 43 of 1901.**

(d) Of Inheritance.

Abandonment of inheritance.

5 *Adverse posesssion—Onus probandi-Claim for a share in undivided ancestral property—Mutation in favour of plaintiffs.*

The plaintiffs sued for possession of one third of the lands in dispute as their share in the joint ancestral property inherited by them

Abandonment—*Continued.*

from their deceased father and brother.

The defendants pleaded adverse possession and that the deceased had abandoned their rights in the property in dispute. The abandonment by the deceasd father and brother of the plaintiffs pleaded by the defendant was not established.

On the death of the father the lands were mutated in the names of the plaintiffs and their deceased brother who died subsequently. It was not till 1891 that mutations adverse to the plaintiffs took place.

Held, that the *onus* of proving adverse possession lay on the defendants and they had failed to prove it for the period prior to 1891, *Punjab Record 61 of 1870, 118 of 1889 116 of 1900, followed,* SAHIB DADKHAN v. AKBAR KHAN. **92 P L R 1902.**

6 *Of inheritance*—The daughter of a Mohammadan of Beluchi tribe who are governed by general Mohammadan Law relying on the generosity of the other party executed a deed of abandonment in his favour.

Held, the deed was without consideration and void. The burden of proving a custom excluding daughters from inheritance lay on the other party. 23 A 20 followed. ISMAIL KHAN v. IMTIAZ UN NISA. **4 A L J 792.**

See Mohammadan Law Succession.

(e) Of issue by Pleader.

7 Vakil—*Scope of his authority—His power to abandon issue—Limitation—Court's power to raise an issue as to—Hindu Law—Partition—Suit for—Joint Hindu family—Manager bound to account for family jewels admittedly belonging to the family—Partial partition.*

Held, that a *Vakil's* general powers in the conduct of a suit include the abandonment of an issue, which, in his discretion, he thinks it inadvisable to press.

When no question of limitation was raised by the pleadings, or arose upon the evidence, *held*, that it was not obligatory on the Court to direct an issue.

When in a suit for partition among the members of a joint Hindu family, the defendant who was a manager of the family admitted the existence of family jewels as joint family property, and could not charge the plaintiff with possession of them, held, that the defendant as manager of the family was primarily responsible, and was bound to account for them.

The plaintiff in a suit for partition did not consider some property in his possession liable to partition, but at an early stage of the case expressed her willingness to bring it into the hotchpot. It was contended by the defendant that the plaintiff's failure to disclose at the outset his possession of this property converted the suit into one for partial partition only.

Held, that the contention was not good, and the suit was not liable to be dismissed on that ground. (RAJA) BOMMADEVARA VENKATA NARASIMHA NAIDU v. (RAJA) BOMMADEVARA BHASHYA KARLU NAIDU. **6 W N, Cal, 461 (P C)**

Abandonment—*(Continued).*
=**29 I. A. 76=25 M. 367. P. C.**

(f) Abandonment by minor.

8. *Punjab Tenancy Act 1887, Section 38—Abandonment by minor.*

When during the minority of an occupancy tenant his holding comes without consideration into the hands of his landlords, it must be presumed in the absence of any satisfactory evidence to the contrary that in such cases the landlords stand in a *quasi* fiduciary position towards the tenant and are bound to restore his holding to his possession when he comes of age. LAKHA *v.* THAKAR DIAL. **P. R. 2 of 1901,** *(Rev.)*

(g) Abandonment by mortgagee.

9. A mortgagee can abandon a portion of his mortgaged property and charge the remaining property for his whole mortgage debt.

See T. P. A. S. 85.

SHEO TAHAL OJHA *v.* SHEW DAN RAI. **A. W. N. 1905 P. 244=2 A. L. J. 630=28 A. 174 (F. B.).**

10. *Mortgagee's right to abandon a portion of his mortgaged property.*

A mortgagee can abandon a portion of his mortgaged property and sue for his mortgaged debt charging the remaining mortgaged property. The Court cannot compel him to distribute liability among mortgaged properties nor can compel marshalling so as to prejudice the mortgagee. *See T. P. A. Section 85.* KRISHNA AYYAR *v.* MUTHU KUMARASAWMIYA PILLAI. **29 M. 217.**

But see to the contrary, 10 C. W. N. 551 and 10 C. W. N. 862.

(h) Abandonment of Partnership.

See Accounts Partnership 28 C 53 P. C.=5 C. W. N. 114. MOUNG THA HUYIN *v.* MAH THEIN MYAH.

(i) Of survey number, abandonment.

11. *See C. P. Tenancy Act, Section 35 and C. P. Revenue Act Section 67 A. and 67 (1) 16 C. P. L. R. 28.*

(j) Abandonment, by Tenants.

12. *See No. 8 supra (Abandonment by minor).*

13. *Landlord and tenant—Occupancy rights—Alluvion and diluvion—Abandonment.*

Held, that the general rule in the Punjab is that an occupancy tenant does not lose his right by reason of the land of his holding being submerged; a custom to the contrary may be proved, but such a custom is plainly inequitable, and very strict proof of it should be required before it is acted upon. *Held,* that a custom contrary to the general rule was not found to exist in respect of lands in Alwalpur village in the Hushiarpur District but it was proved that the tenants had abandoned their occupancy rights by failing to cultivate the tenancy without sufficient cause for more than one year. *P. R.*, 19 *of*

Abandonment—*(Continued).*

1883; 122 *of* 1876; 59 *of* 1877, 96 *and* 127 *of* 1879 *and* 152 *of* 1888, *followed.* ROSHAN *v.* POHU **P. L. R., 54 of 1901=8 P. R., 1901** *(Rev.)*

14. Abandonment or relinquishment of part of a holding by a tenant without notice to the landlord renders him liable to pay rent.

See N. W. P. Rent Act No. 12 of 1881 Section 31.

WARIS KHAN *v.* DAULAT KHAN. **W. N. A. 1902, P. 201=25, A. 77.**

15. *Abandonment by Tenant—Intention—See Bengal Tenancy Act 8 of 1885 Section 87.* **7. C. L. J. 77.**

16. *Abandonment by Tenant—Landlord and Tenant--Occupancy Tenancy.*

A landlord seeking to eject a trespasser is not bound to show that the interests of the late tenant have ceased to exist unless the question of abandonment arises out of the pleadings. HIRA LAL MISRA *v.* AOLA KUNBI. **14. C. P. L. R. 14.**

17. *Abandonment by Tenant—Dispute between rival tenants as to possession—Attachment by Magistrate under Section 146, Criminal Procedure Code—Suit by landlord for possession and recovery of amount realized by Magistrate.*

There was a dispute between certain tenants as to who were entitled to cultivate certain lands, and the lands were attached by a Magistrate under Section 146 of the Criminal Procedure Code. The Magistrate let out the lands to certain outsiders and collected rents. The rival tenants ceased to pay rents to the landlord who sued for recovery of possession of the land and the amount realized by the Collector and alleged that the tenants had abandoned their holdings.

Held, that the suit must be dismissed. That the dispute being with regard to the right of the rival tenants to cultivate the land in suit, the subject of the suit was the right of the contending parties to possess and cultivate the lands as their holdings. That the effect of the attachment was that the Magistrate took possession on behalf of such of the tenants as might eventually establish their right to possession, and the amount realized by the Magistrate was held by him on behalf of the tenants who might establish their right to possession and not the landlord. That it could not be said that the tenants had abandoned their holdings. BENI PRASAD KOERI *v.* SHAHZAD OJHA. **32. C. 850.**

18. *Transfer of non-transferable holding—Ejectment—Abandonment—Sale.*

Ghose, C. J—Where a tenant of a non-transferable holding sold his holding—

Held, that in the suit by the landlord for recovery of possession from the transferee, that if the transaction of sale was not meant

Abandonment—*(Continued).*
to be an operative one, the title to the property still continued with the tenant.

That the true question was, whether there was an absolute abandonment of the holding by the tenant such as would entitle the landlord to treat the purchaser as a trespasser. If the defendant was holding possession on behalf of the tenant, he could not be evicted. MATHUR MUNDAL *v.* GANGA CHARAN GOPE GHOSE. **10 C. W. N. 1033.**

ABATEMENT.

1 of appeal No. 1 to 9
2 of arbitration
3 of claim
4 of execution proceedings
5 of nuisance
6 of partnership
7 of rent
8 of suit

(1) Of appeal.

1. On the death of one of several defendant Appellants pending appeal, his representative was not brought on record and the decree of the Lower Court proceeded on common grounds.

Held, that the appeal abated only as regarded the deceased and the right to appeal survived to the remaining appellants and the whole appeal was not liable to be dismissed 22 A 222 dissented from, 16 A 211; 22 B 710 referred to. RAM SEWAK *v.* LAMBER PANDE. **A. W. N. 1902 P. 171=25 A 27.**

(See C. P. C. Section 361 to 363, 544 and 582).

2. *Appeal—Civil Procedure Code (Act XIV of 1882), Section 368—Death of one of the defendants—Heirs of the deceased defendant—Joint and several liability of defendants—Bengal Tenancy Act (VIII of 1885), Section 12—Transfer—Rent—Valid transfer.*

Where the liability of the defendants is joint and several, and in appeal, on the death of one of the defendants, his legal representatives are not substituted in his place, the appeal abates only so far as the deceased defendant is concerned. *22, All, 430, distinguished.*

Where a transfer of a tenure is only colourable and *benami*, such a transfer cannot discharge the transferer from liability to pay rent, even if the tenure was transferable and the transfer was made by a registered *kabala. 16 Cal., 642; 19 Cal., 17, distinguished.* JOY GOBIND LAHA *v.* MONMOTHA NATH BANERJI. **33 C. 580.**

3. Some of Plaintiffs respondents, who were appellants in second appeal, died pending the second appeal, and their legal representatives were not brought on file.

Held, that the right to prosecute the appeal survived to the surviving appellants and the appeal did not abate. ALLA BAKHSH *v* MADHO RAM. **23 A. 22.**

(See C. P. C. Section 368, 582).

4. The death of defendant appellant against a decree for damages for malicious

Abatement—*(Continued).*
prosecution passed against him does not abate the appeal and his legal representative can prosecute it (26 B 597 referred to) PARMAN CHETTY *v.* SUNDRA RAJ NAICK. **26 M. 499.**

(See C. P. C. Section 361).

5. The representative of a deceased respondent selected for the service of a notice under Section 30 C. P. C. was not brought on record.

Held, the appeal abated. BAGI RAM *v.* RAMA. **160 P. L. R. 1901.**

(See C. P. C. Section 368).

6. A reversioner who had sued to set aside an alienation by a widow, and on his suit being dismissed had filed an appeal, died pending the appeal.

Held, that his this right was personal one and his appeal abated on his death and that his legal representative could not prosecute the appeal. SOKYAHANI JUGLE RAO SAHIB *v.* BHAWNI BOZI SAHIB. **27 M. 588.**

(See C. P. C. Section 361).

7. A Muhamadan appellant having died pending appeal, his sons alone applied to be substituted for him and their sisters (who also were heirs under the Muhamadan Law) were not brought on record.

Held, that it was the duty of the sons to bring their sisters also on the file and having failed to do so their appeal abated. HAIDER HUSAIN *v.* ABDUL AHAD. **5 A. L. J. 62.**

(See C. P. C. Section 362).

8. The death of a proforma defendant Appellant when the other defendants could have maintained their appeal independently of him does not abate their appeal. ASHAQ HUSAIN *v.* ASHGARI BEGUM. **4 A. L. J. 809=W. N. A. 1908 P. 21.**

9. Where several plaintiffs, joint proprietors of a joint residuary estate with no ascertained shares of each of them therein, had obtained a decree in their favour setting aside its sale and pending appeal by the other party two of those respondents died and their legal representatives were not brought on record: Held that the appeal abated *in toto* as the decree setting aside the sale of entire joint estate with unascertained shares of the respondents could not be set aside in the absence from file of the names of some of the joint proprietors with unascertained shares. The ruling 33 C. 580, which was decided on the ground that the liability of the Defendant Respondents was joint and several and that the Appellants' right did survive against the surviving Respondents alone, was distinguished. DHARANJIT NARAYANSINGH and others *v.* CHANDESHWAR PROSAD NARAYANSINGH. **11 C. W. N. 504.**

(Revision) See also 5 C. L. J. 313 same case in appeal.

Abatement—*Continued.*

For other case of abatement of appeal see C. P. C (Act 14 of 1882) Sections 361 to 368 and 582.

2. Of arbitration.

Where after the parties to a suit had referred their partition case to arbitration, and the submission was sanctioned by the Court, and one of the parties died: Held that in order to see whether the parties are bound by the submission or not the Court has to decide whether the right referred to arbitration is of a merely personal nature, or survives to the legal representative of the deceased, and where it is of the latter description, the proceedings must, under section 361 C.P.C., be held not to abate: Held that in this case as the Plaintiff had sued for partition, and referred the matter to arbitration, the right survived to his heir and the parties were bound by the contract of arbitration which could not be revoked at the mere will of a party. C. P. C. Sections 361, 365, 367 and 523. VENKATA SATYANARAYANA *v.* VENKATA RANGAYYA. **13 M L J 311 = 27M 312.**

3. Of Execution Proceedings.

Application for execution by two out of three executors—Abatement—Revival—Sufficient cause—C. P. C. Sections 365 and 371—Limitation Act Section 5 (a) and 17.

A decree holder, having applied for execution, died leaving a will appointing three executors. After the grant of probate two of the executors applied for realization of decree by proceedings in execution. The judgement debtor objected on the grounds: (1) that the executors having omitted to put in a specific application to revive execution applied for, by the decree holder, the proceedings should be considered as having abated, (2) that two out of the three executors could not make the application and (3) that the present application, made after more than three years after the decree holders own application was time barred: Held, though the executors could apply under §. 365 C. P. C. to have their names brought on record and need not have waited till the grant of probate yet they had sufficient cause under §. 371 preventing them from continuing the execution proceedings started by the decree holder himself, as they could have thought that the probate might be refused to them and that under peculiar circumstances of the case §. 372 (a) C. P. C. and §. 5 (a) Limitation Act extended the time for putting in the application in the case and that the objection that only two out of three executors could not apply for execution was not sound. It is not the probate but the will from which the executors derive their title and the probate only authenticates the will which gives them such a title (P. R. 9 of 1901 and 16. C. 457 followed in treating the execution proceedings as a suit, and 8. B. 241 followed in thinking that the probate only authenticates the will from which executors derive their title.) PRICE *v.* GOKAL NATH. **03 P. R.**

Abatement—*Continued.*

1903.

4. Of Nuisance.

Where the plaintiff's foundation of building and wall were penetrated by the roots of trees:

Held mandatory injunction could be granted under Section 55 Specific Relief Act, to remove not merely the roots but the trees themselves, but if the nuisance and damage are due solely to the overhanging of branches of trees, a mandatory injunction for their removal would be sufficient (see Specific Relief Act Section 55). LAKSHMI NARAIN *v.* TARA PROSUNNO BANNERJI. **8 C. W. N. 1904 P 710.**

5. Of Partnership.

See partnership 3 B. L. R. 227 = 25 B. 606.

6. Of Rent.

1. *Land Acquisition Act (No 1 of 1894.)—Acquisition of portion of a Patni—Division of compensation.*

A Patnidar is entitled to compensation and abatement of rent proportionately, on the acquisition by Government of a part of his holding (patni)—(28 C. 146 followed) BHOBANI NATH CHUCKERBUTTY *v.* LAND ACQUISITION DEPUTY COLLECTOR OF BOGRA **(7 C. W. N. 1903 P 130.)**

2. Mere acceptance of a reduced rent for some years can not operate as a binding contract between the parties, without proof of the agreement which granted the reduction. Section 92 Evidence Act is a bar to the admission of a contemporaneous oral agreement, to prove that the tenants' rent was less than that mentioned in the registered *Kabuliat* which was executed by his father.

RADHA RAWAN CHOWDHRY *v.* BHOWANI PROSAD.
6 C. W. N. (1904) P. 60.

3. Whether abatement or adjustment of rent.—

A suit for adjustment of rent, alleging that the sum stated in the lease is only nominal, but really a lesser sum is due, is not a suit for abatement of rent and can lie in a Civil Court. But a suit by a Patnidar for a declaration that he is entitled to an annual abatement of rent, and for a refund of excess rents he had been compelled to pay for some years, is a suit for abatement of rent within the meaning of §. 23 Act X of 1858 (Bengal Tenancy Act) and is cognizable by a Revenue Court (See Section 23 Act X of 1859) ASUTOSH ROY *v.* HARI NARAIN SINGH DEO **3 C. L. J. 143.**

4. A tenant holding under a permanent *mukarriri* lease, is not entitled to any abatement of rent regarding the land taken away by diluvion (Bengal Tenancy Act 8 of 1885 §§. 52, 178, and 173). NANDLAUL MUKHERJI *v.* KYMUDDIN SARDAR **9 C. W. N. (1905) P. 886.**

Abatement—*Continued.*

5. A custom allowing abatement or remission of rent on diluvion cannot be pleaded by a tenant in a suit for rent, unless he has obtained under §. 19 N. W. P. Rent Act (12 of 1881) an order for abatement of his rent. (A. W. N. 1893 P. 29 distinguished) see §. 93 (a) N. W. P. Rent Act 12 of 1881. BENI PERSHAD KUARI *v.* DUKKHI RAI. **A. W. N. 1901 P. 69=23 A. 270.**

7. Abatement of Suit.
See Civil Procedure Code (14 of 1882) S 361 to 371, 582 and 588 and Limitation Act Art. 175.

Absconder.

1. *Sale of property of an Absconder by Criminal Court—Illegality—Jurisdiction of Civil Court—Suit to set aside sale.*

When the property of an absconder is sold by a Criminal Court without the proclamation of sale being duly published the sale is liable to be set aside by a civil court on a suit filed by the absconder. MIA JAN *v.* ABDUL **A. W. N. 1905 P 102=27 A 572.**

2. *Absconder's property sold under illegal warrant. Cr. P. C. § 88 & 89, Civil Courts jurisdiction—Cause of action.*

Where plaintiff's property was sold by a Magistrate believing that he had absconded to evade the trial, and the time and place at which the plaintiff was required to attend were not specified in the sale proclamation:—

Held the plaintiff's suit to set aside the sale was maintainable in a civil court. ABDUL *v.* KAZAM BEGAM **W. N. A. 1904 P. 159.**

ABSENCE.

1. Of appellant on the first or any adjourned hearing. *See Civil Procedure Code (14 of 1882) § 556.*

2. Of defendant on first hearing. *See C. P. C. §. 100.*

3, Of parties to a suit on first hearing. *See C. P. C. §. 98.*

4. Of parties or any of them on any adjourned hearing. *See C. P. C. §. 157.*

5. Of plaintiff on first hearing. *See C.P. C. §. 102.*

6. Of respondent on the first or any adjourned hearing. *See C. P. C. §. 556.*

Absence of reasonable and probable cause.
See suit for damages for malicious prosecution.

Absentees.
See abandonment, adverse possession & Limitation act (1877) articles 142 & 144.

Absentee Co-sharer.
See abandonment 146 P. L. R. 1903.

ABSOLUTE DECREE.

(1.) See T. P. A. § 87 Foreclosure decree C. P. C. 1882 S. 331 RAM CHANDER BANIA *v.* BALKRISHNA GANPAT RAO **17 C. P. L.R. 62.**

2 Absolute decree.
Order Absolute for foreclosure of the mortgage property—Plea of payment of the mortgage debt. *T.P.A. § 87 and C.P.C. §. 257 See T.P.A. §. 87.* SITA RAM AMRIT BRAHMIN *v.* DHARMU **16 C. P. L. R. 111.**

Absolute estate.
1. Restrictions upon alienation invalid—See Hindu Law Will. CHIMAN RAO SADA SHIV *v.* RAMBHAUGHAMAJEE. **4 B. L. R. 508,**

2. Do. *See T. P. A. Section 10.*
Rameshwar Prosad Singh v. Lachhmi Prosad Singh 8 C. W. N. 38=31. C. 111.

3. Condition in restraint of alienation of. *See T.P.A. §. 10 Mortgage.*
FAIYAZ HUSAIN KHAN *v.* NILKANTH and another **4 O. C. 163**

Absolute occupancy holding—*Rent—First Charge—Landlord—Sale of a holding in execution of a money decree—Purchaser*

The rent of the holding of an absolute occupancy tenant is a first charge on that holding, but if the landlord wishes to enforce that charge he must bring a suit for sale and must join all interested parties. If, on the other hand, he is content to take a money decree for arrears of rent, he may proceed against any property belonging to his judgement debtor: but if the holding be sold in execution of a money decree, the purchaser will take the property subject to any charges which other persons may have upon it (17C. 30, and 11C. P.L.R. 95 followed) The holder of a charge under the Tenancy Act has no rights superior to those of the holder of a charge under the Transfer of Property Act. An incumbrancer bringing property to sale in execution of a money decree, without giving intending purchasers notice of his incumbrance may be stopped from subsequently enforcing the lien of which he has given no notice (10 C 609, 12 B 678, 15 M 303 & 21 A. 309 followed). The same principal would apply in the case of a sale held in contravention of §. 99 T.P.A. 14 M. 74, 22 B. 624 and 12 C.P.L.R. 26 followed. BHAGWANDAS SITARAM *v.* TARACHAND AGARWAL **14 C. P. L. R. 17.**

1. *Absolute occupancy tenant—co-sharer proprietor—Purchasing the holding in execution of decree.*

If a co-sharer proprietor purchases in the execution of a money decree the holding of an absolute occupancy tenant he himself becomes an absolute occupancy tenant in respect thereof, and the right of tenancy is not merged in his superior right of proprietorship 21 C 869 and 24 C 143 which are rulings under §. 22 of the Bengal Tenancy Act of 1885 (which clearly lays down "If

Absolute Occupancy Holding *(Con.)* a joint proprietor purchases occupancy rights, such rights shall cease to exist" were not followed, as the C. P. Tenancy Act is silent on the subject. JAIRAM *v.* BALAJI MANSARAM **14 C. P. L. R. 9.**

2. *Transfer by an absolute occupancy tenant.*

A transfer effected before the expiry of the period referred to in §. 41 (2) C. P. T. A. after the notice of transfer to landlord, is voidable at the instance of the landlord 1 C. P. L. R. 53 and 1. C. P. L. R. 132 followed. MT. TULSA *v.* MT. DASODA **15 C. P. L. R. 173.**

3. *Landlord's right to redeem a mortgage by absolute occupancy tenant pre-emption—T. P. A. §. 91 (a) C. P. C. §. 544 joinder of parties.*

A landlord has no such interest as would entitle him to redeem a mortgage of his holding by an absolute occupancy tenant. The ruling 3. C. P. L. R. 154, which held that a *Malguzar* had an interest in the property and could sue for redemption, was held to be purely *obiter dictom.* If a landlord has an interest in the property *i. e.* absolute occupancy holding within the meaning of §. 91 (a) T. P. A. then he must under §. 85. T. P. A. be joined as a party to every suit relating to the mortgage and could re-open a foreclosure. But this is never done, and if allowed would envolve great hardship 13. L. J. Ch: 337, 15. C. P. L. R. 89, 57 L. J. Ch. 1085, 39 L. J. Ch: 342,35. L. J. Ch: 847 discussed, and 4. B. 139 referred to. GANPAT *v.* BHANGI **15 C. P. L. 175.**

4. *His right to make a will—C P T A § 41*

The burden of proof lies in every case upon the party who relies on a will and he has to satisfy the Court that the instrument is the last will of a free and capable testator. An absolute occupancy tenant is not empowered to bequeathe any right in his holding. 46. R. R. 123 and 13. C. P. L. R. 159 were followed as to burden of proof. In 11. C. P. L. R. 167 an occupancy tenant had made a will which he was held to be competent to make. But an absolute occupancy tenant stands on a different footing from an occupancy tenant and therefore that ruling does not apply to this case. MT. ANANDI BAI *v.* HARLAL BRAHMAN **15 C. P. L. R. 1.**

Abuse of Process.

1. The High Court has power to direct a subordinate court not to examine a woman in Court but by a commission. *See C. P. C. (1882) §. 159 and 386. VEERABADRAN CHETTY v. NATARAJA DESIKAR M. L. J.* **1904, P. 329=28. M. 28.**

2. *Abuse of process of Court—Fraud.*

Where a decree holder obtained *leave* of court to purchase the property for the full decretal amount, and it was purchased for him *benami* at a less sum, the judgment debtor not objecting at the time and not getting the sale set aside: Held that the decree holder could execute decree for the balance notwithstanding the abuse of process of Court and fraud of the decree holder. See T. P. A. §. 90. DURGA *v.* BHAGWANDAS **1. A. L. J. 433.**

3. *Abuse of process of Court—Suit for Compensation for wrongful attachment affixing Court seal on outer door of a warehouse—Actual seizure—suit for damages by other judgment creditor—Limitation Act of 1877. Art: 29. See C. P. C. (1882) §. 269.* MULCHAND KANYALAL *v.* BANK OF MADRAS. **27 M. 346.**

4. *Suit for compensation for wrongful attachment—Want of probable and reasonable cause—Malice—See Malicious prosecution.—* SURAJ MAL CHUNNI LAL. *v.* MANEK CHAND KAPUR CHAND.**6 B. L. R. 704.**

5. A debutter estate is liable to pay costs incurred for prosecuting certain criminal cases and also to pay certain amount alleged to have been paid to certain pleaders who were engaged for conducting various suits in connection with the estate. PEARY MOHAN MUKERJEE *v.* NARENDRA NATH MUKERJEE **9 C. W. N. 421=32 C. 582.**

6. Every court of competent jurisdiction has an inherent jurisdiction to prevent abuse of its process; by staying or dismissing without proof actions which it holds to be voxatious, but this power ought to be exercised sparingly and only in very exceptional cases.

Where the plaintiff brought a suit for declaration of his title to a *zimidari* reopening therein questions already settled by decisions of the Judicial Committee and other Courts in more than one litigation regarding the same *zimidari:* Held that the suit was liable to be dismissed as vaxacious. *See Specific Relief Act 1 of 1887 § 42* VIJIA SAMY TEVAR *v.* SASI VERMA TEVAR. **M. L. J. 1905 P. 469=28 M. 560.**

Abusive Language.

1. The mere use of abusive and insulting language not amounting to defamation and without proof of any special damage, is not actionable, although it may, under certain circumstances, form a ground for criminal prosecution. In this case the plaintiff was called "son of mean parents," "son of a dog," and "son of a pig:" Held these words seem to be of mere vulgar abuse and insult, and no special damage to the plaintiff has been proved. It has not been proved that the plaintiff's reputa-

Abatement—*Continued.*

5. A custom allowing abatement or remission of rent on diluvion cannot be pleaded by a tenant in a suit for rent, unless he has obtained under §. 19 N. W. P. Rent Act (12 of 1881) an order for abatement of his rent. (A. W. N. 1893 P. 29 distinguished) see §. 93 (a) N. W. P. Rent Act 12 of 1881. BENI PERSHAD KUARI *v.* DUKKHI RAI. **A. W. N. 1901 P. 69=23 A. 270.**

7. Abatement of Suit.
See Civil Procedure Code (14 of 1882) S 361 to 371, 582 and 588 and Limitation Act Art. 175.

Absconder.

1. *Sale of property of an Absconder by Criminal Court—Illegality—Jurisdiction of Civil Court—Suit to set aside sale.*
When the property of an absconder is sold by a Criminal Court without the proclamation of sale being duly published the sale is liable to be set aside by a civil court on a suit filed by the absconder. MIA JAN *v.* ABDUL **A. W. N. 1905 P 102=27 A 572.**

2. *Absconder's property sold under illegal warrant. Cr. P. C. § 88 & 89, Civil Courts jurisdiction—Cause of action.*
Where plaintiff's property was sold by a Magistrate believing that he had absconded to evade the trial, and the time and place at which the plaintiff was required to attend were not specified in the sale proclamation:—
Held the plaintiff's suit to set aside the sale was maintainable in a civil court. ABDUL *v.* KAZAM BEGAM **W. N. A. 1904 P. 159.**

ABSENCE.
1. Of appellant on the first or any adjourned hearing. *See Civil Procedure Code (14 of 1882) § 556.*

2. Of defendant on first hearing. *See C. P. C. §. 100.*

3. Of parties to a suit on first hearing. *See C. P. C. §. 98.*

4. Of parties or any of them on any adjourned hearing. *See C. P. C. §. 157.*

5. Of plaintiff on first hearing. *See C. P. C. §. 102.*

6. Of respondent on the first or any adjourned hearing. *See C. P. C. §. 556.*

Absence of reasonable and probable cause.
See suit for damages for malicious prosecution.

Absentees.
See abandonment, adverse possession & Limitation act (1877) articles 142 & 144.

Absentee Co-sharer.
See abandonment 146 P. L. R. 1903.

ABSOLUTE DECREE.
(1.) See T. P. A. § 87 Foreclosure decree C. P. C. 1882 S. 331 RAM CHANDER BANIA *v.* BALKRISHNA GANPAT RAO **17 C. P. L. R. 62.**

2 Absolute decree.
Order Absolute for foreclosure of the mortgage property—Plea of payment of the mortgage debt. *T.P.A. § 87 and C.P.C. §. 257 See T.P.A. §. 87.* SITA RAM AMRIT BRAHMIN *v.* DHARMU **16 C. P. L. R. 111.**

Absolute estate.
1. Restrictions upon alienation invalid—See Hindu Law Will. CHIMAN RAO SADA SHIV *v.* RAMBHAUGHAMAJEE. **4 B. L. R. 508,**

2. Do. *See T. P. A. Section 10.*
Rameshwar Prosad Singh v. Lachhmi Prosad Singh 8 C. W. N. 38=31. C. 111.

3. Condition in restraint of alienation of. *See T.P.A. §. 10 Mortgage.*
FAIYAZ HUSAIN KHAN *v.* NILKANTH and another **4 O. C. 163**

Absolute occupancy holding—*Rent—First Charge—Landlord—Sale of a holding in execution of a money decree—Purchaser*
The rent of the holding of an absolute occupancy tenant is a first charge on that holding, but if the landlord wishes to enforce that charge he must bring a suit for sale and must join all interested parties. If, on the other hand, he is content to take a money decree for arrears of rent, he may proceed against any property belonging to his judgement debtor: but if the holding be sold in execution of a money decree, the purchaser will take the property subject to any charges which other persons may have upon it (17C. 30, and 11C. P.L.R. 95 followed) The holder of a charge under the Tenancy Act has no rights superior to those of the holder of a charge under the Transfer of Property Act. An incumbrancer bringing property to sale in execution of a money decree, without giving intending purchasers notice of his incumbrance may be stopped from subsequently enforcing the lien of which he has given no notice (10 C 609, 12 B 678, 15 M 303 & 21 A. 309 followed). The same principal would apply in the case of a sale held in contravention of §. 99 T.P.A. 14 M. 74, 22 B. 624 and 12 C.P.L.R. 26 followed. BHAGWANDAS SITARAM *v.* TARACHAND AGARWAL **14 C. P. L. R. 17.**

1. *Absolute occupancy tenant—co-sharer proprietor—Purchasing the holding in execution of decree.*
If a co-sharer proprietor purchases in the execution of a money decree the holding of an absolute occupancy tenant he himself becomes an absolute occupancy tenant in respect thereof, and the right of tenancy is not merged in his superior right of proprietorship 21 C 869 and 24 C 143 which are rulings under §. 22 of the Bengal Tenancy Act of 1885 (which clearly lays down "If

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A transfer effected before the expiry of the period referred to in §. 41 (2) C. P. T. A. after the notice of transfer to landlord, is voidable at the instance of the landlord 1 C. P. L. R. 53 and 1. C. P. L. R. 132 followed. MT. TULSA *v.* MT. DASODA **15 C. P. L. R. 173.**

3. *Landlord's right to redeem a mortgage by absolute occupancy tenant pre-emption—T. P. A. §. 91 (a) C. P. C. §. 544 joinder of parties.*

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Abuse of Process.

1. The High Court has power to direct a subordinate court not to examine a woman in Court but by a commission. *See C. P. C. (1882) §. 159 and 386. VEERABADRAN CHETTY v. NATARAJA DESIKAR. M. L. J.* **1904, P. 329=28. M. 28.**

2. *Abuse of process of Court—Fraud.*

Where a decree holder obtained *leave* of court to purchase the property for the full decretal amount, and it was purchased for him *benami* at a less sum, the judgment debtor not objecting at the time and not getting the sale set aside: Held that the decree holder could execute decree for the balance notwithstanding the abuse of process of Court and fraud of the decree holder. See T. P. A. §. 90. DURGA *v.* BHAGWANDAS **1. A. L. J. 436.**

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5. A debutter estate is liable to pay costs incurred for prosecuting certain criminal cases and also to pay certain amount alleged to have been paid to certain pleaders who were engaged for conducting various suits in connection with the estate. PEARY MOHAN MUKERJEE *v.* NARENDRA NATH MUKERJEE **9 C. W. N. 421=32 C. 582.**

6. Every court of competent jurisdiction has an inherent jurisdiction to prevent abuse of its process; by staying or dismissing without proof actions which it holds to be vexatious, but this power ought to be exercised sparingly and only in very exceptional cases.

Where the plaintiff brought a suit for declaration of his title to a *zimidari* reopening therein questions already settled by decisions of the Judicial Committee and other Courts in more than one litigation regarding the same *zimidari:* Held that the suit was liable to be dismissed as vaxacious. *See Specific Relief Act 1 of 1887 § 42* VIJIA SAMY TEVAR *v.* SASI VERMA TEVAR. **M. L. J. 1905 P. 459 =28 M. 560.**

Abusive Language.

1. The mere use of abusive and insulting language not amounting to defamation and without proof of any special damage, is not actionable, although it may, under certain circumstances, form a ground for criminal prosecution. In this case the plaintiff was called "son of mean parents," "son of a dog," and "son of a pig:" Held these words seem to be of mere vulgar abuse and insult, and no special damage to the plaintiff has been proved. It has not been proved that the plaintiff's reputa-

Abusive Language *(Continued)*.
tion has been in any way affected by them, and therefore no suit for damages was maintainable under these circumstances 26 C. 653 followed. 15 Bengal L. R. 161 referred to. MAUNG KYAN *v.* THA DUN U.—**4 L. B. R. 1907 P 50.**

2. *Abusive Language—Defamation Tort.*

Defamation, as distinguished from mere vulgar abuse, is actionable without proof of special damage. In this case the plaintiff was accused in the hearing of other persons of stealing palm leaves and firewood. The defendant failed to prove the allegation as true. The ruling S M. 175, which laid down that defamation which caused substantial pain and annoyance to the person defamed without proof of money damage was actionable, was followed (12 C. 424 referred to, 26 C. 653 discussed and 28 C. 452 dissented from) MA PAN YE *v.* MAUNG PAN AUNG.—**U. B. R. 1905 P 1.** *(Tort Defamation) See Torts, Libel, Slander.*

Abutting or adjoining a public Road
See N. W. R. and Oudh Municipal Act of 1900 §§ 87, 168 and 132. KING EMPEROR *v.* MUKANDLAL **A. W. N. 901 P. 203.**

Abwab—*(Cesses)*

1. All conditions to pay *Abwab Mahtub* and other like impositions are void—*See Bengal Tenancy Act* 8 of 1885 § *74-6 C. W. N. 360.*

2. Certain collection charges blended with rent were held not to be *abwab* but rent. *See B. T. A. 8 of 1885. § 74. 8 C. W. N. 529=31 J. 834.*

3. Conditions to pay the price of three cocoanuts and render one day's service besides rent fall under *abwab* and are void —*See B. T. A. § 74—10 C. W. N. 527.*

4. Condition to pay Rs. *3/* instead of delivery of 2 goats is void.—*See B. T. A. § 74-12 C. W. N. 175.*

5. Where rent is fixed in sikka rupees and *butta* is claimed to make the demand equal to current coin the demand is not illegal.—*See B. T. A. 8 of 1885 § 74 6 C. L. C. 637.*

6. *Do. 6 C. L. J. 667.*

7. *Puja* expenses realised from a tenant in excess of rent is *abwab. B. T. A. § 74-3 C. L. J. 391.*

8. Road cess is not *abwab—See Act 9 of 1880—3 C. L. J. 337.*

9. Valuation of property award—*See B. T. A. 1885 § 74—7 C. W. N. 439.*

Acceleration of Estate.

A widow can, during her lifetime, convey the estate absolutely to next reversioner,

Acceleration of Estate *(Continued)*
and thus accelerate such reversioner's succession.—*(See Hindu Widow)* **7 B. L. R. 622.**

Acceptance of goods by buyers.
See Contract Act § 107—7 C. W. N. 562-30 C. 649.

Meaning of acceptance—*See Stamp Act § 62-4 O. C. 168.*

Of rent by landlord (vide Landlord v. Tenant) 15 C. P. L. R. 99

Accession.

1. See accritions, alluvion and diluvion.

2. To mortgage property accrue for the benefit of the mortgagee—*See Mortgage Accession A. W. N. 1902 P. 176.*

3. To mortgage property—*See Mortgage Accession 29 C. 803—See T. P. A. § 63—14 C. P. L. R. 169.*

Accident.

Loss of goods by—See Railway Act 9 of 1890 § 47 (23 A 367); § 72 (27 B. 126) and (27 B. 597) etc.

Accounts.

(a) ACKNOWLEDGEMENT OF—*See Acknowledgement.*

(b) ACCOUNT BOOKS—ADMISSIBILITY OF, IN EVIDENCE—*See Evidence Act § 34.*

1. *Rokar* and *Mashakbari* books regularly kept in ordinary course of business are admissible in evidence under § 34 Evidence Act, though the *Khata* books had been destroyed by the defendant and were not forthcoming. *(See Evidence Act § 34) 9 C. W. N. 1905 P. 421=32 C 582*

2. Do. Admissibility of.—3 B. L. R. 213=25 B. 616 *(See § 34 Evidence Act).*

3. Copies of account books furnished under § 141 (a) C. P. C. (1882) do not fall under Article 24 Stamp Act (1899) and require no stamp—*See Stamp Act Art 24 4 B. L. R. 223=26 B. 22.*

4. Corroborative Evidence in support of account books is necessary.—*See § 34 Evidence Act—6 B. L. R. 50=28 B. 294.*

5. Do. Do. *See Evidence Act § 34-4 B. L. R. 378=6 C. W. N. 401=29 I A. 43=29 C. 334.*

6. Do.—Do—*See Evidence Act § 34-3 B. L. R. 213=2 B 216.*

7. Corroboration is necessary under § 34 Evidence Act, but where accounts are relevant also under § 32 (2) they are sufficient evidence and require no corroboration.—*See § 32 (2) and 34 Evidence Act 6 B. L. R. 50=28 294.*

(c) ADJUSTMENT OF ACCOUNT IN EXECUTION—*C. P. C. § 501.*

1. Where a decree did not expressly direct an adjustment of accounts in the terms of § 501 C. P C.(1882): Held such adjustment

Accounts (*Continued*).
could be ordered in execution by the execution court if it could be shown from the nature of the decree that it could and should have contained such an order and was imperfect without it.—*See C. P. C. § 501*—RADHEY SINGH *v.* MAGNI RAM. **6. C. W. N. 1902 P. 710.**

2. *Adjustment of partnership—Settled accounts—Error—Reopening—General words of release.*

Where partners strictly adjusted their partnership accounts and one of them assigned and released his share in the firm for a particular sum in favour of the other, but by mistake some Government Promissory Notes for Rs 7,000 were omitted from the accounts and he, on the discovery of the mistake, sued the other partner for a share of the notes: Held either the whole account may be reopened or leave may be given to the plaintiff to surcharge and falsify. The latter course seemed more probable on the facts of the case. 5 M. I. A. 372, 9 Bean 503 and 9 Ch. D. 547 referred to.

General words of a release in a deed can only pass what the parties had in contemplation and not something with which they had no intention of dealing. 4 H. L. 610 and 14 Ch. D. 829 followed. BANEY MADHUB MULLIK *v.* SUBAL CHANDAR LAW. **11 C. W. N. 776.**

(d) ADMISSIBILITY OF ACCOUNTS IN EVIDENCE.—*See Evidence Act Section 34.*

(e) ASSIGNMENT OF DEBT TO CREDITORS—DUTY OF CREDITORS TO RECOVER DEBTS.

When a creditor accepts from his debtor assignment of a debt due to the latter by another person and the creditor makes no attempt to recover the same he may be debited with the amount of debt, when account is settled between him and the debtor. MT. SHAM KUMARI *v.* RAJA RAMESHWER SINGH BAHADUR. **8 C. W. N. 1904 P. 86 P. C.**

(f) ACCOUNTS BETWEEN BANKERS AND CUSTOMERS—MORTGAGE HELD BY BANKER—INTEREST.—*See Banker.* THAKUR JWALA SINGH *v.* LUCHHMAN DAS. **9 C. W. N. 745 P. C.**

(g) COMMISSION FOR TAKING ACCOUNTS—C. P. C. Sections 394 and 395 R. M. S. CHETTI *v.* MOHOMED ESSA SAHAB. **5 C. W. N. 692**

(h) ACCOUNTS BETWEEN CO-SHARERS OR CO-OWNERS CO-TENANCY.

A co-owner quarrying a hill to the extent of his share is not liable to account to his other co-sharers. *See Co-tenancy Accounts.* MAHESH NARAIN *v.* NAWABAT PATTAK. **1 C. L. J. 437=32 C. 837.**

(i) ACCOUNTS BETWEEN CREDITORS AND DEBTORS—*See Accounts Assignment. 32 C. 27 P. C.*

(j) DECREE—Priliminary decree under § 215 (a) C. P. C. for taking accounts. High Court's power in appeal of staying under section 545 further proceedings under section 545 C. P. C. *See § 215 (a) C. P. C.* BALKISHAN

Accounts (*Continued*).
SAHU *v.* KHUGNO. **8 C. W. N. 572=31 C. 722.**

3. *Decree directing a Company to furnish accounts—Transfer of business.*

Where a decree directs a Company to furnish accounts, but in the meantime the business of that Company is transferred to a Limited Company, the accounts directed by the decree would not extend beyond, or include contribution accrued later than that date; for the limited company to whom transfer is made is a distinct legal person. *See Contract Act Section 27* S. B. FRASER & Co. *v.* THE BOMBAY ICE MANUFACTURING Co. LIMITED. **7. B. L. R. 1905 P. 107=29. B. 137.**

4. *Decree—No specific direction as to accounts—Practice.*

Where a decree does not contain direction as to accounts, but it contemplates an account, and the direction ought to have been incorporated in the decree when passed, the Court can, at any stage of the proceedings, direct necessary enquiries to be made or accounts to be taken. SIR JEHANGIR COWASJI JEHANGIR *v.* THE HOPE MILLS LIMITED. **9. B. L. R. 1380.**

5. Decree in favour of defendant—In suit for accounts where the Lower Court passed a decree in favour of defendants and the plaintiffs appealed alleging that the Lower Court was wrong in awarding a sum to the defendants as if they were plaintiffs, although as defendants they had claimed no set off, and had paid no Court-fee Stamp: Held, overruling the contention, that in a partnership or partition suit, each party, however arrayed formally, becomes in turn either plaintiff or defendant and that even supposing that there was some irregularity, it did not affect the merits and was cured by §. 578. C. P. C. NANCHAND AMAR CHAND *v.* MUSSA HUSEIN. **6 B. L. R. 1904. P. 692.**

6. *Form of decree—Principal and agent C. P. C. §. 215 (a)*

Where the plaintiff proves that defendant is his agent the Court ought to fix a date for the defendants to furnish accounts, and it is for the defendant to prove the amount of his receipts and disbursements. *See §. 215 (a) C. P. C. as to form of decree.* RAJHU NATH *v.* GUNPATJI. **A. W. N. 1905. P. 3=27. A. 374.**

(k) ENTRIES IN ACCOUNT BOOKS—*See Accounts—Account Books Supra (b).*

(l) *Expenses—partnership and private accounts confused.*

Where a partner mixed up his private accounts with those of the partnership, although he honestly incurred expenses for the partnership, and the Court could not possibly conjecture what the separate ex-

Accounts *(Continued).*

penses were: Held he could not be allowed the expenses. MAUNG THA HUIN *v.* MATHEIN MAYAH. **5 C. W. N. 114=28C 53.**

(m) Guardian and Ward—Guardian's liability to render accounts—*See Guardian and Wards Act 8 of 1890 § 34 NABU BEHARI v. SHEIK MAHOMED 5 C. W. N. 207.*

(n) Hathchita—Entries in–Signature on –Sufficiency thereof–Custom—Intention of parties—*See Acknowledgement Limitation Act § 19-SADASOOK AGARWALLAH v. BAIKUNTHA NATH BASUNA* **9 C. W. N. 83=31 C. 1043.**

(o) Interest account of—Interest also is barred where the principal is barred. *See Interest on time barred debts. DHONDI RAM v. TABA SAVADAI* **5 B L.R. 198=27 B 330.**

(p) Interest calculation of the date on which money was lent and the date on which it was repaid, should both be excluded in calculating interest. RAGHAB PRUSTI *v.* BHOBNI SAHOO. **8 C. W. N. 216.** *See Interest.*

(q) *Jurisdiction—Accounts—Suit for—Valuation Court-fees.*

(1) In a suit for an account the valuation first fixed in the plaint is final for purposes of jurisdiction and stamp duty on the plaint, but does not preclude the plaintiff from getting a decree for such higher amount as the accounts may show he is entitled to. He must, however, pay extra stamp duty in execution on such higher amount.

Where in a suit for accounts the Court required the plaintiff to pay additional Court-fees on the higher amount which might be due to him over and above the amount claimed on the plaint and the plaintiff offered to relinquish his claim for the excess amount, but did not pay the extra Court-fees, and the Court dismissed the suit:

Held, that the order of the Court was erroneous, and the relinquishment made by the plaintiff would not bind him. SELLAMUTHU SERVAGAR *v.* RAMASWAMI PILLAI. **12 M. L. J. 1902. P. 66.**

(2) *Jurisdiction—Suit for accounts of an estate.*

Held that a suit for profits of an estate against a co-sharer is a suit for accounts and is not, as such, cognizable by a court of small causes.—*See Provincial Small Cause Courts Act 9 of 1887 Art. 31.* GOBIND *v.* MATHURA **5 C. C. 130.**

(r) Liability to render accounts.

(1) Administrator's liability to render accounts. *See Limitation Act Arts. 120, 59 and 60. KRISTOKAMINI DASSI v. ADMINISTRATOR GENERAL OF BENGAL* **7 C. W. N. 1903 P. 476.**

2. Administrator failing to file accounts —ground for revoking probate—*See Probate and Administration Act § 50 4 B. L. R. 637=26 B. 792.*

Accounts *(Continued).*

3. Administrator filing inventory power of Court Accounts.—*See Probate and Letters of Administration Act 5 of 1881 § 50 and 98 MAHARANI SARAT SUNDRI BARMANI v. UMA PROSAD ROY CHOWDHERY 8 C. W. N. (1904) P 578=31 C. 628.*

(ii) Agent's liability to render accounts. —*See Civil Procedure Code § 215 A. RAJHUNATH v. GANPATJI* **1 A. L. J. 722–A. W. N. 1905 P. 3=27 A. 374.**

(iii) *Executor's Liability to render Accounts.*

An executor whose right to come in and apply for probate is reserved, is entitled to call upon the executor who has obtained the probate to furnish accounts as required by Law. JEHANGIR RUSTUMJI *v.* BAI KUKIBA. **5 B. L. R. 131=27 B. 281.**

(iv) *Liability of a firm acting as Managing Agents of a Company.*

Where the defendant was sued as the surviving partner of a firm, who were Managing Agents of the plaintiffs, a registered Company, for accounts: Held that the relationship between the parties was of a fiduciary nature and the defendant was liable to render accounts, and that it was no answer to the suit that the defendant had made over the account books to the plaintiffs 14 C. 147 P. C. and 7 C. 627 followed. ANDERSON *v.* DELHI COTTON MILLS COMPANY LD. **155 P. L. R. 1903=69 P. R. 1903.**

(v) *Liability of a Karta of joint Hindu family to render accounts of joint property.*

When in a suit for partition among the members of a joint Hindu family, the defendant, who was manager of the family, admitted the existence of family jewels as joint family property, and could not charge the plaintiff with possession of them. Held that the defendant as manager of the family was primarily responsible, and was bound to account for them. RAJA BOMMADEVARA VENKATA NARASIMHA NAIDU *v.* RAJA BOMMADEVARA BHASHYA KARLU NAIDU, **6. C. W N. 1902 P. 641 P. C.**

(vi) Liability of a mortgage to render accounts.—*See Mortgage Accounts (See § 74 T. P. A.)—4 B. L. R. 42=26 B. 363.*

(s) Limitation—in suits for account.—*See Limitation Act (1877) Arts. 57, 57 & 85 (mutual, open & current accounts) 85, 89, 90, 102, 106 and 120 (see mode of taking accounts v. (4) infra-24 A. 527 P. C.*

(t) Misconstruction of portion of documentary evidence—Accounts.—*See Contract Act § 213 32 C. 719.*

(u) Mode of taking Accounts.

(1) Decree passed against an estate. Different judgment debtors paying off at different time. *See Contribution suit, mode of taking accounts 8 C.W.N. 265=31 I.A. 94=31 C 597 P.C.*

(2) Duty of Court in a mortgage suit or mode of taking accounts—*See Mortgage Accounts 4 B.L.R. 42=26 B. 363.*

Accounts *(Continued).*

(3) *Accounts ordered—dissolution decreed—mode of taking Accounts—Partnership—Abandonment accounts.*

Held, that it must be decided in each case upon facts whether a partner has abandoned the partnership or lost his interest by laches.

Held, also, that expenses incurred by a partner for the partnership were rightly disallowed because he had by his own acts in mixing up his private affairs with those of the partnership made it impossible even to conjecture what those expenses were. MOUNG THA HUYIN *v.* MAH THEIN MYAH. **28 Cal., 53 P. C.**

(4) In a suit to take accounts, it is irregular to take them irrespective of the plea of limitation. In Art 89 (Limitation Act) moveable property includes money. ASHGARALI *v.* KHURSHEDALI, **3 B.L.R. 576=24A 527 (P.C.).** *See infra Nos. (z2 and z3) infra 15 C. P. L. R. 61.*

(v) MORTGAGEE'S DUTY TO RENDER ACCOUNT. —*See Mortgage Accounts 4 B. L. R. 42=26 B 363.*

(w) MUTUAL, OPEN AND CURRENT ACCOUNTS. —*See Limitation Act Arts 57 and 85.*

(x) OMISSION TO EXHIBIT ACCOUNTS IS A GOOD GROUND FOR REVOKING PROBATE—*See Probate and Administration Act § 50 B. G. TILAK v. SAKWARBAI.* **4 B. L. R. 637=26 B. 792.**

(y) *Order for accounts, in a suit for possession without any prayer of the plaintiff in his plaint for accounts.*

Where in a suit for possession by a sharer in a deceased Mahomedan's estate against his widow, the plaintiff asked the Court to order accounts to be taken: Their Lordships declined to do so, especially as there was no prayer in the plaint to that effect. HUMERA BIBI *v.* ZUBEDA BIBI **2 A.L.J. 485.**

(z) PLEA AS TO THE TAKING OF ACCOUNTS RAISED FOR THE FIRST TIME IN HIGH COURT IS NOT MAINTAINABLE. **2 A. L. J. 485.**

(z1) PARTNER'S RIGHT TO SETTLEMENT OF ACCOUNTS. *See Settled Accounts infra No. 23 (3) (z1) 12 M. L. J. 1902 P. 444.*

(z2) PRINCIPAL AND AGENT.

1 Burden of proving the correctness of accounts lies on the agent and he is bound to render accounts. *See Contract Act § 213-1 A. L. J. 722=27 A 374 and 32 C 719=1 C. L. J. 232.*

2 The profits made by an agent enure to the benefit of the Principal. *See Contract Act. § 216-4 B. L. R. 469=26 B. 659 (see also § 217, 218, and 219 Contract Act).*

3 Whether agent's signature on settled accounts is on behalf of his principal—*See Settled Accounts (z3 (2)) infra 28 M. 544*

Accounts. *(Continued)*

(z3) SETTLED ACCOUNTS

1 *Necessity of signature on.—*

It is not necessary, in order to be a settled account, that it should be signed by the other party to be bound thereby. It is enough if it has been submitted to the other party sought to be made liable on it, and he has by words and conduct acquiesced in its correctness. HAJI ABDUL *v.* HAJI BIBI **7 B. L. R. 151.**

2 *Agent's Signature whether on behalf of principal or himself.*

The question whether an agent endorsep a negotiable instrument for himself or on behalf of his principal is one of fact to be decided with reference to the evidence in the case. The reception of parol evidence in regard to such a matter is subject to much the same rules as govern written contracts generally. MUTHAR SAHIB MARAIKAR *v.* KADIR SAHIB MARAIKAR. **M. L. J. 1905 P. 384=28 M. 544.**

3 *Accounts settled by a partner—bind the partnership.*

Under § 251 Contract Act a partner is bound by the act of another partner in settling the accounts between the partnership and a stranger. MAUJU NATH KAMTI *v.* DEVAMMA. **12 M. L. J. 1902 P. 444.**

4. *Reopening settled accounts—Surcharge.*

The plaintiff who seeks to open a settled account must specify in his plaint the grounds on which he claims permission to surcharge or falsify, otherwise he will not be allowed to prove errors at the hearing.

In this case the plaintiff sued his agent to render accounts. The defendant pleaded that the accounts had been settled and the plaintiff on a certain date acknowledged being indebted to the defendant to the extent of a certain sum and that now nothing was due by one party to the other. The plaintiff denied the alleged settlement of accounts. The first court, instead of framing a preliminary issue as to the date from which accounts were to be rendered, proceeded to enquire into the merits of the claim holding that, athough the acknowledgement was proved to have been signed by the plaintiff yet he was entitled to go behind the acknowledgement and to show that the settled account was incorrect. The Appellate Court modified the order and directed that the enquiry should be confined to the account subsequent to the acknowledgement, as the plaintiff, having refrained from raising any pleas of fraud or mistake was debarred from going behind the settled accounts: Held (confirming the Lower Appelate Court's judgement) and following 36 L. J. Ch. 292 that a party who seeks to open an account must point out specific errors in his plaint, otherwise he will not be permitted to prove them at the hearing. The Court's procedure in

Accounts *(Continued).*
such cases ought to be as is well described in 7 C. 654. The Court ought to decide whether the defendant is liable to render accounts and if so for what period the account is to be rendered. When these points are decided the Court should order the defendant to file accounts in Court, within a fixed time. If the defendant omits or refuses to obey the order it may be enforced under § 260 C. W. P. C. If he files the accounts then the plaintiff should be allowed a reasonable time for filing objections to its correctness. If the disputed items are few the Court may dispose of them. If they are numerous and the enquiry is complicated the Court should take action under § 394 and 395 C. P. C. After the proper taking of the accounts the decree should be passed for the sum found due. MAULVI NIZAMUDDIN SOWDAGAR *v.* SETH KASTUR CHAND **15. C. P. L. R. 61.**

(5) Suit to falsify settled account.
Specific averment of errors is necessary in changing suit of accounts into suit to falsify settled accounts. Procedure in account suits. Relation between co-mortgagors, one of whom is a pleader. *See Pleader and Client.* MOHESH CHANDER BASU *v.* RADHA KISHORE. **6. C. L. J. 580=12 C. W. N. 28.**

(z4) ACCOUNT STATED

1 An account stated respecting a debt constitutes a new cause of action, the consideration for which is the previous uncertain state of transaction and a promise to pay is implied by the admission of the balance. *See C. P .C. § 43.*— HONO RAJ *v.* LALJI. **6 B. L. R. 454=28 B. 447.**

(2) Accounts stated. *See Limitation Act Art 64—7 O. C. 166.*

(3) Account stated—Promise to pay—acknowledgement. *(See Limitation Act Art. 64) 1 L. B. R. 190*

(4) Whether account stated or balance can form the basis for a suit—cause of action. —*See accounts—Acknowledgement anti.*

(z5) ACCOUNTS, SUIT FOR

(i) Acknowledgement or balance of accounts—basis of—cause of action—*See Acknowledgement clause (d) infra.*

(ii) Amendment of plaint in.—*See C.P.C. § 53-117 P. L. R. 1904.*

(iii) Court-fees on.—*See Court-Fees Act § 11—12 M. L. J. 66; 6 B. L. R. 1102; 6 C. W. N. 346, 58 P.R. 1902 & other cases.*

(iv) Limitation in. *See Limitation Act (1877) Arts. 57, 85, 89, 90, 102, 106 & 120.*

(v) Meaning of—*See Provincial Small Cause Courts Act Art 31—15 M.L.J. 142; A.W. N. 1904 P. 227, 28 M. 394 and other cases.*

(vi) *Mortgagor and Mortgagees—Suit for Accounts.*

Accounts, *(Continued).*

1 Mortgagee not realizing assigned debt—*See Mortgage Accounts 32 C 27.*

2 Mortgagee's rate of interest—*See Mortgage Accounts 8 C. W. N. 609—31 I A 57= 31 C. 332 (P.C.)*

3 Mortgagee in possession spending money to defend his title. *See T. P. A. § 72 5 B. L. R. 916=28 B 181.*

4 Morgagee purchasing mortgaged property in execution of a decree. His liability to account. *See T.P.A.§ 99— 7C.W.N. 532=30 C. 463.*

5 Liability of mortgagee in possession for mesne profits *See T.P.A. §§ 82 and 841 —3 B.L.R. 939=26 B312.*

6 Mortgagor and mortgagee, Possession with mortgagee under a consent decree mesne profits, suit for account. *See T.P.A. §§ 83 & 84.* *RAM SAUJI PARULEKAR v.KRISHON SONJI PARULEKAR 3 B.L.R. 939=26 B 312.*

7 Pre-emptor a mortgagee of the property sought to be pre-empted.
In a suit for pre-emption when the property is previously mortgaged with the pre-emptors and the vendee takes upon himself to pay the mortgagees money deposited with him, out of the consideration for sale, the Court is not justified in going through the mortgage accounts to find what was due to the pre-emptors at the date of sale MUHAMMED UMAR *v.* KIRPAL SINGH **78 P.R. 1904.**

8 Suit by second mortgagee to enforce his mortgage. *See Mortgage Accounts 32 C 27 (P.C.)*

9 *Redemption Suit—Accounts.*
Held by the Privy Council that a mortgagee is not liable for the amount of the gross rental as shown in the *Jamabandi* but only for such sums as had been actually received by him or on his behalf and such sums, if any, as might have been received by him, but for his own neglect or fault. BENARSI PERSHAD *v.* RAM NARAIN. **7 C. W. N. 514 P. C.=25 A 227.**

10 Suit for redemption by the first mortgage.—*See Mortgage Redemption 15 C. P. L. R. 26.*

11 Redemption suit. *See Mortgage Redemption 5 C. L. J. 192 and other cases.*

(vii) *Partners' suit for Accounts.*
1 Suit by one partner against another without praying for dissolution of partnership. *See partnership, suit for accounts—1. A L. J. 94, 28 M. 394 &c,*

Account Books.

See Account—Account Books anti.

Accountability.—

See accounts—Liability to render account anti.

ACCRETIONS.

(a) To Ancestral Property.
(b) By Alluvion and Deluvion.
(c) To mortgaged Property.

(a.) *To Ancestral Property.*

Lands and houses which accrue to a member of the proprietary body by reason of his membership of that body are regarded as ancestral property and not as a self-acquisition P. R. 10 of 1893 followed.

Where the nucleus of the landed property had descended from an ancestor common to the parties, accretions to such a nucleus assume such a character.

But property purchased by the common ancestor of the parties and afterwards confiscated by Government and subsequently released in favour of one of his descendants was held to be acquired by the person in whose favour it was released as it did not appear that the release was made to him as the descendant of the original owner but on account of his own capability. Under the customary law property acquired by the income of ancestral property is not regarded as ancestral property P. L. R. 8 of 1901, 4 P. R. 1900=P. L. R. 1900 P. 152 & P. R. 12 of 1901 followed. HAIDAR KHAN *v.* JAHAN KHAN **65 P. L. R. 1902=50 P. R. 1902**

(b) *By Alluvion and Diluvion.*

1 Auction purchaser in revenue sale for arrears of revenue has right to accretion—*See Bengal Regulation 11 of 1825*-**8 C. W. N. 676.**

2 *Custom—Land of* adná málik *reappearing after submerger*—haq juri.

Where the land of an *Adná Málik* reappeared after sub-merger and the *álá Málik* claimed the land or at least *haq-i-juri*, which was entered in the *Wajib-ul-arz* Rs 1 to Rs 2 per bigah; their claim to *haq-i-juri* was allowed at Rs 1 per bigah and the land was decreed to the *adná máliks* (Muradpur village in the Muzaffargarh District) **33 P.R. 1903.**

3 Action of river tidal or non-tidal—*See Bengal Regulation 11 of 1825 & Act 18 of 1876-2 A. L. J. 623=7 B. L. R. 87=2 C. L. J. 185=9 C. W. N. 889=8 O. C. 293=15 M. L. J. 349=27 A. 655 (P. C.)*

4 Gradual formation—alluvion and diluvion—*See Bengal Regulation 11 of 1825 & Act 18 of 1876 14 C. P. L. R. 97.*

5 Do—1 M. L. J. 101.

Accretion *(Continued).*

6 Do—A. W. N. 1905 P. 271=2 A. 1 J. 821=28 A. 256.

7 Do—Reformation of diluviated land—1 M. L. T. 175=3 C. L. J. 560 (P. C).

8 Do—Right of Royat having no pre-existing right to land to later accretions to such land—*See Act 8 of 1885 (Bengal Tenancy Act and Bengal Regulation 11 of 1825—33 C. 444).*

(c) To MORTGAGED PROPERTY *See Accession Nos. (2) and (3) supra.*

Accrual of right to sue.—

Meaning of—See Calcutta Municipal Act 3 of 1899 (Bengal Acts) §, 634 (2).—THE CORPORATION OF CALCUTTA v. SHYAMA CHARANPAL 9 C. W. N. 217=32 C. 277

ACKNOWLEDGEMENT.

(a) What amounts to an acknowledgement of debt.

1. Where at the bottom of a *Hathichitta* account the defendant wrote *Likhtam khude, i.e.,* written by self: Held it amounted to an acknowledgement to operate as such within the meaning of § 19 Limitation Act.—*See L. A. § 19*—SADASOOK-AGARWALA *v.* BAKUNTHA NATH BASUNIA **9 C. W. N. 83=31 C. 1043.**

2. *Do., See Limitation Act § 19—9 B. L. R. 715*

3. *Do, See L. A. § 19 and 179—6 C.L.J. 141.*

4. *Do. See L. A. § 19z—2 B. L. R. 1086 =25 B. 330.*

5. Judgement debtor's application in writing for extension of time is an acknowledgement and saves limitation—*See L. A. § 19 12 M. L. J. 351.*

6. Defendant's written statement in a previous suit dismissed for misjoinder of causes of action was treated as an acknowledgement. *See L. A. § 19—24 M. 361.*

7. Defendant's acknowledgement of liability in a letter written by him to his own agent and given to the plaintiff to be despatched to that agent is an acknowledgement under § 19 L. A. and saves time—**4 B. L. R. 447=26 B. 562.**

(b) What does not amount to an acknowledgement

When J, a contractor, sent a letter and his bill to one R for whom he had done a building job and R replied "Received a letter and bill from J for the building works done by him. The bill glanced over seems to be incorrect. I will first have the work and

Acknowledgement *(Continued).*
estimates examined and after deducting what is to be deducted I will see what is to be paid." Held this writing did not amount to an acknowledgement under § 19 L. A.—JOGESHWAR ROY *v.* RAJ NARAIN MITTRA. **8 C. W. N. 1904 P. 168.**

(c) *By Agent.*—
An agency (such as is contemplated by § 19 L.A.) can not be inferred from the mere fact that the acknowledger is a joint contractor or a co-mortgagor. The deposition in Court as to mortgage by one of several co-mortgagors co-defendants binds him alone as an acknowledgement under § 19 L.A.

It may be shown by evidence that the managing member of a joint Hindu family was duly authorised to make the acknowledgement on behalf of all the members to bind them by the acknowledgement made by him. NARAYANA AYYAR, *v.* VENKETA RAMANA AYYAR **25 M. 220 (F. B.)**

A co-mortgagee is not an agent of other co-mortgagees.

Where a mortgage is joint in favour of two mortgagees an acknowledgement by one of them can not ensure to the benefit of the mortgagor as against the other and cannot save time. 18 A. 458 followed. HANUMAN PRASAD *v.* RAGHUNADHA SINGH. **1 A.L.J. 355. (See L. A. S. 19)**

(*d*) *Acknowledgement—cause of action, whether an acknowledgement can constitute a cause of action whereon to base one's suit.*

1 *Acknowledgement—cause of action—mistake in framing plaint.*

When facts on which a claim is based are clear the court should not dismiss a suit merely for the cause of action being wrongly stated.

The plaint set out that there were money dealings between parties and their ancestors for many years and that in *sambat* 1951 the accounts were made up and a debit of Rs 1942 was acknowledged, and that afterwards the defendant's estate fell under the management of the Court of Wards and that in 1897 that Court acknowledged a debit of Rs 1412 to save limitation. This last acknowledgement was assigned as the cause of action and the total amount claimed was Rs 2229-7. No documents were filed with the plaint but account books from *samt* 1942 to *St.* 1951 were produced at the first hearing and their extracts were filed. The defendant's objection that the suit was bad as being based on an acknowledgement was overruled and the case decreed *in toto.*

The Divisional Judge, on defendant's appeal, dismissed the plaintiff's suit as being based on an acknowledgement which did not constitute a cause of action: Held although the plaintiff should have produced his account books in Court, with the plaint, and given their copies to be filed with the plaint, and he should have referred to the acknowledgement not as constituting a cause of action

Acknowledgement *(Continued).*
but as extending limitation, yet the real cause of action was perfectly apparent and the dismissal of a suit merely because a plaint is not artistically worded will never find any favour in our Courts (11 C.P.L.R. 65 & 22 B 513 explained and distinguished). In the present case even if it be *conceded* that the plaintiff put forward the acknowledgement as furnishing his cause of action still the error was perfectly immaterial and the debt itself was not open to objection. The judge should have disregarded the averment as surplusage or should have caused the plaint amended then and there.—DURGASHUNKER *v.* RAM PERSHAD **14 C.P.L.R. 151.**

2 *Suit on a balance of accounts.*

The plaintiff's claim comprised a balance for Rs. 479-1 struck in his account books Re 1-2 and Rs 42 subsequently, lent to the defendant and Rs. 39 and Rs. 42 recovered from him. The first court decreed the claim, the Lower Appellate Court holding that no suit could lie on the basis of a mere acknowledgement gave a decree for only two items of Re 1-2 and Rs. 42 : Held that the plaintiff's suit was rightly framed and he was entitled to recover the whole amount claimed by him (23 A 502 referred to). BHOLA NATH *v.* NET RAM. **A. W. N. (1906) 185=3 A. L. J. 800.**

3 *Balance struck—Cause of action—Novation—Limitation.*

The striking of the balance in account books may according to the particular facts and the nature of the entry amount to a mere acknowledegment of liability or to a new contract altogether. In the first case it is only evidence of the original cause of action and if duly complied with § 19 Limitation Act extends the period of limitation, but merely as such does not constitute a cause of action whereon to sue. The suit must be based on the original cause of action. In the second case it may amount to a complete novation of the old contract for which it is substituted and can form the basis of suit. Whether it falls under the first or the second case depends entirely on the circumstances of each case. Where the balance was *lekhá Ganpat da Sambat* 1957 *Miti* 23 *Katak* Rs 51/14/- *baqi ande* Rs 51/14/- *Hathi Ganpat di mawarikhe* 23 *Katak* 1957 *Mubligh* Rs 51/14/- *rubru Ibrahim*: Held it was only an acknowledgement and not a new contract in substitution of the original cause of action nor could any promise to pay be reasonably implied in it. GANPAT *v.* DAULAT RAM, **123 P. L. R. 1904=63 P. R. 1904.**

3. *Acknowledgement—Suit based on mere acknowledgement—Limitation Act Art. 64—Novation.*

A mere acknowledgement, or balance struck, does not amount to a new contract and can not be sued upon nor is it an account

Acknowledgement (*Continued*).

stated, for the latter in the strict sense is where several cross claims are brought into account on either side, and are set off against each other and a balance is struck. The consideration for the payment of the balance is the discharge on each side. Article 64 Limitation Act applies only to such an account stated and not to a case where there were no demands to be set off against each other, but only debts on one side of the account and payments made by the debtor on the other. 22 B 513, 15 A 1 followed. 2 A 611 and 872, 3 A 148 A. W. N. 1883 P. 47, A. W. N. 1881 P. 65, Agra F.B. 94—6 Mad H. C. R. 197, 10 C. 284 referred to—GANGA PERSHAD *v.* RAM DAYAL.—**A. W. N. 1901 P. 150 = 23 A. 502.**

4. *Acknowledgement—Construction of document—Novation—Contract Act § 25 and Limitation Act § 19—*

Held that the following document embodied a promise to pay within the meaning of § 25 (3) Contract Act and was not a mere acknowledgement of a balance.

"Bais tahrir ánki mublaghá 1,500 rupei ......az sare nau hisáb karki bábat hisáb bálá joki Hafiz Muhammed Naim ke sáth merá hai mere zimme bâqi rahe, Liházá yeh chand kalmát bataur sanad likh detá hun ki sanad rahai aur waqt háj t kám áve" MAHBUB JAN *v.* NURUD-DIN—**22 P. L. R. 1906 = 102 P.R. 1905.**

5 *Acknowledgement of Conditional liability.—*

There can not be an acknowledgement of a conditional liability unless the condition is fulfilled. Although so far as the specific cases provided for in the explanation to § 19 Limitation Act are concerned, the Indian Law is not the same as the English Law, yet there can be no doubt that here as well as in England an acknowledgement of a conditional liability would not give a fresh start so long as the condition remains unfulfilled (1 M.L.T. 199 P. C. followed) RAJAB KAVALI ARUNA CHELLA ROW *v.* SRI RAJU RAUGHIA APPA RAR,—**1 M. L T. 318 = 16 M.L.J. 563 = 29 M. 519.**

(*e*) *Acknowledgement—Construction of a document.—*

1 Novation of a contract—*See Contract Act § 25 (3) & Limitation Act § 19—22 P.L. R. 1906.*

2 Held that the following document was not a promissory note nor a bond, nor an acknowledgement of a debt containing a promise to repay the debt or a stipulation to pay interest. As it was nothing more than a mere memorandum or note drawn up between the parties to a transaction which had just been settled between them, it was sufficiently stamped (with one anna stamp), and was admissible in evidence:—

"Lekhá of Bhawáni Din (&c.,) 8th February 1901. Interest 1 per cent per mensem

Acknowledgement (*Continued*).

payable 3rd May 1901, Rs 500/- borrowed from Udit Upadhia for Sugar Factory, signature of Bhawáni Din,"—UDIT UPADHIA *v.* BHAWANI DIN,—**A. W. N. 1904. P. 169 = 1 A. L. J. 433. = 27 A 84**—(*See Stamp Act II. of 1899 Art 1.*)

3 *For other cases see Stamp Act 2 of 1899 Article 1.*

(*f*)—DEED OR DOCUMENT IN, A MATERIAL ALTERATION OF AN—

1 *Material alterations in a document —Alterations in acknowledgement.*

The material alteration of a document upon which a suit is based by a party to it after its execution without the consent of the other party renders it void.

A written acknowledgement of his liability by a debtor does not become void and inoperative because it is materially altered without his consent by his creditor. ATMA RAM *v.* UMED RAM. **3 Bom. L. R. 213 = 25 B. 616.**

2 *Acknowledgement—Material alteration in a hathchitta. Document. Material alteration of—Acknowledgement Suit on—Alteration with regard to interest—Document merely relied on as evidence.*

The plaintiff sued the defendant for a sum of Rs. 360 for money advanced. In a business book of the plaintiff, the defendant had acknowledged his liability for that amount, by signing his name in the book over an eight anna stamp. After the defendant had signed the book, some words with regard to the payment of interest were interpolated into the entry. The plaintiff put the entry in evidence in support of his claim, merely as an acknowledgement of the defendant's liability. No reliance was placed upon the entry as to interest, nor was any interest asked for.

Held, that as the plaintiff was not suing upon any instrument which he had fraudulently altered, and the acknowledgement as to indebtedness of Rs. 360 was not altered or tampered with; the plaintiff was entitled to a decree for Rs. 360 without interest.

That the authorities discriminate between cases in which the altered document is the foundation of the claim and those in which it is only used as evidence. *7 Cal. 616, 9 Mad., 399 and 25 Bom., 616 referred to.* HARENDRA LAL ROY CHOWDHRY *v.* UMA CHARAN GHOSH. **9. C. W. N. 695.**

3 *Alteration of date in an acknowledgement—Oral evidence—Admissibility of.*

Held oral evidence is inadmissible to prove the date of an acknowledgement where its date is unauthorisedly altered subsequently—GULAM ALI *v.* MIYABHAI. **8 B L R. 574.**

Acknowledgement *(Continued)*.

(g) ACKNOWLEDGEMENT—ESSENTIALS OF AN. *See Limitation Act § 19 cases under the heading essentials of an acknowledgement.*

(h) EFFECT OF—ON EXECUTION PROCEEDINGS. *See Limitation Act § 19 rulings under this heading*

(i) FORGED BOND, ACKNOWLEDGEMENT IN A ITS EFFECT TO SAVE LIMITATION. *See Limitation Act § 19—3 C. L. J. 363.*

Do., Where a date in the acknowledgement is unauthoritatively altered, oral evidence as to date is inadmissible—*See Limitation Act § 19 3 B. L. R. 574.*

(j) OF LEGITIMACY OR PRATERNITY.

1 *See Muhammedan Law—9 O. C. 246*

2 „ „ „ *—9 C. W. N. 352*

(k) BY GUARDIAN—*See Limitation Act* §. *19.*

(l) IN A HATHCHITTA—SIGNED AT THE FOOT BY THE DEBTOR. *See L. A.* §. *19-9 C. W. N. 63=31 C. 1043.*

2. ENTRY IN A HATHCHITTA—*See Material Alteration of a deed, acknowledgement (f) supra 9 C. W. N. 695.*

(m) BY A KARTA OR MANAGER OF A JOINT HINDU FAMILY. *See Limitation Act* §. *19 (and Hindu Law) 25 M. 220.*

(n) Limitation—acknowledgement of liability to save limitation must be stated in a plaint.

1 Where the right claimed is a debt, it is necessary that an unequivocal and unqualified admission of the debt or a part of it or of the subsisting relationship of a debtor and creditor should be established to satisfy §. 19 L. A (26 C. 715 and 16 M. 220 referred to.) There is a distinction between the law of limitation as to acknowledgements applicable in England and that in force in India. The plaintiff ought not to be allowed to put forth a new case, inconsistent with the plaint to enable him to avoid limitation. BINODE BEHARI MUKERJI *v.* RAJ NARAIN MITTRA. **7 C. W. N. 1903 P. 651=3 O. C. 699.**

2 *Acknowledgement not set out in the plaint can not be relied upon to save limitation L. A.* §. *19.*

A plaintiff cannot rely on any ground of exemption from limitation, e. g., an acknowledgement of liability to save limitation, when he has not set out in the plaint that ground as required by §. 50 C. P. C. GOGESHWAR RAI *v.* RAJ NARAIN MITTRA. **8 C. W. N. 1904 P. 171.**

3 Do.—8 C. W. N. 168=31 C. 195.

(o) MATERIAL ALTERATION IN AN—*See Acknowledgement Deed (f) supra.*

(p) BY MINOR. *See L. A.* §. *19—59 P. R. 1901.*

(q) BY MORTGAGEES. *See L. A.* §. *19.*

(r) NAVOTION OF A CONTRACT. *See Acknowledgement cause of action (d) supra 18 P. R. 1904=123 P. L. R. 1904 and 102 P. R. 1905= 22 P.L. R. 1906.*

(s) BY A PARTNER. *See L. A.* §. *19.*

Acknowledgement *(Continued).*

(t) BY A PERSON HAVING NO INTEREST IN THE PROPERTY WHEN MAKING AN—*3 A. L. J. 680 (See L. A.* §. *19.)*

(u) PROOF OF—BY ACCOUNTS. *See L. A.* §. *19, 25 B. 330.*

(v) BY A RECEIVER. *See L. A. § 19—10 C. W. N. 959.*

(w.) REQUISITES OF AN—*See Limitation Act* § *19.* (Under that heading).

(x) BY SETTLEMENT OFFICER *75 P. L. R. 1905.=53 P. R. 1905.*

(y) SPECIAL AND LOCAL LAWS. *See L. A. § 19 under that heading A. W. N 1902 P. 34.*

(z) STAMP ON.

1 An acknowledgement stamped with a postage stamp instead of receipt stamp was held to be unstamped *(§ 37 Stamp Act) 23 A. 213.*

2 Unstamped—Evidence *(See Stamp Act Art. 1). 30 C. 687.*

3 Stamped promise to pay. *(See Stamp Act § 23 and Art. 1) 3 B. L. R. 839= 30 C. 687.*

4 Bond, Pro-note, Memorandum of a loan *(See Stamp Act Art. 1) A. W. N. 1904 P. 169=27 A. 84.*

5 Held that an entry in acconnt books being an acknowledgement of a debt signed by the debtor and attested by witness was a bond and chargeable as such and not as acknowledgement § 2 (5) Stamp Act 35 P. R. 1903=101 P. L. R. *1903.*

(z1) STARTING POINT OF LIMITATION. *See L. A. § 19.*

(z2) Of Title. *See L. A. § 19 26 M. 34*

ACQUIESCENCE.

(a) IN ADOPTIONS. (In adoption by a co-widow)—*See Hindu Law. BHIMAPPA v. BASAWA 7 B. L. R. 405=29 C. 400.*

(b) IN ALIENATIONS.

1 Long silence in alienation or unequal distribution of property by a childless proprietor among heirs amounts to an acquiescence on the part of reversioners. *See Custom Alienation 42 P. R. 1902=97 P. L. R. 1902.*

2 Do.—Alienation was made in 1867 and plaintiff's reversioners sued in 1891. *See Custom Alienation 102 P. R. 1902=9 P. L. R. 1903.*

3 Alienation by sonless proprietor acquiescence. *See Custom Alienation 97 P. L. R. 1902.*

4. In alienation or gift by a sonless proprietor to a daughter. *See Custom Alienation and Limitation Act Art 91—133 P. L. R. 1902.*

5. In Alienation by a widow, Assent of only reversioners. *See Custom Alienation and Hindu Law. 83 P. L. R. 1905=1 P. R. 1905.*

(c) ARBITRATION REFERENCE TO—ACQUISCENCE IN. *See C. P. C. § 506.*

There can be no acquiescence to arbitration by the parties, as that section requires a clear written application of the parties. *5 C. W. N. 268=28 C. 303.*

Acquiescence *(Continued).*

c Reference to arbitration by a pleader. His Client's knowledge of reference. *See C. P. C. 506—4 A. L. J. 342.*

d. By a Company.

Agreement between a company and directors how far binding on the company. Scope of authority of companies' officers. Ratification-acquiscence. *See Contract Act §§ 64—100 P. L. R. 1905=10 P, R. 1905.*

e. By father in an alienation how far binding on his son. Son's right to object. *See Custom Alienation 66 P. L. R. 1905=7 P. R. 1905.*

f. By Guardian.

Where the Government gave sanction to the Collector to manage the property of a minor, and intimated the Collector that on ascertainment of the debts owed by the minor's deceased father the plan for their liquidation would be determined and the Collector, without obtaining orders from the Government, executed a permanent lease of some 11,000 acres of minor's land to the defendant: Held that the Government was the guardian of the minor and the Collector could not grant a permanent lease, and there was no acquiescence or ratification by the Government. The Government had delegated merely the management of the estate and had reserved the power to determine the best plan for liquidation of debts. That there can be no ratification by a person who at the time of ratification could not have done tho act himself, even though he had the power to do it when the original act unauthorised by him was done, for no one can supply an authority who does not possess it. 19 L. J. Ex. 154. That full knowledge is essential to ratification 13 M. and W. 834 (1897) 1 C. H. 313, 33 L. J, Ex. 190. That the registration of the lease was compulsory and it was inadmissible in evidence for want of registration. That the Collector was not an administrator and did not purport to act as agent. The plaintiff (minor on attaining his majority) was not bound and could not ratify the transaction. That the plaintiff had not acquiesced in the transaction by his receipt of rent from the defendant. THAKORE FATEH SINGH JI DIP SINGH JI *v* BAMANJI ARDESHIR DALLAL.—**5 B. L. R. 274=27 B. 515.**

g. By a *Parda Nashin* Hindu female.

It is not the practice of the courts in India to press a presumption by acquiescence against a *parda nashin* female in a rival claim, from the mere non-contestation for a limited time of an adverse title. EBRAHIM RAHIM BHOY *v* FALBAI—**4 B. L. R. 180 =26 B. 577.**

h. In Jurisdiction of Court.

1 *See C. P. C. §. 17 and 120—7 B. L. R. 289.*

2 Do. *C. P. C. § 17—36 P. R. 1902=22 P. L. R. 1903.*

Acquiescence *(Continued).*

3 Do. *See C. P. C. § 17, 20, 57.—386 P. L. R. 1903=27 P. R. 1903.*

i. Laches— Waiver —Acquiescence—Evidence.

Laches to operate as a bar to the plaintiff's suit must amount to waiver, abandonment, or acquiescence, and to raise the presumption of any of these, the evidence of conduct must be plain and unambiguous. PIR MAHOMMED DIN JI *v* MAHOMMED EBRAHIM—**7 B. L. R. 200=29 B. 234**, *See Specific Relief act § 22.*

j. In misplacement of burden of proof

Where misplacement of the onus has been acquiesced by the parties, the High Court would be very reluctant to interfere with the result, unless there were reasons to suppose that the error might have produced error in the decision of the case on the merits. GANGA DAS JUMNA DAS *v* DAMA CHANGO—**5 B. L. R. 1903, P. 177.**

k. Under a mistake of fact—*See Estoppel* GAURA CHANDRA GAJAPATI—*(Raja of Parlikamadi) v* THE SECRETARY OF STATE *1 C. L. J. 360=9 C. W. N. 553=32 I. A. 53 P. C.=28 M. 130.*

l. By a mortgagee.—

1 By a mortgagee of a usufructuary mortgage,—Diminution of Security, Acquiescence, Interest, Rents and profit.—*See Mortgage Acquiesence*—RAJA PARTAB BAHADUR SINGH *v* GAJADHAR BAKHSH SINGH **4 B. L. R. 845 P. C.=7 C. W. N. 1903, L. C.**

2 By a mortgagee in the loss of part security—*See Mortgage acquiescence. I A. L. J. 715=A. W. N. 1907, P. 273=27 A. 313.*

3 Diminution of Security—claim by mortgagee to profits of the lost portion of his security,—*See Mortgage acquiescence A. W. N. 1904 P. 273.*

4 Whether a question of law or fact.

Acquiescence is not a question of fact but of a legal inference from the facts found, and upon it the judgement of the Appellate Court is not final, 3 C. W. N. 502=21 A. 496, L. R. 26 I. A. 53 refer to, A. A. CASPERSZ *v* KIDAR NATH SARBADHIKARI, **5 C. W. N. 858.**

m. Receipt of rent by landlords.

The receipt of rent by landlord from the alleged adopted son of an occupancy tenant does not amount to such an acquiescence as to preclude the Civil Court from trying the suit of the landlords for possession against the alleged adopted son of the occupancy tenant.—*See Limitation Act Art: 118* HOSHNAKI *v* LACHHMAN, **14 P. L. R. 1902.**

Acquired Property

Held that income and profits derived

Acquired Property *(Continued).*
form ancestral property do not constitute ancestral property under Customary Law 4 P. R. 1900 followed. MEHR KHAN v. KARM ILLAHI—**161 P. L. R. 1901=18 P. R. 1902.**

Acquisition

a. ACCRETION—*See supra*

b. ACQUISITION OF DOMICILE.

Where a widow residing in the French Territory on her husband's death became an absolute owner of his property according to the Hindu Law prevailing there, and after that she migrated to British Territory: Held that acquisition of a British Indian domicile by her did not change the character of her estate, when it was not suggested that she had adopted the system of Law prevalent in British India.—*See Hindu Laws, Widows Estate*—MILATTIOE AMIR v SUBHARAYA MUDALIAR—**M. L. J. 1901 P. 309=24 M. 650.**

c. OF EQUITY OF REDEMPTION—*See Mortgage Accession.—AJUDHIA PERSHAD v MANSINGH, A. W. N. 1902. P. 176=25 A. 46*

d. OF LAND.

1 By Government.

Suit for money paid as compensation is not a land suit. *See Jurisdiction, land suit.* U. B. R. 1901, P. 1.

2 Of land for public purposes—*See Land acquisition Act 1 of 1894 §§ 17 & 48, M. L. J. 1904 P. 173.*

e. BY A MORTGAGEE.

Acquisition by a mortgagor after the mortgage, enures for the benefit of the mortgagee—*See Mortgage Accession—AJUDHIA-PRASAD SINGH v MAN SINGH A. W. N. 1902 P. 174=25 A. 46.*

f. OF PORTION OF PATNI.

Land Acquisition Act (I of 1894)—Acquisition of portion of putni *—Abatement of rent —Division of compensation.*

When a portion of a *putni* was acquired by Government under the Land Acquistion Act—

Held that as the land acquired by Government was absolutely lost to the *putnidar*, the latter was entitled to abatement of rent at the hands of the *Zamindar*, and he was also entitled to some share of the compensation money.

With regard to abatement of rent as the gross rental of the whole *putni* is to the gross rent of the land proposed to be taken, so will the entire *putni* rent be to the particular portion of the rent to be remitted, *S. D. A.* 1860 p. 336, *followed.*

With regard to the amount of compensation, as the gross profit of the *putni* is to the profits of the *putnidar*, so will the gross compensation be to the portion of the compensation the *patnidar* is entitled to recover. 28 *Cal.* 146 *followed.* BHOBANI

Acquired Property *(Continued).*
NATH CHUCKERBUTTY v. LAND ACQUISITION DEPUTY COLLECTOR OF BOGRA **7 C. W. N. 180.**

g. BY PRESCRIPTION.

1 Acquisition of under proprietory rights by prescription—*See Specific Relief Act § 42,* **4 O. C. 207.**

2 A right of trusteeship with power to successors can be acquired by prescription *See Adverse possession of Trusteeship with power to appoint successors, ANNA SAMI PILLAI v RAMA KISHNA MUDALIAR* **24 M. 219.**

h. OF SITE AND BUILDINGS BY TENANTS—PAYMENT OF HAQE CHAHARUM—*See Landlord and tenant*—Haqe chaharum by whom payable. **A. W. N. 1903 P. 5.**

Actionable Claim.

1 *Purchase of property to which there are adverse claims is legal, but the purchase merely for litigation is illegal.*

P sued for possession on purchase from S, an alleged adopted son of T. The defendants, other than S, pleaded that the sale deed was a champertous transaction, without consideration and void its object being to disturb the peace of the defendant's family and to promote gambling in litigation. The District Judge found that the purchase was speculative and without consideration, and executed mainly to harass the Defendants, the whole transaction was a speculation in litigation and not a bouâ fide purchase of an actionable claim and dismissed the suit.

Held reversing the decision, even if the recital in the sale deed as to consideration is false and the transaction is of a highly speculative character it is not necessarily an offence against the law of champerty, immoral or against public policy.

The question in such cases is whether the real object of the transaction is to acquire an interest in property for the purchaser or merely to speculate in litigation on the account either of the vendor alone, or the vendor and the vendee jointly. It is not illegal to purchase an interest in property, though adverse claims exist which necessitate litigation for realising the interest, but it is illegal to purchase an interest for the purpose of litigation. In other words the sale of an interest to which a right to sue is incident is good, but the sale of a mere right to sue is bad for champerty. The object of the law is not so much to prevent the purchase or assignment of a matter then in litigation as the purchase or assignment of a matter in litigation for the purpose of maintaining the action 8 M. 2 A. 170, 14 B. 72, 18 M. 374, 22 M. 810, 27 A. 270 referred to.—DEORAO GOPALJI v SADASHEO,—**2 N. L. R. 17.**

2. *Whether an executory contract comes within the meaning of actionable claim.*—See T. P. A. § 3, 10 C. W. N. 755=33 C. 207.

Actionablo Claim *(Continued)*

3. *Mortgage redemption, assignment of mortgage.* See T. P. A. § § 130, 131, 135, See Mortgage Redemption.—JAWAHIR SINGH *v* PARWANSINGH—**4 O. C. 210.**

4. *Sale of a Share in a Law suit—Right of Pre-emption*—UMAR KHAN *v* KHADIM HUSAIN—**9 O. C. 76.**

5. *Transfer by a Hindu Reversioner of his interest in inheritance is not the transfer of an actionable claim within the meaning of § 130 T. P. O. A.*—MATA PRASAD *v* MT. AUDAN KUWAR—**3. O. C. 215.**

6. *What is an actionable claim, explained* See T. P. A. § 135 (d) AZIM ALI KHAN *v.* CHOWHARJA BAKHSH—**3 O. C. 18.**

7. Where a tenant was ejected, and the value of his standing crops was fixed by the Assistant Collector under § 95 Act 12 of 1881 (N. W. P. Rent Act) and the tenant assigued his right to receive the sum to the plaintiff (assignee) who brought the suit to receive the amount assessed with interest in the Court of the Munsiff: Held that the assignment of the right to receive the sum awarded was not an assignment of an *actionable claim* having regard to the provisions of clause (d) § 135 T. P. A. and the defendants (landlords) were not entitled to be discharged by paying to the assignee the price and the incidental expenses of the sale of the claim with interest; that the assignee's remedy was by a suit in the Revenue Court but as the objection to the Munsiff's jurisdiction was not taken in the Lower Courts it could not be entertained in the High Court (Act 12 of 1881 § 206). MATHURA DAS *v* MURLIDHAR—**A. W. N. 1902 P. 150=24 A. 517.**

Actionable Wrong.

1. *Abusive language is actionable without proof of damages. 4 L. B. R. 50* See Abusive Language Col 18

2. Do. U. B. R. 1905 P. 1 See Abusive Language Col 19 See Torts.

Action of Public servant ultra vires not binding on Government
M. L. J. 1902 P. 432, See Agency.

Action for recission of a Contract
See Contract Act § 78, 14 C. P. L. R. 57

Action in Rem.
See Admiralty Jurisdiction 6 C. W. N. 1902 P. 773=29 C. 302.

Action for Slander.
See Abusive language Cols 19 & 20 & Torts.

Active prosecution of a contentious Suit.
See T. P. A. § 52 Lispendens, 28 C. 23.

Act of Bankruptcy. *(Continued)*
See Insolvency 6 B. L. R. 296=28 B. 364

Act of God.
See Vis—Major (Vis Major.)

Act of State.

1 Government and Government Officers. Suit against—Power of Government as to dismissal, reduction, &c., of public servants— Act of State—Suit for libel—Privileged communication—Civil Procedure Code (Act XIV of 1882). Section 424—Notice. Object of—

The object of such notices as that required by section 424, Civil Procedure Code, is to inform Government or the public officers concerned generally of the nature of the suit, which is intended to be filed against them. These notices must not be too strictly or too narrowly construed. They must not be construed as if they were pleadings; they need not set out all the details and facts of the case, which the plaintiff intends to prove, and the notice must be considered sufficient, if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed.

The Governor and Members of the Council are exempt from the jurisdiction of the High Court, so far as their acts in public capacity are concerned.

As no action will lie against the Governor and the Members of his Council, none will lie against the Secretary of State.

The Secretary of State can be sued in respect of those matters for which the East India Company could have been sued. The East India Company could only have been sued in regard to those matters for which private individuals or trading corporations could have been sued, or in regard to those matters for which there was express statutory provision.

The Sovereign and his ministers and those who represent him have the right to employ and dismiss public servants at pleasure, on public grounds.

The power of the Crown to dismiss its public officers is necessarily limited by any statutory provision that may have been enacted for the benefit of such public servants; it has no application to such of the servants of Government, as are not charged with functions which are in themselves the acts or the attributes of Sovereignty.

A Hazur Deputy Collector in Bombay is liable to be dismissed at the pleasure of the Crown, or agents of the Crown, that is, the Government of Bombay.

It is open to Government, by resolution or otherwise, to censure or reprimand an officer.

All communications between Ministers of State, with regard to public matters or public functions, and all expressions of opinion in the conduct of public duties by the officers of State, and all records and

Act of State (*Continued*)

documents in which the opinions or orders of Public officers relating to other Public officers are contained, are absolutely privileged. They are privileged to such an extent that they cannot be compelled to be produced, and that even if the defendant or any party, in whose possession that document may be, is willing to produce it, the Court ought not to notice it and ought not allow that document to be put in or produced. If *primâ facie* the document is privileged, if *primâ facie* it purports to be an official communication which would be privileged, then no allegation of malice would be allowed and no proof of malice will take away the privilege.

Any charge of libel against a public officer must fall, if it is contained in a document which is privileged, because that document cannot be produced and so is incapable of being proved in a Court. JEHANGIR MANAKJI CURSETJI *v.* THE SECRETARY OF STATE FOR INDIA **27. B. 189 = 5. Bom. L. R. 30.**

(**2**) ACT OF STATE

Government Sovereign—Gevernor and Member of his Council—Defamation in a Government Resolution—4 Geo. IV. C. 71—St. 21. and 22 Vic. C. 106—Act of State—Servant, power to dismiss—Civil Procedure Code (Act XIV of 1882), Sections 416 and 575. Suit against Government—Notice—Crown, irresponsibility of, for the negligence of its servants—Plaint—Cause of action, statement of —Privileged communication—Publication—Evidence Act (1 of 1872). Sections 123 and 124 —Master and servant—Wrong by servant—Course of service—Corporation—Principal and agent—Reference to a third Judge—Statutory body—Liability of the Crown.

Per Batty, J.—No action can lie in this country against the Governor and Members of his Council for acts done in their public capacity, but an action will lie against the Secretary of State for India in Council, although his liability can only be traced through the Governor and Members of his Council. The exemption conferred on the Governor and Council at Bombay by 4 Geo. IV. C. 71 is local and not absolute and does not affect any liability to suit on the part of the Secretary of State for India in Council, in respect of any acts of the Executive Government or Members thereof, for which the East India Company, then might have been, or the Secretary of State for India in Council now be, liable.

The liability of the Secretary of State for India in Council to be sued is co-extensive with the liability to which the East India Company was subject at date of 21 and 22. Vic. C 106.

Though the appointment or dismissal of a certain class of officers is among the functions of a Government and is not exerciseable by private individuals as such, it

Act of State (*Continued*)

is a power which is exerciseable only in pursuance of an authority conferred and regulated by Municipal Law and deriving its justification therefrom and subject to limitations thereby imposed. It is a power not unfrequently conferred on some *personæ designatæ* by the Legislature. If the donee of the power acts within the powers conferred or is vested with final and exclusive discretion the Courts cannot interfere with the exercise of that power or substitute its own discretion for that of the authority so empowered. Yet the power is none the less one which must be exercised in conformity with the law and subject to all conditions which may have been imposed by the law, and if those conditions be not fulfilled or if those conditions be exceeded the jurisdiction of the Courts is not ousted.

The test whether an Act is or is not an Act of State excluding the jurisdiction of the Courts is not whether it is capable of being legally performed only by persons specially empowered in that behalf as authorized by the law to perform specific acts of Government, but whether it is an Act of State in those external relations, which Municipal or positive law addressed by political superiors to political inferiors does not profess to regulate. An Act of State in respect of which the jurisdiction of the Courts is barred must be an act which does not purport to be done under colour of a legal title at all, and which could neither assert or violate any right conferrible by law, but which must rest for its jurisdiction on considerations of external politics and interstatal duties of rights.

The power to dismiss a servant, which is exerciseable conditionally by all employers, does not extend to or include the right to publish statements of the principal's unfavourable opinion as to the dismissed agent's character. The publication of the censure, and not the making of it, furnishes a cause of action.

Section 416 of the Civil Procedure Code does not enlarge or in any way affect the extent of the claims or liabilities enforceable by or against the Secretary of State for India in Council, which must always depend on the provisions of 21 and 22 *Vic.* *C.* 106. It only provides a means of affecting the revenues of India, in cases where these revenues could have been affected when in the hands of the East India Company. No power is given by that Section to Government, to bind or otherwise affect the revenues. It gives no cause of action but only declares the mode of procedure when a cause of action has arisen.

The doctrine, as to the irresponsibility of the Crown for the negligence or misconduct of its officers, does not apply in the case of the East India Company, which is liable for the acts of its servants in the same way as an ordinary principal is liable for the acts of his agent.

The plaintiff is bound by law to state his

Act of State (*Continued*)

cause of action not only in the plaint but in the notice required by section 424 of the Civil Procedure Code. And where the plaintiff charges the publication of a libel by a Government Resolution, which on the face of it purports to be an official document and a privileged communication addressed only to specified officials, he is bound to allege in his plaint the publication on which he relies as giving him a cause of action in respect of such a communication.

It is clear that what determines whether a communication is privileged or not is the occasion on which and the circumstances in which it is made, and not the possibility of the persons receiving it making further communication to others in circumstances that would not be privileged.

Even in the weakest form of qualified privilege, in order for an action for libel to be sustainable, actual malice must be alleged and proved.

The privilege attaching to an official publication is not absolute, but is subject to the condition that it is without malice actual, express and in fact.

Where a printed Resolution issued by the Government of Bombay containing defamatory matter about a Huzur Deputy Collector is circulated to the Commissioner, the Collector, the Accountant-General, the Secretary to the Government in the Judicial Department, and the Private Secretary to the Governor of Bombay, there is no excessive publication of it by reason of such communication.

The question whether an official communication is privileged from production in evidence is distinct from the question whether it would, if produced, be privileged in respect of liability for libel. The first point is in India governed not by English cases but by sections 123 and 124 of the Indian Evidence Act, the first of which excludes only unpublished official records relating to any affairs of State except with the permission of the head of the Department, while in the other official matters, the public officer claiming privilege may exercise his own discretion in giving or refusing disclosure.

The master is answerable for every such wrong of the servant, or agent, as is committed in the course of the service *and for the master's benefit*, though no express command or privity of the master be proved. The expression "course of business or service" does not connote mere continuity of employment or service, but continuity of purpose—the uninterrupted progress of work to subserve the interest of the master. The word "course" has no reference to time, but to running on of work, devoted to the master. Any deviation to other interests is an interruption of such course although it takes place in point of time in the middle of such work: it then ceases, though it be but momentarily, to be the work for the master. The crucial test is not whether the act is done during a time while the servant is performing a duty for his master but whether it was done *in* the performance and for the purpose of performing that duty and for the master's interests and not the servant's purposes instead.

If the agents, of a corporation, act in pursuance of real or supposed powers in its behalf, the corporation is liable, for their acts. And even if the acts of the agents amount to implied malice or even express malice on behalf of, and in the interest of, the corporation, the corporation is still liable.

The ground of the principal's liability for the acts of his agent, must always rest on the very simple ground that he was not merely a *causa sine qua non*, of the injurious act of his agent, but the *causa causans*.

For a principal to be liable for an agent's acts, it must always be necessary that to the question "What made the agent to do it" the only answer possible should be "He was doing the thing for his principal."

Per Jacob J.—The Government of Bombay is not empowered (and the East India Company, not being a Sovereign power, would not have been empowered) wrongfully and capriciously, to dismiss or to libellously censure an officer, with immunity from liability to question in the Civil Courts.

The Resolution issued by the Government of Bombay libellously censuring a public officer for his delinquencies is not an act of State, and has therefore no absolute privilege.

The Governor of Bombay in Council and the Secretary of State for India in Council in his statutory capacity as transferee of the liability of the East India Company cannot be put on the same level with great officers of State, who cannot be sued because they are servants of the Crown.

The principle of the liability of a master for the wrongful acts of his servant is *equally* applicable whether the agency is for a corporation in a matter within the scope of the corporate powers or for an individual. And where a libel arises out of excess of censure by a servant, the act becomes one of an authorized class which becomes wrongful by reason of excess, and the master is liable for such act of his servant, since but for such excess it would have been clearly within the scope of the authority and the master would be responsible for the manner in which the servant had discharged the duty entrusted to him, although he might not have authorised the particular act.

Per Chandavarkar, J.—There is nothing in the language of section 575 of the Civil Procedure Code, to support the view that the third Judge to whom reference is made under the section cannot sit and hear the appeal alone.

The notice under section 424 of the Civil Procedure Code should state the relief which the plaintiff claims; it should be absolute

Act of State *(Continued)*
in terms and not conditional.

Where the persons compriaing a statutory body, as the Government of Bombay, outstep the limita of their authority and commit a wrong, they are no longer the agents of the East India Company or of the Crown and their tortious acts do not bind either.—JAHANGIR M. CURSETJI *v* SECRETARY OF STATE FOR INDIA.—**6 B. L. R. 133.**

3. *Appeal to Privy Council—Act of the Governor-General of India in Council—Act of State.*

The petitioner applied for leave to appeal to Privy Council against an order of the Governor-General of India in Council removing him from the Government of the State of Panna.

Held, that the act was clearly a political act—an act of State—done by the Viceroy in Council in the interest of the State of Panna, and the inhabitants of Panna, and for the peace and good Government of India generally, and the Privy Council were precluded from entertaining a petition for leave to appeal against an act of that character.—*In re* MAHARAJA MADHAVA SINGH.—**6 B. L. R. 763=8 C. W. N. 841=33 I. A. 239 P. C.=32 C. 1 (P. C.)**

ACTS.

I. Supreme Government Acts (i. e. Acts of the Governor-General of India in Council).
II. Bengal Government Acts.
III. Bombay Government Acts.
IV. Burma Acts.
V. Central Provinces Acts.
VI. Madras Government Acts.
VII. North-Western Frontier Province Acts.
VIII. North-Western Provinces Acts.
IX. Oudh Acts.
X. Punjab Acts.

I. Supreme Government Acts.

(1) Act XXIV of 1839.—*(An Act for the Administration of Justice and collection of the Revenue in certain parts of the Districts of Ganjam and Vizigapatam.)*

1 *XXXIV of 1839.—Agency Rules, Nos. XX and XXXI.—*

This was an application prosecuted by the Maharaja of Jeypur under Rule No. XX. of the Agency Rules praying the High Court to direct the Agent to the Governor at Vizagapatam to reveiw his judgment in a certain appeal reversing the decision of the Senior Assistant Agent giving a decree in favour of the Maharaja for possession of certain villages, on the ground that he was entitled to resume the villages as the terms, on which they had been granted to the defendants, had been violated.

On behalf of the defendants two pre-

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liminary objections were raised:—(1) that the latter part of Rule No. XX, under which the application was made, was *ultra vires;* and (2) that even if it were not *ultra vires* the application should not have been presented to the High Court but to the Governor in Council under Rule No. XXXI.

Held, that Rule No. XX was not *ultra vires;* and rule No. XXXI did not apply to this case.—23 *Mad.*, 329, *refered to.* MAHARAJA OF JEYPUR *v.* JAMMANADHORA. **24 Mad. 345.**

2. *Agency Rules for Ganjam and Vizagapatam—Rule XXXI—Appeal against order in execution passed by the Agent—Decree.*

No provision is made in the Agency Rules for Ganjam and Vizagapatam for an appeal against an order in execution passed by the Agent.

An order passed in execution under the Agency Rules is not a decree within the meaning of these rules. SRI SRI SRI VIKRAMADEO-MAHARAJULUM GARU *v.* SRI NELADEVI PATTAMADHADEVI GARU **26 M. 266.**

(2) Act XXIX of 1839 *(Dower Law Amendment Act) Section 4—Rule 20. Compromise by father.*

Held, that provision in rule 20 framed under Section 4 Act XXIX of 1839 to the effect that the finality of the agent's decision shall be subject to the power of the Sader Court to direct the agent to review his decision on special grounds is not *ultra vires.*

The High Court may pass order under rule 20 on its own motion or on the application of parties. Such application may be made directly to the High Court.

In the absence of fraud or any other ground invalidating it, a compromise of a disputed claim entered into by the father is binding on the family. MAHARAJA OF JEYPUR *v.* JAYAKOTA. **Mad. L. J., 1901, P. 70.**

(3) Act XXXII of 1839 *(An Act concerning the allowance of Interest in certain cases). Section 2.*

1. *Interest—Compound interest—Unconscionable agreement—Delay in filing suit—*Pardahnashin *lady. Dealings with—Mortgage executed by* Pardahnashin *ladies and their male relatives.*

There is no authority for the rule that a bargain which in itself is not open to objection as hard and unconscionable can be held to have assumed that character in consequence of the delay on the part of the creditor in suing on the agreements comprising the bargain.

It is not in every case in which the interest charged is very high that the Court will interfere when the debtors who contracted the loan were *suijuris* and there was no proof of

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unfair dealings. The cases of a female debtor in fiduciary relation to the creditor and of an expectant heir are exceptions to the general rule.

The mere fact that a person is in urgent need of money is not sufficient in itself to raise the presumption that the persons to whom he applies for the loan will take unfair advantage of his necessity. Undue influence or unfair dealing must be proved before such a presumption can arise. 9 *All.*, 228 *dissented from*, 21 *W. R.*, 352; 4 *Cal.*, 137; 20 *Cal.*, 366; 2 *K. B.*, 110; 1 *B. L. R.*, *(O. C.)* 31 *Note*; 7 *Cal.*, 245; s.c., *L.R.*, 8 *I. A.*, 39; 26 *Cal.*, 891, 918; 5 *W. N.*, *Cal.*, 505; 12 *Cal.*, 225; s. c., *L. R.* 12 *I. A.*, 215; *L.R.*, 10 *Ch.*, 389 *referred to.* UMESH CHANDRA KHASNAVIS *v.* GOLPA LAL MUSTAFI. **7 C. W. N. 876 = 31 C 233.**

2. *Interest—Policy of insurance—Demand of insurance money—Acceptance without prejudice to the claim for interest.*

In this case certain goods were consigned by a firm in Mauritius to plaintiffs in Bombay, in October 1896. The goods were covered by a policy of insurance, dated the 19th September 1896, effected with the defendant Company for a sum of Rs. 4,914. The ship, with the goods on board, was totally lost. On 12th November 1896 the plaintiffs gave notice to the agents in Bombay of the defendant Insurance Company of the loss, and demanded payment of the insurance money. On 17th November 1896 the agents replied asking to be allowed to see the policy of insurance. On 5th January 1897 plaintiffs, by their solicitors, made a formal demand, and giving notice that in default proceedings would be taken against the Company for recovery thereof with costs. On 7th January 1897 the agents replied, through their solicitors, stating that "their principals deny their liability on the policy in question, on the ground *(inter alia)* that the ship (S. S. Taif) was not sea-worty when she sailed." They also mentioned certain litigation pending at Mauritius, in which the question was being raised, "and (without prejudice) we should be glad to know whether your client is prepared to allow his claim to stand over for the present to enable our clients to see if some arrangement can be come to." Plaintiffs' solicitors replied, on 26th January 1897, saying, "since your clients raise an issue as to the seaworthiness of the vessel, the matter is one which is to be (*sic* in copy) settled in Court, and our client will now take proceedings. With reference to your suggestion to wait until the result of the suit or suits said to be filed in the Mauritius is known, our client has no knowledge of such suit or suits, save what is derived from your letter under reply, and, even if he had, the result of such suit or suits cannot bind our client." The correspondence then apparently ceased for a while. Nearly two years afterwards, on 18th November 1898, plaintiffs' solicitors repeated their formal claim on defendants for the payment of the insurance money "with interest thereon from the date thereof" (apparently the date of the policy) "till Payment." The agents wrote to the plaintiffs, stating they had received advice to pay the amount of the policy, and on 25th May 1901 they wrote that they had received advice from their head office "that they do not see their way to pay interest on your claim." Plaintiffs' solicitors made the following proposal. "With a view, however, not to lengthen the correspondence our client will accept the sum of Rs. 4,914 (insurance money) now offered by you on account of his claim and without prejudice to his right to recover the interest thereon as claimed." The plaintiffs were offered the insurance money which was accepted, and discharge receipt given with the condition—"exclusive of interest which I claim, but which claim the Union Marine Insurance Co., Ld., dispute, and without prejudice to any right to recover such interest." The litigation in the Mauritius was finally concluded on 2nd March 1901, when the Privy Council found that the sea-worthiness of the vessel had not been proved, and judgment was entered for the plaintiffs in the case for the sum assured, and damages in the nature of interest at 4 per cent. per annum from 21st December 1896 until payment.

On the 2nd September 1901 the present plaintiffs filed a suit in Bombay Court of Small Causes, to recover interest from the date when payment of the insurance money became due, *viz.*, 12th November 1896, up to the date, when the amount was actually paid, *viz.*, 7th June 1901. This claim was rejected by Court for want of jurisdiction. The present suit was filed on 14th December 1901. The defendants contended that the plaintiffs' claim was barred by limitation, and the plantiffs had no right of suit in respect of interest claimed.

Held, that interest could not be allowed before notice of the claim was made. With reference to the period subsequent to the demand, which was on 18th November 1898, the matter was within the discretion of the Court, and there was no bar to the plaintiffs' right of suit in respect of interest from the date of demand to the date of receipt, 7th June 1901. AHMED *v.* UNION MARINE INSURANCE COY. **4 B. L. R. 205.**

3. *Interest on rent—Oudh Rent Act (XXII of 1886), Sections 12 and 141—Contract Act (IX of 1872,) Section 73—Interest Act (XXXII of 1839)—Landlord and Tenant—Rent—Compromise—Under-proprietor. Liability of, for interest.*

There is nothing in the Oudh Rent

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Act or in *Medhi Ali Khan* v. *Yasin Khan (3 C. W. N., 218, s. c., 26 I. A., 41 P. C.)* which excludes any liability for payment of interest which the under-proprietor might be under, apart from the Act.

Interest on arrears of rent cannot be claimed under section 73 of the Contract Act by a Talukdar from an under-proprietor holding land under a compromise-decree when the compromise and the decree did not fix any date for payment of rent.

In such a case interest could not be claimed under Act XXXII of 1839 for no time was fixed for payment of rent.

And section 12 of the Oudh Rent Act was not applicable to such a case, for the provisions of an Act could not apply to a compromise entered into previous to the passing of the Act. (THAKUR) GANESH BAKHSH *v.*(THAKUR) HARIHAR BAKHSH **8 W. N. Cal., 521 (P. C.)=6 Bom. L R., 505 (P.C.)=7 O.C. 116=M. L J. 1904 p. 190 (P. C.)=26 A. 299 (P. C).**

4. *Interest Act XX of 1839—Haks—Sukhadi and Rejgi—Notification of Bombay Government—Act XXXII of 1839—Interest.*

The *haks* of Sukhdi and Rejgi do not fall within the purview of the notification issued by the Government of Bombay on the 11th June, 1841, issued under Act XX of 1839: and they, therefore, are not affected by the Act.

Interest prior to the institution of the suit cannot be given, under Act XXXII of 1839, unless a demand of payment has been made in writing; and it can not be given in the shape of damages. FEZALI GULAMALI *v.* MAHOMED SADIK MIYA. **7. B. L R. 798.**

(5) Interest on arrears of rent.

Held that the arrears of rent due from an under proprietor are not liable to interest under § 141 Oudh Rent Act 1881, but these arrears might be charged with interest under Act XXXII of 1839, if the conditions, specified under that Act, are satisfactory. RAJA MUHAMMAD ALI KHAN *v* MUHAMMAD YASINKHAN **1 O. C. 267**

(6) Interest on arrears of rent.

Under-proprietors whose beneficial interest has been transferred by an official act to persons who thereby become possessors of the whole *mahal* are not liable to pay rent to the Taluqdar for such time as they are out of possession. They are, moreover, not liable to pay interest on arrears of rent due from them, for proprietors are not tenants within the meaning of § 141 Oudh Rent Act of 1886. MUHAMMAD MAHDI ALI KHAN *v.* MUHAMMAD YASIN KHAN **26 I A 11 =3 C. W. N. 218=26 C. 523=2 O. C. 233**— *See Interest*

7. *Interest Act (XXXII of 1839)—Contract Act (IX of 1872)—Debtor withholding payment—Interest—Hindu law.*

Neither the Interest Act nor the Indian Contract Act affects the rule of Hindu law that, in the case of a debt wrongfully withheld, after demand of payment has been made, interest becomes payable from the date of demand by way of damages. That law was in force, when the Interest Act was passed, and, under that Act, it has continued to be in force. The Indian Contract Act has not interfered with it. SAUNDANAPPA ANDANAPPA *v.* SHIVBASAWA AMINGOWDA, **9 Bom. L. R. 439.**

(4) Act XIX of 1841. *(An Act for protection of property against wrongful possession in cases of successions).*

1. *Act XIX of 1841 Sections 1, 3, 4—Intestate's property—Jurisdiction of Judge—Review—Rectification of mistake by successor of Judge who passed the order—Revision.*

Before the procedure provided by Act XIX of 1841 can be set in motion the title and *bona fides* of the applicant must be *prima facie* clear, it must be manifest that the party complained of had no lawful title to possession and if the applicant were referred to a regular suit, he would be a serious sufferer, as by the risk, of waste or misappropriation or by his inability to prosecute his rights when out of possession.

When it appeared that before issuing citation under Act XIX of 1841 the Judge did not satisfy himself that the person in possession had no lawful title and the person applying was in danger of being injured by delay and his successor after recording evidence did not consider it right to disturb possession and passed order accordingly.

Held, that the order was not open to objection. (6 W. R. 53 & 7 P. R. 1904 Ref. to) RAJJI *v.* LAL CHAND. **138 P. R. 1906.**

2. *Act XIX of 1841, Ss. 3—8, - Jurisdiction—Procedure.*

The District Judge upon an application filed under Act XIX of 1841 called upon the Collector under section 8 of the Act to submit a report on the case. On the Collector recommending that action be taken under the Act the District Judge directed the party complained against to be cited but before the date fixed for the hearing of the case—appointed a person recommended by the Collector as curator to take possession of the estate.

Held by the Chief Justice—That the District Judge was not competent to proceed on the mere report of the Collector. The Judge should have himself exercised a judicial discretion before making use of the summary powers conferred by the Act. The word 'shall' in section 3 is not directory but mendatory and the order passed by the District Judge without adopting the procedure laid down in section 3 was with-

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out jurisdiction. If not without jurisdiction the Judge acted with material irregularity.

Held by Subrahmania J.—That whereas in the case of property other than land paying revenue to Government, the Judge must, in order to determine whether a party is to be cited or a curator is to be appointed, satisfy himself by an enquiry under section 3, in the case of land paying revenue to Government for the determination of the propriety of citing the party or appointing a curator, the Judge need not make any enquiry, but may make the Collector's report the basis of his action.

Held by Shepherd J.—That the District Judge had not acted without jurisdiction by reason of his omission to comply with the terms of Section 3 of the Act. But he had acted with material irregularity in passing his order without adopting the course prescribed in section 3. Section 8 cannot be read as containing an alternative statement of the course to be pursued in the cases therein mentioned so that the Judge can properly dispense with the examination of witnesses and act upon the report of the Collector only. KRISHNASWAMY PANNIKONDAR *v.* MUTHU KRISHNA PANNIKONDAR. **Mad. L. J., 1901, P. 78. F. B.**

3. *S. 18—Original jurisdiction vested in District Judge in Berar—High Court, competent to revise proceedings of the District Judge.*

The original jurisdiction under the Act now vests in Berar, in the District Judge. The words 'Sudder Diwani Adawlut' in the Act signify a High Court in British India, and 'The Judicial Commissioner of Berar' was duly invested with the powers given by the Act to a High Court in British India. (See S. 4 (3) of the Hyderabad Assigned Districts Courts Law, 1889). The entire jurisdiction of the Judicial Commissioner of Berar has been transferred to the Court of the Judicial Commissioner at Nagpur, by S. 3 (1) Berar Courts Law 1905.

The High Court can not revise the proceedings of the District Court under the Act, except as expressly provided by that Act. Though S. 622 of the Civil Procedure Code has been modified in its application to Berar so as to remove the restrictions which have been placed by that section upon the revisional jurisdiction of the High Courts in British India, yet the revision can only be in cases where it is not expressly forbidden by some other enactment. The order which S. 18 of the Act declares to be final is intended to be a legal order, and so a totally illegal order would always be subject to the High Court's revision. But where the District Court has exercised its power legally under the Act, then, however erroneous its procedure, or unjust or improper its order might be, the High Court has no power of revision.

The Act is only to be used where exceptional grounds for prompt action are necessary to guard against misappropriation, waste, or neglect of the deceased persons' estates. KHAJA KUTBUDDIN *v.* KHAJA FAIZUDDIN, **2 N. L. R 72.**

4. *This Act is not applicable to Mitakshara joint Hindu family.*

Where a member of a joint Mitakshara Hindu family died leaving a widow, a daughter and two brothers; and the brothers applied under Act XIX of 1841 for an order declaring their title to the property and also for possession and the District Judge granted their application; held on widow's revision application that Act XIX of 1841 does not apply to a Hindu family governed by the Mitakshara Law, whereby the surviving members of a joint family take the deceased's property by survivership and not by succession and the D. J. had no jurisdiction in the case and he should have left the parties to establish their title by a regular suit. Held also that the D. J. acted illegally and with material irregularity and the High Court had full jurisdiction in Revision to reverse his order. 6. W. R. 53 followed and 4. C. W. N. 1900 and 10 M. 68 referred to. SATOKOER *v* GOPAL SAHU—**12 C. W. N. 65=34 C. 929**

5 Act XIX of 1843 (*Registration*)

§ 2.—See Registration Act § 50—3 A. L. J. 320=A. W. N. 1906 P. 113=28 A. 607.

6 Act XI of 1846.—(*An Act exempting certain territory in the Province of Khandesh from the operation of the general Regulations).*

Act XI of 1846, Section 3—Rule 35 of the Rules promulgated in 1855.—Reference in a criminal case to the High Court from the Scheduled Districts.

In this case the Agent to His Excellency the Governor in Khandesh submitted for the confirmation of the High Court of Bombay his proceedings in which he had convicted the prisoner of murder in the Mehwashi Estate of Kathi, and sentenced him to transportation for life.

Held, that the High Court had jurisdiction to hear and determine the reference.—IMPERATRERI *v* RATNYA.—**25 Bom., 667**

7. Act XX of 1847 *(Indian Copy Right Act)*

Sections 3, 6—Press and Registration of Books Act (XXV of 1867), Section 18—Expunging entry from the Catalogue of books kept in Bombay—Jurisdiction of High Court of Calcutta—24 and 25 Victoria C. 104, Section 9—Acquiring of copyright in British India by foreigner residing abroad.

By section 6 of Act XX of 1847, the only Court having jurisdiction to deal with the Register of Copyrights for the purpose of vary-

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ing or expunging an entry was the Supreme Court in Calcutta. It had, therefore, jurisdiction over the book of Registry wherever it happened to be kept.

By section 9 of 24 and 25 Vic. C. 104, the High Court of Calcutta took over all the powers of the Supreme Court including the powers which the Supreme Court exercised absolutely in respect of any Copyright Register.

Held, that the High Court, therefore, has jurisdiction to order the expunging of an entry in the Catalogue of books kept in Bombay under section 18 of Act XXV of 1867. ISMAIL BIN SHAIKH BADAL *v.* ALIBHOY SARAF ALI. **1 C. L. J. 278= 9 C. W. N. 591.** *(On appeal from this case see No. (2) next.*

(2) *Sections* 6, 14-*Printing Presses and Newspapers Act (XXV of* 1867), *Section* 18— *Book of Registry—Catalogue of Books—Application to have a name expunged from such catalogue—Assignee of proprietor of copyright—Infringement of Copyright—Supreme Court of Calcutta. Jurisdiction of—High Court of Calcutta. Jurisdiction of—High Court of Bombay. Vesting of jurisdiction in —Judge of the Original Side. Power of, to try the case—Charter Act (24 and* 25 *Vict. Cap.* 104), *Sections* 9, 13, 14—*Letters patent, Section* 36—*Person aggrieved. Meaning of—Affidavit evidence if proper—Summary proceeding.*

Section 18 of Act XXV of 1867 has not ousted the jurisdiction of the Supreme Court of Calcutta specially vested in it by section 6 of Act XX of 1847 to entertain an application to have the name of a person who has got his name registered in the Catalogue of Books at Bombay in fraud of the applicant's rights' under the provisions of the Act, expunged from such Catalogue; nor has it vested such jurisdiction in the High Court of Bombay.

A Judge of the High Court appointed by the Chief Justice of the Court under section 14 of the Charter Act (24 and 25 Victoria Cap. 104) to take the work of the Original Side of the Court, has, having regard to sections 9, 13 and 14 of that Act, and to section 36 of the Letters Patent, jurisdiction to try the case.

A proprietor of the Copyright of books is a person aggrieved within the meaning of section 6 of Act XX of 1847 when he finds that another person has got his name registered in the Catalogue of Books at Bombay in fraud of his rights.

The summary proceeding mentioned in section 14 of Act XX of 1847 means the summary proceeding mentioned in section 6 of the Act. A proprietor of the Copyright of books, whose name has not been entered in the Book of Registry at the office of the Secretary of the Home Department of India at the time the proceeding is commenced, is precluded by section 14 of the Act from maintaining an application to have the name of a person expunged from the Catalogue of

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Books at Bombay, the proceeding being one in respect of an infringement.

Per Sale, J.—The high Court in its Original Jurisdiction is the successor in the direct line of descent of the Supreme Court and all the powers and functions of the Supreme Court now fall to be exercised by the Judge or Judges of the High Court who are appointed by the Chief Justice to exercise the Original Jurisdiction of the Court. ABDOOLLA BHAY SARAFALLI *v.* ISMAIL. **2 C. L. J. 511=10 W. N., Cal., 134, 33 C. 571**

3. *Section* 14—*Act (XXV of* 1867)—*Copyright—No copyright in unregistered publications.*

In the case of a book which has been published there is no right to sue on account of piracy, except when the copyright has been registered, and subsists under statutory provisions. The effect of the proviso to section 14 of Act XX of 1847 is to protect copyright in unpublished works as also copyright where there is registry under the statute in the case of published works inclusive of cases in which there has been registry before the suit, though after the infringement complained of. 17 *Cal.*, 951 *distinguished.* SABAPATHY MUDALIAR *v.* SEETHARAMIAH, **29 M. 292.**

4. *Section 18—See No. (2) Supra*

8. Act 1848—*(Indian Insolvent debtors Relief Act.)*

1. § *7 Vesting order, withdrawal of petition, Reversion of property.*

When a petition is filed in insolvency, a vesting order is made in the official assignee's favour and the insolvent's property vests in him. The adjudication of a man to be insolvent has the same effect On the withdrawal of the petition for insolvency, the vesting order determines and must be taken to be annulled: and the property of the insolvent vests in him.—MACLEOD *v.* HAJI SAJAN LALJI—**9 B. L. R. 1006.**

2. § 7. The benefit of an executory contract can vest in official assignee, as it is an actionable claim under § 3. T. P. A. and a such property as would vest in the Official assignee under § 7. of the Indian Insolvency Act. JAFFER MEHER ALI *v.* BUDGE BUDGE JUTE MILLS & Co. **11 C. W. N. 566=34 C. 289.**

(Which was a case on appeal from 10 C. W. N. 755=33 C. 702.)

3. §§ *13 and 49.*—§ 49 is not directory but merely permissive, and after a vesting order has been made and the schedule filed, the Court can under § 245 B. C. P. C. direct execution against the person of the defendant by his arrest and imprisonment in cases of fraud or misconduct. BHASKAR WAMAN RANADE *v.* SRIDHAR KRISHNA KOTHAULE —**9 B. L. R. 898.**

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4. Act 1848—(*Indian Insolvent Debtor's Relief Act*) Insolvency—*Indian Insolvency Act, 1848—appeal from order refusing benefit of—application by appellant for protection from arrest—section 13, 73—Lower Burma Courts Act, 1900, § 8—Civil Procedure Code, §§ 545, 639, 747, 4.*

Applicant had filed an appeal against the order of the learned Judge on the Original Side of the Chief Court, dismissing his petition for the benefit of the Act for the Relief of Insolvent Debtors. He applied for an order of protection from arrest during the hearing of the appeal.

Held—after examination of the law applicable, that such an order could not be granted. *Agabob, F., in re*—**3 L. B. R. 1906 P. 241.**

(5) Insolvent Debtor—*composition with creditors—unscheduled debt—liability of negocited promissory note—fraud—bar to suit—Indian Insolvency Act, 1848.*

A was adjudicated an insolvent, and entered into a composition deed with certain of his creditors, which was to operate, on compliance with its terms, as effectually as an order of final discharge under the Indian insolvency Act, in respect of the debts due to the assenting creditors. The amount due to each was shown in a schedule to the deed.

B, one of those creditors, subsequently sued A for a sum due on two promissory notes made in favour of A by C, and negociated by A with B. The amount due on these notes had not been included as due to B in the schedule to the composition deed or brought to the notice of the other creditors.

Held,—that B was therefore debarred from suing A for the amount. *Britten v. Hughes*, (1829) 5 Bingham, 460; followed. *Payler v. Homershan*, (1815) 5 Maule and Selwyn, 423; referred to. M. N. N. RAMAN CHETTY *v.* ABDUL KADER and others. **4 L. B. R. 1907 P. 101.**

6. §§ *36, 37, 47, 59, 60*—The whole object of the Act implies that the insolvent must place all the property he has in the hands of the Court for being collected and distributed amongst his creditors, and that he must render every assistance to unable the Court and the official assignee to realize the property. Where the applicant only informs the Court in his schedule that he has certain debts due to him but does nothing more, held that the Court is justified in adjourning the hearing until the applicant has taken the necessary steps before the benefit of the Act can be extended to him.

The vesting order vests in the official assignee all the property which the insolvent possesses or is entitled to when the order is made, but also all property which he may thereafter become entitle to until he obtains a certificate of final discharge either under Section 59 or 60 of the Act. Therefore the official assignee is entitled to receive the whole salary which the insolvent was at the time of the order earning or might thereafter earn until he obtains the certificate of discharge. The Court can, however, under § 47 make a reasonable allowance for the applicant's maintenance until final order. MAUNG CHIT U. *v.* OFFICIAL ASSIGNEE **L. B. R. 1900—02. P. 249.**

9. Act XVIII of 1850—(*Judicial Officers' Protection Act.*)

1. *Judicial Officers' Protection Act (XVIII of 1850),—Judicial officers—Act done in discharge of duty—Protection afforded as a matter of public policy—Jurisdiction—Civil Procedure Code (Act XIV of 1882), Section 199—Judgement*

To secure the protection of Act XVIII of 1850, the defendant must show—

i. That the act complained of was done or ordered by him in the discharge of his judicial duty, and (ii) that it was within the limits of his jurisdiction, or if not within those limits, that he, at the time in good faith believed himself to have jurisdiction to do or order the acts complained of.

Jurisdiction mentioned above rests, not on the proof adduced in support of the charge, but on the nature of the charge actually made.

The protection afforded to judicial officers rests on public policy. And thought hereby a malicious Judge or Magistrate may gain a protection designed not for him but in the public interest, it happily does not follow that he can exercise his malice with impunity. His conduct can be investigated elsewhere and due punishment awarded.

A judgement was written by a Judge after he was transferred from the District and it was pronounced by his successor.

Held, that section 199 of the Civil Procedure Code, 1882, afforded a complete answer to the objection that the judgement was illegal.

Per Jenkins, C. J.—"We earnestly hope that those judicial officers whose official movements may leave them open to this charge (that is of wilfully compelling the defendant to follow the movements of his camp) will strive to exercise their powers with such consideration for those who appear before them as will secure them from any imputation of misconduct in this respect." GIRJASHANKAR NARSIRAM *v.* GOPALJI GULABBHAI, **7 B. L. R. 951, =30 B 241.**

2. *Civil Procedure Code (Act XIV of 1882), Section 586—Tort—Tort committed by Government servant—Government, Liability of—Provincial Small Cause Courts Act (IX of 1887) Schedule II, Exceptions 1 and 3—Second appeal—Government. Suit against.*—

In cases of torts commited by Government officials the person to be sued is the person who has actually done the alleged

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wrongful act, who may or may not have a statutory or other defence.

The plaintiffs sued Government for recovery of money alleged to have been wrongfully made over by a Magistrate purporting to act under the provisions of section 577 of the Cirminal Procedure Code.

Held, that the Government was not liable, for the Magistrate was in such a position that, for all practical purposes, the Goverument had no control over him, it did not cause the act complained of, did not authorise or adopt it, and gained no profit from it. *4 Mad., 344; 17 Cal., 290 referred to.*

That the suit was cognizable by a Small Cause Court; and its value being less than Rs. 500, second appeal did not lie. MOTI LAL GHOSE *v.* SECRETARY OF STATE FOR INDIA. **1. C. L. J. 355=9 C. W. N. 495.**

3. *Civil Procedure Code (Act XIV of 1882), Section 220—Costs—Discretion.*

The fact that the defendant is protected under the provisions of Act XVIII of 1850 does not take away the discretion of the Court under section 220 of the Civil Procedure Code as to the award of costs. GANESH MAHADEV *v.* NARAYAN BALSHET. **4 B. L. R. 109.**

4. *Damages for plaintiff's property having been wrongly attached as that of the accused under Section 88; Criminal Procedure Code—Liability of Secretary of State and the complainant—Act XVIII of 1850.*

The plaintiff brought this suit against (1) the Secretary of State for India in Council; (2) Messrs. Ralli Brothers; and (3) B. P. R. Chowdhry for recovery of certain immovable property and mesne profits, on the allegations that the property in dispute belonged to the plaintiff; that defendant No. 2, Messrs. Ralli Brothers, having instituted criminal proceedings against defendant No. 3, B. P. R. Chowdhry, and the accused not having appeared, the property in dispute was, on the 1st of July, 1895, attached, at the instance of defendants No. 2, under Section 88 of the Code of Criminal Procedure, as the property of the accused; that the plaintiff was thereby dispossessed of the property in dispute which remained in the possession of the servants of defendant No. 1, the Secretary of State; and that notwithstanding that the plaintiff served defendant No. 1 with a notice under Section 424 of the Code of Civil Procedure before bringing the suit, the property in dispute was not released.

Held, that the defendant No. 1 could not be made liable for mesne profits and damages for any period preceding the date on which the property, if it had been property of the absconding offender, would have come to be at the disposal of Government under Section 88 of the Code of Criminal Procedure; the Officers of Government were protected by Act XVIII of 1850, the attachment being an act of the magistrate in the discharge of judicial duty and no want of good faith being imputed to the Magistrate or to the Police-officers who acted under his orders. But the defendant No. 1 must be held liable for mesne profits and damages in respect of the period subsequent to the date when the property, if rightly attached, would have come to be at the disposal of the Government under Section 88 of the Criminal Procedure Code.

Held, also, that the defendants No. 2 were liable for damages as they, as private prosecutors through legal and other agents, did cause the attachment to be effected.—*12 W. R., 329, referred to.* THE SECRETARY OF STATE FOR INDIAN IN COUNCIL *v.* GAGAT MOHINI DASSI. **28 Cal. 540.**

10. Act XXI of 1850 *(Caste Disabilities Removal Act.)*

1. OBJECT AND MEANING OF THE ACT—*See Act X of 1865.*—MRS. EDITH SUSAN MUKERJI *v.* MRS. GEORGE ALFRED *and others 52 P. W. R. 1907*

2 *Guardians and Wards Act (VIII of 1890), Section 17 (2)—Hindu Law—Guardian and Ward—Mother preferable guardian of her daughter than paternal grand-father—Act XXI of 1850, Section 1 Excommunication from caste—No disqualification.*

A Hindu mother is a preferable guardian of her infant daughter than paternal grandfather. The fact that the mother has been outcasted does not stand in the way of her being appointed as guardian by Court.—KAULESRA *v.* JORAI KASAUNDHAN,—**A. W. N. 1905. P. 205=2 A. L. J. 663=28 A. 233.**

3 *Hindu Law—Adoption—Boy given in adoption by his uncle under the authority of his father converted to Muhammadanism.*

Held, that an adoption among Rajputs is not invalid under Hindu Law because the boy is given under the authority of his father converted to Mahomadanism by his uncle. Adoption may be regarded as a civil transaction as well as a religious ceremonial. If civilly the father is competent to give he is equally competent to sanction the giving. The Court observed "were the parties here Brahmins, and not Rajputs, and *datta hom* essential then possibly the father after becoming a Muhammadan could not sanction his brother to be present at the giving during the *datta hom*, but the point does not arise here." 8 Bom. H. C. R., 244; 24 Bom. 89, referred to. SHAM SINGH OMRAY SINGH *v.* SANTABAI.—**3 BOM. L. R. P. 89=25 B. 551.**

4. Effect of conversion or change of religion before the passing of Act XXI of 1850.

Acts *(Continued)*
See Hindu Law Conversion, GOBIND KRISHNA NARAIN *v.* KHUNNI LAL **4 A. L. J. 365=A. W. N. 1907 P. 151=29 A. 487.**

5 A Hindu daughter converted to Mohammadism and marrying a Mohammadan during the life of her Hindu husband, has no right of inheritance to her Hindu father. *See Hindu Law Inheritance*, SUNDARI LETANI *v.* PITAMBARI LETANI, **2 C. L. J. 97=9. C. W. N. 1003.**

6 *Muhammadan Convert's right to contest alienation by his Hindu Collateral (See Custom Punjab 77 P. W. R. 1907, (Jiwan v. Harnam Dass)*

(11) Act XII of 1855 *(Legal Representative's Suits Acts) Tort—Malicious prosecution—Suit for damages not to proceed against representatives of deceased wrong doer—Act XII of* 1855, *section* 1, *clause* 2—*Abatement of suit.*

Clause 2 of Section 1 of Act XII of 1855 does not apply to an action commenced against the defendant in his life time, but only to actions commenced against the executors, administrators or other representatives of a deceased wrong doer. Therefore a suit, brought against a wrong doer during his life time, will abate on his death.

13 *Bom.*, 677 *followed*, 31 *Cal.*, 406 *referred to.* RAMCHODE DOSS *v.* RUKMANY BHOY. **28 M. 487.**

(12) Act XIII of 1855 *(Fatal, accidents Act) Limitation Act (XV of* 1877), *Sections 7, 8, Schedule 11, Art 21—Tort—Death caused by wrongful act—Suit by deceased's representatives for compensation—Limitation—Joint claimants. Meaning of—Some of the beneficiaries being minors. Effect of—*

The relations of a person whose death was caused by the wrongful act of another could not, prior to the enactment of Act XIII of 1855, claim compensation on account of the death. Such a right to claim compensation was conferred by Act XIII of 1855.

It is not correct to say that the term " representatives " as used in section 1 of Act XIII of 1855 has no application to Europeans and Eurasians, nor is it correct to say that it includes all the "heirs" of the deceased.

It means and includes all or any one of the persons for whose benefit a suit under the Act can be maintained.

Only one suit is allowed to enforce the claims of all the persons beneficially entitled and in such suit the right of each and every one of them shall be adjudged and adjusted by the Court. Such suit may be brought by the executor or administrator of the deceased, or where there is none such or where such executor or adminstrator fails or is unwilling to sue, the suit may be brought by and in the name of the representatives of the deceased.

The right of the beneficiaries to compensation is a right distinct in each so that the

Acts *(Continued)*
beneficiaries are not entitled to claim compensation jointly but are entitled to claim relief severally in respect of the same cause of action.

Where of several beneficiaries entitled to claim compensation under Act XIII of 1855 some are under no disability while others are the latter will not be entitled to claim the benefit of section 7 of the Limitation Act for they are neither " joint creditors" nor " joint claimants" within the meaning of section 8 of the Act. A suit brought by persons under disability under such circumstances will therefore be barred if brought more than one year after the accrual of the cause of action.

The term "joint claimants" in section 8 of the limitation Act is used with reference to persons whose substantive right is joint or who possess the same identical substantive right. The expression does not comprehend persons whose rights are distinct and different. JOHN *v.* THE MADRAS RAILWAY COMPANY. **15 M. L. J., 1905. P. 363.=28. M. 479.**

(12a) Act XXVIII of 1855 *(Usury Laws Repeal Act (XXVIII of 1855). Evidence Act (1 of 1872)* *S. 92, prov. 2.*

Certain Hundis upon which a suit was brought were silent as to interest. But it was proved that according to the custom of the district the parties had entered into a collateral written agreement, that the *hundis* should bear interest at 30 per cent. per annum.

Held—That S. 80 of the Negotiable Instruments Act was an enabling section, and did not bar the recovery of interest at the rate. GOSWAMI SRI GHANSHIAM LALJI. *v* RAM NARAIN, **11 C. W. N. 105 (P. C.) =4A. L. J. 29=9 Bom. L. R. I=IM.L.T. 427=17 M.L.J. 35=5 C.L.J. 7=29 A. 33**

13. Act XXVIII of 1855. *(Usury Laws Repeal Act).*

Interest Act (XXVIII of 1855), Section 2—Exorbitant rate when not allowable.

The mere fact of the rate of interest being exorbitant is not sufficient to entitle the debtor to exemption from liability.

Where the terms of a contract are so extortionate as to involve the conclusion that the party did not understand what he was about or was the victim of severe imposition, such a contract is not enforced by Courts of Justice. SATISH CHUNDER GIRI *v.* HEM CHUNDER MOOKHOPADHAY. **29. C. 823.**

14. Act XV of 1856. *(Hindu Widow Remarriage Act).*

1. *Re-Marriage of Hindu-Widows Act (XV of 1856) Section 2—Hindu widow—Second marriage—Property left by son from former husband—Succession to such property.*

Held, that a Hindu widow who contracted second marriage after the death of

Acts (*Continued*)
her former husband is entitled to succeed to the property left by her son from her former husband, the son having died after her contracting the second marriage. *11 W. R. 52 followed.* BASAPPA *bin* FAKIRAPPA *v.* RAYAVA *kom* BASAPPA. *S. C.,* **6 Bom L. R. 779 (F. B.)=29 B. 91.**

2. *Act XV of 1856 Section 2—Effect of re-marriage on the rights of a Hindu widow.*

A Hindu widow is not precluded by re-marriage from inheriting the property left by her son from her first husband. CHAMAR HARU DALMEL *v.* KASHI. **4 Bom L. R. 73=26 B. 388.**

3. Act XV of 1856 (*Widow Marriage*) *Marriage between a* Khatri *and a* Khatrani *widow*—chadar andazi—*Legitimacy of issue-inheritance.*

The plaintiffs, being the collaterals of a deceased *Khatri*, claimed his estate against the defendants, whom they alleged to be the illegitimate sons of the deceased as their mother was a widow at the time of her alleged marriage with the deceased, and that no legal marriage had been contracted between her and the deceased. It was found that the defendant's mother was a *Khatrani* widow and that a marriage by the *chadar andazi* form (which prevailed in the tract of the country in which the parties resided) was gone through by the parties. *Held*, the marriage was, apart from the custom, legal and valid under Act XV of 1856, and the defendants, as the offspring of such marriage, were legally entitled to inherit their deceased father's estate. *49 P. R. 1903 followed.*) NATHU *v.* RAM DAS. **4 P. R. 1905=20 P. L. R. 1905.**

4. Karewa *between a* khatri *and* khatrani *widow, status of issue—Concubine or* dharel *has no legal status.*

Held, that a *karewa* marriage between a *Khatri* and a *Khatrani* widow is valid under S. 1 of Act XV of 1856 and the issue of such marriage is legitimate and capable of inheriting property. *Held*, also, that a woman, who accepts the position of a mere concubine or *dharel*, acquires thereby no legal status as a wife.—*(40 P. R. 1903 and 4 P. R. 1905 followed 22 P. R. 1889 and 46 P. R. 1891 (F. B.) refd. to.)* NARAIN DASS *v.* GUJAR MAL—**61 P. R. 1905.**

5. *Marriage—A Khatri Kuka Sikh married a Tarkhani Jat woman—Act XV of 1856, Hindu Law.*

Held, that, according to custom, the marriage of a *Khatri Kuka Sikh* with a *Tarkhani* or *Jat* woman in *Karewa* form is not invalid, and the offspring of such union are not illegitimate:—(*P. R. 73 of 1897 ref. to)* RANJIT SINGH *v.* ISA **15 P. L. R. 1907.**

6. *Widow re-marriage—Forfeiture of interest in the estate of first husband—Widow remarriage Act* (*XV of* 1856), *Section* 2—*Transferees from a person not entitled to transfer. Right of—Hindu Law.*

A Hindu widow, belonging to *Kasodhan* caste, in which there is no obstacle by law or custom against the re-marriage of widows, does not by marrying again forfeit her interest in the property left by her first husband—11 *All.* 330; *A. W. N.*, 1889 p. 78; 20 *All.*, 476 *followed.*

G. died leaving a mother K and a widow *T* who remarried. *T* transferred his rights to the plaintiffs and K to some of the defendants who, in order to pay up the debt of *G*, mortgaged the property to other defendants.

Held, that *T* did not forfeit her right on account of re-marriage.

Held, further, that the plaintiff was not bound by the arrangement entered into by defendants, although the money was borrowed to pay up *G*'s debt. The defendants were not interested in paying *G*'s debts when they purchased from K and could not burden the estate by a mortgage. KHUDDU *v.* DURGA PRASAD.—**W. N. ALL 1903 P. 299=3 A. L. J. 729=29 A. 122.**

7 *Hindu Widows' Re-marriage Act* (*XV of* 1856), *Section* 2, 5—*Hindu widow—Re-marriage—Right to succeed to son by first husband dying subsequent to re marriage.*

A Hindu widow who re-marries during the life-time of his son by first husband is entitled to succeed on his son's death to the estate left by him. 2 *B. L. R.* 199 *followed.* LAKSHMANA SASAMALLO *v.* SIVA SASAMALLAYANI, **15 M. L. J., 1905, P. 245=28 M. 425.**

8 *Hindu Law*—Widow marriage Act XV of 1856.

The Hindu Widow Marriage Act XV of 1856 applies to all widows, including those widows who, apart from the Act, would be able to re-marry,—*2 B. L. R. A. C. J. 199, 5 C. P. L. R. 85 and 26 B. 388 cited and followed, 22 B. 321, 9 C. P. L. R. 47, 11. A. 330, 22 C. 589, 11 B. 119, 130, 19 C. 289, 1 M. 226, 11 A. 252 and 14 C. 176 referred to* SADHU GOUR *v.* MT. PATANGO.—**16 C. P. L R 1903 P. 99.**

15 Act XXV of 1858 *(Court of Wards Act)—See Bengal Court of Wards Act IX of* 1879 § 10—*See Act XXXV of* 1858 §§ 9, 10 and 11—**29 C. 638.**

16 Act XXXI of 1858.—(Act for settlement of *Land* gained by Alluvion in Bengal Presidency)

See Alluvion and diluvion—**7. C. W N. 193=5 B. L. R. 1=30 C. 291 (P. C.)**

17 Act XXXV of 1858—(*Lunatics Estates Act.)*

Acts (*Continued*)

1. §§ *2 and 23 See infra No. (12)*

(1a.) Ss 3, 22—meaning of "relative" in S. 3 Inquiry into the lunacy, who could apply—Order by District Judge appeal.

The applicant in this case admitted in his application that he was no relative of Rahman whom he alleged to be a lunatic, and there was no allegation that the applicant possessed any other status such as was described in S. 3 of the Act. The applicant was, therefore, held not competent to apply to the District Judge to make an enquiry into the alleged lunacy of Rahman. The contention that the applicant and the alleged lunatic were members of the same tribe, and that the term "relative" in S. 3 was wide enough to include such cases was over ruled. It was *held* that a member of the same tribe is not a 'relative' within the meaning of S. 3.

Held also, that an appeal from the order of the District Judge, in this case, lay to the Chief Court as the value of the property involved exceeded Rs. 5000, (*32 P. R. 1887 refd. to.*—MUHAMMAD YAR *v.* ILAHI BUKSH—**94 P. R. 1906.**

2 *Ss. 3, 9 and 10, application—Duty of Court to enquire whether lunatic has property.*

Previous to the Court's taking action on an application under the Act, it is necessary that the Court should be satisfied that the alleged lunatic has property. But on the mere denial, by counter-petitioner of the possession of any property by the lunatic, the Court is not justified in summarily dismissing the petition. In such a case, it must proceed to enquire whether or not the lunatic has property and whether further action is necessary and then take or stop further action as it may think fit.—LAKSHMI AMMAL *v.* SEERANGA THAMALL. **29 M. 310.**

3. *§ 5 Medical expert's report inadmissible in evidence.*

In proceedings under the Lunatics Estates Act XXXV of 1858 a report or certificate of a Medical practitioner, who is not called as a witness, embodying the opinion of such Medical practitioner as to an alleged lunatic's mental capacity, and given in the course of or for the purposes of such proceedings, is not admissible in evidence either under § 5 of the above Act or under § 32 (2) of the Indian Evidence Act. MOHAMMAD YAD ALI *v.* MT. AMIRUN NISA.—**7 O. C. 354.**

4 *Lunacy Act (XXXV of* 1858*), Section* 9.

It is incumbent upon a District Judge to appoint a manager to take charge of the state of a lunatic. The mother of the lunatic may be appointed as manager if she be a fit and proper person. A lunatic should not be forced to go to a lunatic asylum when he is well taken care of by his own people at home. JOGA KOER, *In re.*—**3 O. C. 973.**

Acts (*Continued*)

5 §§ *9 and 10 See 29 M. 310 Supra. No. (2)*

6 *Court of Wards Act (Bengal Act IX of* 1879*), Section* 10—*Act XXXV of* 1858, *Sections* 9, 10, *and* 11.

The Judicial Commissioner of Chota Nagpur considering it would be for the interests of the state of a certain *jagirdar*, who was adjudicated a lunatic under Act XXXV of 1858, authorised the Court of Wards to take charge of the management of the estate and of the person of the *jagirdar.* On appeal it was contended that the properties of the lunatic not being properties paying revenue to Government, the Judicial Commissioner had no jurisdiction to appoint the Court of Wards the gardian of the person and the property of the lunatic.

Held, that the authority of the Court of Wards to take upon itself the management of the property of a lunatic was not dependent on the nature of the property, and not restricted to property which is subject to the payment of Government revenue. MUKUND KOERI *v.* DEPUTI COMMISSIONER OF CHOTANAGPUR.—**29 C. 638.**

7. *Lunacy (District Courts) Act(XXXV of* 1858), §. 14—*Agreement for sale of property of lunatic not sanctioned by Civil Court—Earnest money paid prematurely.*

The guardian of a lunatic entered into negotiations for the sale of some immovable property belonging to the lunatic. The would-be vendee paid to the guardian Rs. 500 as earnest money and Rs. 95 for the purchase of a stamp for the conveyance, and further drew from his banking account Rs. 9,000 to complete the purchase. The sale, however, was not sanctioned by the Civil Court, as required by section 14 of the Lunacy (District Courts Act 1858). *Held*, that the would-be vendee was entitled to a refund of Rs. 595 with interest from the date when he had demanded the return of that sum from the guardian of the lunatic, but to nothing further. RAMDIN *v.* IKRAM-UD-DIN.—**A. W. N. 1906 P. 298=3 All L. J., 686.**

8 *Lunacy (District Courts) Act XXXV of 1858, Sections 21, 22 and 23—Lunatic—Unsoundness of mind, Degrees of—Management of affairs Incapability of—N. W. P. Court of Wards Act (III of 1899, Local), Section 8 (d) (i)—Medical evidence.*

The Additional District Judge found on inquiry that one S. was of unsound mind and incapable of managing his affairs and passed orders under the provisions of Act No. XXXV of 1858 for the proper care of the lunatic and his estate. Brother of S., representing that the unsoundness of mind of S. had ceased-presented an application to set aside the order. The application was rejected. The evidence of the Civil Surgeon was as follows:—"I did not find any evidence of insanity. I

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believe him to be of sound mind.

On appeal to the High Court.

Held, that the case was possibly one which might be dealt with by the Local Government under section 8 clause (d) (i) of the Court of Wards Act, but the S. being of sound mind, the appeal must be accepted. A person may be incapable of managing his affairs in a prudent manner, but unless this incapacity is due to unsoundness of mind, it does not justify a Civil Court in taking action under Act No. XXXV of 1858. DOST MUHAMMAD KHAN *v.* ASHRAF ALI. **A. W. N. 1905 P. 8.**

9 *Lunacy Act (XXXV of 1858) Section 23—Lunacy—Evidence.*

The brother of R. applied that R. being a lunatic a guardian of his person and effects ought to be appointed. The only expert evidence of a Civil Surgeon with regard to the alleged lunacy was to the effect that " R's mental condition is, in my opinion not up to the average of his class in life. His mind is not deranged. He is in a condition of imbecility resembling the mental condition of a child. In my opinion he has not sufficient mental capacity to enable him to manage a large property."

Held, that upon the above evidence it was wrong to declare that R. was a lunatic and to appoint a guardian of his person and property. RAMESHWAR TIWARI *v.* NAGESHAR TIWARI. **A. W. N. 1905 P. 43=2. A. L. J. 154.**

10 Lunacy Act *(XXXV of 1858). Section 23--Lunatic.*

It is necessary for the Court to adjudge a person to be a lunatic within the meaning of section 23 of Act XXXV of 1858 before an order can be passed as to the management of his property and for the guardianship of his person. The Court cannot proceed upon an admission made by a person who is supposed to be a lunatic, though it would be justified in examining him personally. It must come to a decision upon evidence. NAGESHWAR PROSAD SINGH *v.* RUDRA PROKASH SINGH. **31 C. 210.**

11. *Suit by an alleged lunatic not so adjudged through his next friend—Act XXXV of 1858.*

A person of unsound mind sued through his next friend. The defence was that the suit through the next friend was not competent, since plaintiff had not been adjudged a lunatic, under Act XXXV of 1858. *Held*, that a Civil Court can allow a person after ascertaining him to be of unsound mind, to sue through a next friend even though he has not been adjudged to be a lunatic under the Act. Civil Courts have power, in suits brought by, or against, unadjuged lunatics, to enquire into the fact of the unsoundness of mind of the party and order

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the appointment of a next friend or guardian as the case may be. *20 A. 2, 23, B. 653, 24. M. 504, 7. C. 242 and 10. Ch. D. 183 followed.* **91 P. R. 1887** *Refd. to; 13 P. R. 1896 Dissented from.*—JANBA *v.* JOGA.—**54 P. L. R. 1905 = 31 P. R. 1905.**

12 *§ 23 & 2—Lunatic defined—Weakness of intellect and unsoundness of mind—Court of Wards Act (IX of 1879), § 6 cls. (c) and (d).*

A lunatic, within the meaning of § 23 of the Act, must be incapable of managing his own affairs, and must also be of unsound mind. 24 W. R. 124 refd. to and approved. Mere weakness of intellect is not unsoundness of mind within the meaning of that section.

Where, a person is found to be only of a weak intellect, the Civil Court cannot proceed under this Act, although the person may, from such weakness of intellect, be incapable of managing his own affairs.

It is open to the petitioners in such a case to move the Court of Wards under Act IX of 1879 (B.C.). MAZAHARUDDIN-KHAN *v.* SERAJUDDIN KHAN,—**4 C. L. J. 115.**

13 Lunatic's right to sue through next friend *See—C. P. C. § 463*—SHEVE THE *v.* THA KADO **3 L. B. R. 169.**

18 **Act XXI of 1860**—*(Literary Scientific and Charitable Societies Registration Act).*

Act XXI of 1860 *Section* 20—*Charitable Society—Religious society.*

A religious purpose may be a charitable purpose within the meaning of Act XXI of 1860, and a society for religious purposes would therefore be a society for charitable purposes. Charitable purposes are not restricted to the giving of alms or other charitable reliefs. A society established for the purpose of obtaining possession of the property of a public mosque and to Manage it for the mosque may be registered under Act XXI of 1860.—ANJUMAN ISLAMIA OF MUTTRA *v.* NASIR-UD-DIN.—**W. N., ALL., 1906 P. 59; 3 ALL., L. J. 124.=28 A. 384.**

19 **Act XX of 1863** *Religious Endowment Act.)*

1. *Act XX of 1863, § 3, 7, 14, 18, Endowments under Regulation XIX of 1810—Removal of trustees for misconduct*

Act XX of 1863 relieves the Boards of Revenue and Local Agents from the duties imposed on them by Reg. XIX of 1810, and S. 3 of the Act requires that the provisions of the regulations specified in the preamble to that Act should be applicable to the endowment which is the subject of the suit, and that the nomination of trustees, etc., should either be vested in or be exercisable by the Government at the time of the passing of the Act.

Where it was admitted that, in 1864, the

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Local Government appointed a Committee of three members under § 7 of the Act, for a religious endowment at Cuttuck: *Held* that such appointment clearly indicated that that endowment was under the management of the Board of Revenue before the passing of the Act of 1863, and that this fact was sufficient to characterise it as a public endowment and as one falling within the operations of this Act—*(8 W. R. 313 followed.)*

Held also that all endowments effected by Reg. XIX of 1810, whether they came under the Board of Revenue or not, fell within the purview of Act XX of 1863,—*18 A. 227, 5, B. L. R. 55, 7 C. 767 refd. to, 26 M, 166 followed).*

For this Act, it is immaterial whether the office of the trustee or manager is hereditary or not, and, in either case, a trustee or manager, who misconducts himself and acts contrary to the object of the endowment, can be dealt with under the provisions of this Act (*2 M. 197 followed.*) Where the Court finds that a trustee was guilty of misconduct in the management of the endowment, it can order him to execute a bond with sureties, to ensure better management for the future, *(14. M. 103 followed)* MAHOMMED ATHAR *v.* RAJMAN KHAN—**34 C.—587.**

2. *Religious Endowments Act* (*XX of* 1863), *Section* 3, 4,—Durga—*Trustee. Misconduct of —Dismissal by Committee—Resumption of* inam jaghir *by Government—Money allowance substituted for* inam jaghir. *Effect of—*

The managing committee of a religious institution to whom the institution was handed over dismissed the plaintiff, the trustee of the institution, for misconduct and appointed another person as his successor. The plaintiff brought a suit to set aside the order, contending, *inter alia* that as the institution fell under section 4 of Act XX of 1863, the Committee had no jurisdiction to dismiss him.

The lower Court dismissed the suit on the ground that the plaintiff had been already punished for his misconduct by Government having resumed possession of the *inam* land and substituted a money payment.

Held, that the fact of Government resuming possession of the *inam* land and substituting a money allowance, was in no sense a punishment of the plaintiff. It was a precautionary measure to render malversation more difficult. The Government was in fact not competent to remove him from office or punish him for misconduct.

Held, also, that as the institution fell under section 3 of the Act, and the plaintiff was guilty of gross misconduct, the Committee were justified in removing him from office and the suit was properly dismissed.—MAHOMMAD ABDULLA SAHIB *v.* GULAM HUSAIN SAHIB,—GULAM HUSAIN SAHIB *v.* MAHOMMAD KADIR SAHIB,—**15 M. L. J. 26.**

3 *Religious Endowments Act* (*XX of* 1863), *Section 5—Appointment of Manager by Civil Court—Revision—Civil Procedure Code* (*Act XIV of* 1882), *Section* 622.

Under Section 622 of the Civil Procedure Code the High Court has power to revise an order appointing a manager under Section 5 of the Religious Endowments Act.

Before the jurisdiction under Section 5 can be exercised it is necessary that there should be vacancy in the office. If there is no vacancy there is no occasion to appoint a temporary manager. It is also necessary that there should have been a transfer to the former trustee and a dispute respecting the right of succession to the office. The words 'any dispute shall arise respecting the right of succession' apply to a case in which a question has arisen with reference to the person who has to succeed to the office. A. L. V. GOPALA AYYAR *v* A. ARUNACHALLAM CHETTY,—**26 M. 85.**

4 *Religious Endowments Act* (*XX of* 1863), *Sections* 5 *and* 14—*Receiver. Power of Civil Court to appoint—Civil Procedure Code* (*Act XIV of* 1882), *Sections* 32. 375, 539 *and* 582—*Parties—Power of Appellate Court to add parties*

Certain worshippers of a temple applied to the High Court to be added as respondents on an appeal to that Court in a case under the Religious Endowments Act, on the ground that the parties to the appeal had colluded together and entered into a compromise and that the public interests would not be duly protected unless such parties were added.

Held, that the case fell within the wide language of section 32 coupled with section 582 of the Civil Procedure Code. Even if that were not so, section 32 was not exhaustive. In cases like the present, the Court has, for the ends of justice inherent powers to add such parties as may be necessary to enable it to adjudicate fairly and properly on the matters before it.

Held, also, that a Civil Court has no power to appoint a Receiver in a suit framed under the Religious Endowments Act of 1863, though a manager can be appointed under the circumstances mentioned in section 5 of the Act. If the plaintiff wishes to have the Receiver appointed and to have the trust property administered under the directions of the Court he should proceed under section 539 of the Civil Procedure Code. GYANANANDA ASRAM *v.* KRISTO CHANDRA MUKHERJI, **8 C. W. N. 404.**

5 *Religious Endowments Act* (*XX of* 1863), *Section* 7. *Rules under—Rule* 19—*Election of member—Disqualification of candidate—Bribery.*

To warrant a candidate being declared disqualified within the meaning of Rule 19

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of the Rules framed by Government under section 7 of Act XX of 1863 it must clearly appear that money or other valuable consideration was given in return for votes, in other words that such consideration passed as the result of a bargain. 6 *H. L. C.*, 746.

Where the candidate admitted that he had spent Rs 2,000 or more in connection with the election and that he kept no accounts of such expenditure and he stated that "the sum spent by mef or the expenses of myself and my friends and canvassers in touring about the circle was about Rs 500 and the cost of bringing my voters to.........(the place of voting,) train fare, cart hire, &c., was about Rs 1,500."

Held, that the payment to the voters under the circumstances could hardly be treated as otherwise than in return for the votes.—N. KRISHNASWAMI IYENGAR *v.* SIVASWAMI UDAYAR,—**15 M. LJ. 449=29. M. 166.**

6. *Religious Endowments Act (XX of 1863), Section 16—Reference to arbitration by District Court—Drawing up scheme for management of temple.*

Held, that under section 16 of the Religious Endowments act of 1863, it was open to the Judge to refer to an arbitrator any matter in difference in the suit for decision, but it was not open to him to refer the whole suit for decision to an arbitrator, as he had done in this case.

The High Court set aside the scheme which the arbitrator had drawn up for the management of the temple as being beyond the powers even of the District Judge. KAREDLA VIJAYARAGHAVA PERUMALAVVA *v.* (SITARAMAYYA) VEMAVARAPU. **12. M. L. J., 1902, p. 401.=26. M. 361**

7. *Religious Endowments Act (XX of 1863), Sections 16—Reference to arbitration by District Court—Civil Procedure Code (Act XIV of 1882), Section 522—Award Finality of—*

When the question, whether the trustee of the temple should be removed, as prayed for in the plaint, was referred to an arbitrator by District Court under section 16 of the Religious Endowments Act, and a decree was passed in the terms of the award given by the arbitrator—

Held, that no appeal lay against the decree, and that the District Court was competent to refer the question to arbitration.—19 *Mad.*, 498 *followed.* NAMBI AIYANGAR *v.* YAJNARAYAN SOMAYAJIAL. **12. M. L. J. 431.**

8. *Act XX of 1863, Sections 14; and 18—Regulation XIX of 1810—Religious endowments—Suit to remove manager.*

Held, that Regulation XIX of 1810 was extended to the Punjab by general rules and orders of government and that Act XX of 1863 is in force in the Punjab.

Supreme Govt. Acts *(Continued)*

Held, also, that the Court had power to decree removal of the manager of the temple on the plaintiff's suit field after sanction was given under Section 18, Act XX of 1863, although the sanction was not applied for by all the plaintiffs. 2 C. L. R., 121 *and* 128, P. R., 35 of 1871 *and* 75 *of* 1884, *referred* to. GOKAL RAM *v.* KAHANI RAM. **6 P. L. R., 1901.**

9. *Religious Endowments Act 1863, Section 14.*

The plaintiffs sued for a declaration that a particular *inam* garden was the endowed property of a public mosque and that a mortgage-deed executed by the defendant was not binding in so far as it related to the *inam* property and for the removal of the manager.

Held, that, the prayer for the declaration prayed for was introductory or ancillary to the plaintiffs' claim, and section 14 of the Religious Endowments Act 1863 did not preclude the Court from granting it. The Court ordered the defendant to pay off the mortgage within six months and saddled him with the costs of the suit. As it appeared from the evidence that the defendant in setting up a right of private property in the mosque was acting under the *bona fide* belief that the mosque was the private property of his family and there was no evidence of his misconduct the removal of the defendant from the office of the manager was not ordered. MUHAMMAD JAFAR *v.* MUHAMMAD IBRAHIM **24. M. 243.**

10 § 14 and 18 A declaratory suit that plaintiff can be appointed as a manager in preference to defendants to manage the shrine in which no misfeasance or breach of trust or neglect of duty is alleged against the trustees appointed under the Act is not maintainable under § 14 of that Act. Held also that a priliminary application to the D. J. for leave to institute the suit was necessary under § *18 of the Act.*—TAJAMUL HUSAIN *v.* FAZ L RASOOL,—**4 A. L. J. 774 =A. W. N. 1907. P. 287.**

11 *Civil Procedure Code, 1882, Chapter XXVI—Suit in form a pauperis.*

A plaintiff may sue in *forma papuperis* when his suit is one that is brought under the Devasthanam Act, (Religious Endowments Act). GURUSAMI CHETTI *v.* KRISHNASAMI NAIKAR. **24 Mad., 419.**

12 *Civil Porcedure Code, 1882, Sections 622 & 647—Revision—Material irregularity—Religious Endowments Act, 1863, Section 18—Leave to sue—Notice to defendant.*

Section 647 of the Civil Procedure Code contemplates that certain formalities of Procedure be observed even in miscellaneous applications which are not suits.

Sup: Govt. Acts (Act XX of 1863) *(Con)*

An application under Section 18 of the Act XX of 1863 should be duly verified and presented, either in person or by pleader, as in the case of plaints.

The District Judge acts with material irregularity in granting leave upon an unverified letter, not presented in Court, enclosing a *mahzarnamah* purporting to be from certain persons of a particular community.

If the order granting permission is in accordance with law in other respects, it is not invalid merely because no notice of the petition for leave was given to the defendant. AMDOO MIYAN *v.* MAHOMED DAVOOD KHAN BAHADUR. **11 M. L. J., 1901, P. 326 = 24 M. 685.**

13 § 18—*Order granting leave to bring suit for accounts if a decree—Civ. Pro. Code (Act XIV of 1882), S. 2—Appeal.*

Act XX of 1863 makes no provision for appeal, and an order granting leave to bring a suit, for the purpose of having the accounts of a certain religious endowment, not being a "decree" within the meaning of S. 2 of the Code of Civil Procedure, no appeal lies against such the order (18 C. 382 referred to) MOZAFFAR ALI *v.* MIRZA HEDAYET HOSSAIN. **5 C. L. J. 641 = 34 C. 584.**

14 § 18—*Founder of a temple—Acquisition of right of trusteeship by prescription—Transfer of such right.*

A temple was erected by funds received from Government as compensation for an old temple acquired by Government and by subscriptions raised by the manager. *Held*, that the circumstance that the manager had taken the trouble to raise subscriptions to supplement the trust funds in his hands and that such subscriptions amounted to much more than the original trust funds would not make either him or the subscribers founders of the temple. If a temple gets into ruin and a person as a matter of mere benefaction erects fresh buildings and dedicates them to the same sort of worship as had been carried on in the old temple, such person may be treated as the founder of the new temple even though in constructing it he used materials of the former temple or other property belonging thereto.

Held, that where a person who had no right to the office of a trustee according to the rule of devolution established by the founder acquires a title to the office by prescription, but restores it to one who, except for the transferror's prescriptive title, could have taken the office according to the rules laid down by the founder, such transfer should be treated as an exception to the general doctrine that a trusteeship is not an assignable subject, of course, to the condition that no corrupt inducement has entered into the transaction and the interests of the trusts are not likely to be prejudicially affected. A trustee may be appointed by one who had acquired by prescription a valid title to the trusteeship with power to appoint a successor.

Sup: Govt. Acts (Act XX of 1863) *(Con.)*

Held, that a suit against a rightful trustee of a temple, so far as it relates to the charge of neglect of duty alleged against him is not unsustainable because no leave was obtained under Section 18 of the Religious Endowments Act, XX of 1863. ANNASAMI PILLAI *v.* RAMA KRISHNA MUDALIAR. **11 Mad., L. J., 1901, p. 1 = 24 M. 219.**

15. § **14 and 18**—*Power of District Court to grant leave to sue.*

The District Court is competent to grant leave to sue under section 18 of Act XX of 1863, whether the Board of Revenue has or has not exercised control over the temple concerned.—*17 Mad., 95; 2 Mad., 197; 22 Mad., 223, referred to.* SATURLURI SEETARAMANUJA *v.* NANDURI SEETAPATI. **26 M. 166.**

16. § **18**—*Trustees—Sanction for removal of trustees. Application for, contents of—Civil Procedure Code (Act XIV of 1882), Section 622—Revision—Civil cases—Material irregularity.*

Under section 18 of the Religious Endowments Act the Judge is to determine, on the perusal of the application itself, whether there are sufficient *Prima facie* grounds for giving sanction to institute a suit under section 14 for the removal of a trustee and for recovery of damages.

Where one application is made against several trustees, the application should clearly set forth the charges and the nature of the charges made against each, and the Judge would be acting with material irregularity in the exercise of his jurisdiction in according sanction based on a general petition against several trustees not containing specific charges against each of them. CHINNATHAMBI SAHIB *v.* MUHAMMAD GHOUSE SAHIB. **15 M. L. J. 221.**

17 Devasthan *Committee—Powers of appointment and dismissal of Moktesars—Powers exercisable in the interest of the* Devasthan—*Dismissal of Moktesar—Good and sufficient cause—Burden of proof.*

The powers of appointment and dismissal of *Moktesars* with which a *Devasthan* Committee are vested are exercisable not in their own interests but in the interests and on behalf of the *Devasthan* of which they are trustees. They are not at liberty to appoint or dismiss arbitrarily, capriciously or for private reasons of their own, but only on grounds justified by the interests of the institution.

When a *Moktesar* is dismissed by a *Devasthan* Committee, the burden of proof is on him to show that the Committee did not act on a *bona fide* belief that the dismissal was necessary in the interests of the *Devasthan*, but had been actuated by some other improper motive. BHAVANISHANKAR RAMRAO *v.* TIMANNA RAM BHATTA. **8 Bom., L. R., p. 401 = 30 B. 503.**

Sup: Govt. Acts (Act XX of 1863) (*Cont.*)

18 *Committee, Powers and duties of—Transaction of business by Committee or by circulation—Control over Manager.*

The Commitee as a body constituted under statutory authority should, in the absence of specific provisions in the statute, follow as far as practicable in the transaction of its business, the usual procedure adopted by public bodies entrusted with duties of a more or less public character. The Committee should ordinarily transact its more important business at a meeting held after due notice to the members, and it would specially be incumbent upon it to do so, if any member so required. In the event of such a member's request not being complied with it would be open to him to challenge the propriety of any action taken by the Committee in disregard of his requisition and, if necessary, by legal proceeding to restrain the other members of the Committee from giving effect to their decisions.

But the transaction otherwise than at a meeting even of such important business as the appointment of a manager is not necessarily void and incapable of being adopted and approved of by the other members who may not at first have agreed to it.

The Court should not look upon the Committee strictly as a corporation so as to import into consideration of cases the technical rules applicable to such bodies in England.

It is not proper for the Committee to exercise minute control over the details of the manager's action in administering the trusts. Such control is inconsistent with the respective responsibilities imposed on the trustee and on the Committee by the provisions of Act XX of 1863. The Committee should lay down general instructions for the guidance of the trustees and see that they are followed but without minute interference with the discretion of the trustees in the actual administration of the trust. SUBBA NAIDU *v.* GOPALASWAMI NAIDU. **15. M. L. J. 185.**

19. *Religious endowments—Temple Committee, powers of—Trustees additional, appointment of—Hereditary trustees—Temporary trustees, Appointment of—Trustees, appointment of in consideration of spending money for endowment Regulaion VII of* 1817—*Board of Revenue, powers of—*

The Temple Committee cannot arbitrarily put an end to a scheme of management made by the Board of Revenue under Regulation VII of 1817. Interference with a scheme so made can only be for good and sufficient reasons connected with the interests, of the institution, and any interference would be unwarranted so long as the scheme permanently introduced is at work without any default on the part of the manager and so long as there is no change of circumstances rendering an alteration of the scheme necessary. An authority to alter a scheme at the mere will and pleasure of a supervising Board cannot be taken to exist unless it is specifically given by stature.

Sup: Govt. Acts (Act XX of 1863) (*Cont*)

A Committee cannot appoint additional trustees, where there is a hereditary trustee, whether as a sole trustee or in conjunction with other not hereditary; nor has the committee unqualified power of adding to the number of trustees sanctioned under an existing scheme even if the trustees are not hereditary. The power of the Temple Committee in the matter of the appointment of additional trustees can be exercised only for good and sufficient cause.

Obiter:—If the existing trustee is guilty of negligence or mismanagement, the proper course is to remove him if necessary after due enquiry and to appoint a new man in his place.

The policy of appointing temporary trustees is deprecated.

The policy of giving benefactors a place in the Board of management as an inducement to their spending money on behalf of the endowments is deprecated.

The power of superintendence provided for by *S.* 13 of Regulation VII of 1817 was not confined to institutions where the trustees were not hereditary. The Board of Revenue was quite competent under the Regulation to introduce an hereditary element into the management of a temple, if they thought fit to do so. GANAPATHY AGYAR *v* SRI VEDAVYASA ALAGASIGA BHUTTER.—**16. M. L. J. 435.**

(20) Act X of 1865 (*Indian succession Act*)

1. Act X of 1865 (Succession)—*Daughter's succession—Hindu converts to Christianity of Act 21 of 1850 Act IV of 1872 (Punjab Law).*

F, a Hindu convert to Christiauity, died leaving G, H, and E, his three sons, M daughter, and P, a son of his predeceased daughter. E also died after him. The estate of F consisted of two houses and a business called George Alfred and Co. M was maintained and educated by her brothers with whom she lived until her marriage. In 1899, 11 years after F's death M attained majority, and in 1902 she claimed ½ share of F's estate, under Indian Succession Act X of 1865. Her claim was resisted solely by G whose principal pleas were:—

(1) He was the sole owner of the business.

(2) The Indian Succession Act did not apply.

(3) M was not entitled to any share, by family custom.

Held, that all Christians are bound by Act X of 1865 in matters of succession, but also, as pointed in I. L. R. 31 B 25 this Act does not affect the rights of Co-proprietorship between persons to whom it applies. 9 M.I.A. 195 followed, 63 P. R. 1895, 102 P. R. 1904, 11 A 100 19 B. 783 referred to.

(2) A native convert to Christianity, living in this Province, can prove that he has

Sup: Govt. Acts (Act. X of 1865) *(Cont)*
adhered to his old personal Law as regards inheritance, &c., and establish any family custom, applicable to the parties, such as, that daughters are excluded from succession by sons, &c., as provided by S. 5 (*a*) of Act IV of 1872.

(3) The object of Act XXI of 1850 is, not to confer on any party the benefit of the provision of Hindu or Mahomedan Laws, but, to prevent them from depriving any party of any property, which, but for the operation of such laws, he would be entitled to receive.

Held also, that, although the business is the family property, yet, its division is inexpedient and inequitable, as it had been carried on by the sole exertions of G who had specially qualified himself for the same, and M is to get ¼th price of the whole existing stock and not share in the business.

(2) There is no law in force independently of Act IV of 1893 to justify a money decree in a suit for partition of immoveable property, and M is entitled to get ¼ of that property by partition (10 C 675 distinguished).

(3) Where in a partition case, a mere money decree is given only in favour of plaintiff in lieu of his share, it is not a decree for partition in favour of all the parties concerned as laid down in 23 P. R. 1905.

Held, further that a party not appealing, or filing cross-objections, as provided in S. 561, C. P. C., against a decree is incompetent to take cross-objection against it in further appeal. It was not proved that F continued to attach himself to Hindu society, or to observe Hindu usages, after his conversion. MRS. EDITH SUSAN MUKERJEE *v.* MRS. GEORGE ALFRED AND OTHERS, **52 P. W. R. 1907.**

(2) *ss.* 3, 179, 187, 260—*See will-Delanery v. Rohawat Ali 32 C. 710.*

(2a) *§§ 3, 187 See 4 C. L. J. 523 infra No. 36.*

(3) *Indian Succession Act, ss.* 5, *331—Burma Laws Act, 1898, s. 13 Budhist Law.*

A claimed a right of pre-emption over certain property that had belonged to her father B, who was a Chinaman. She based her claim on Chinese customary law.

Held,—that (1) if B was not a Buddhist, the provisions of the Indian Succession Act, and not Chinese customary law, would apply to the property; and (2) if B was a Buddhist, the property would be exempt from the operation of the Indian Succession Act. In the latter case in order to succeed, it would be necessary for A to show that there is a Chinese Buddhist Law in China applicable to Chinese Buddhist only, as apart from the customary law of the country by which a right of pre-emption was given in respect of the land in dispute. *Fone Lan v. Ma Gyee* 2 L. B. R., 95; referred to. APANA CHARAN CHOWDRY *v.* SHWE NU. **4 L. B. R. 1907 P. 124.**

4. *Sections 20, 22, 105—Relationships contemplated by the Act—Illegitimate children outside the scope of the Act—Gift of the residue to such charities as the trustees may think deserving.*

Sup: Govt. Acts (Act X of 1865) *(Cont)*
The relationships contemplated by the Indian Succession Act, 1865, are only those flowing from lawful wedlock.

The gift, by a Will, of the residue to such charities as the trustees may "think deserving" is a good gift, the objects being wholly charitable. EMMA AGNES SMITH *v.* THOMAS MASSEY. **8. B. L. R. 322 = 30. B. 500.**

5. *Sections 25, 46—Converts—Co-parcenership between persons converted from the Hindu Religion—Difference between co-parcenership and inheritance*

Parcenership can be a part of the law governing the rights of a Christian family converted from the Hindu religion.

The Indian Succession Act, 1865, deals with the *devolution* of rights on intestacy; it does not purport to enlarge the category of heritable property. The Act does not affect rights of co-parcenership as between those to whom it applies. 10 *Mad.*, 67, *dissented from.*

The difference between co-parcenership and inheritance is radical. In the case of inheritance property devolves on death, it survives in the case of co-parcenership: on inheritance new rights are acquired, on survivorship the enjoyment of existing rights is increased by the removal of one from the body of co-sharers. FRANCIS GHOSAL *v.* GABRI GHOSAL. **8. B. L. R. 770 = 31. B. 25.**

6. *§. 46—See §§. 25, 46 Supra. 8. B. L. R. 770 = 31. B. 25.*

7. *§. 48-Will—Execution by a Muhammadan* parda-nashin *lady—Undue influence.*

When dealing with the case of a will or a deed, executed by a *parda-nashin* lady, a particular and peculiar onus rests upon those who come forward to support the document to show that the executant thoroughly understood what she was doing, and was thoroughly and fully acquainted with the terms of the document she was executing, and the presumptions as to the knowledge of the executant of the contents of the document she is executing do not equally apply in the case of a *parda-nashin* lady as in the case of other persons.

The real question in all cases of this description is, was the testatrix of sufficient mental capacity to understand what she was doing, and did she understand what she was doing, and does the will give effect to her true intentions and wishes?

As to what constitutes undue influence in this country, a useful guide is afforded by Section 48 of the Indian Succession Act. Though the section does not apply to the wills of Muhammadans, yet it is a useful guide as to what does or does not constitute undue influence. KHAS MEHAL *v.* THE ADMINISTRATOR-GENERAL OF BENGAL. **5. W. N., Cal., 1901, P. 505.**

8. *S. 48, illus. (g) and (h). Pressures in execution.*

Sup: Govt. Acts (Act X of 1865) (*Cont.*)

A will is not invalidated on the ground of its having been executed under pressure unless the pressure was such as the testator could not resist. Illus. (*g*) and (*h*) of S. 48 of the Succession Act practically lay down the rule, which should guide all Courts on the question of importunity. They indicate the law as stated in "Williams on Executors and Administrators." JAJNESHWARI SAHA *v* UGRESHWARI DASSYA. **11 C. W. N. 824.**

9 § 50 Codicil proof of execution of Oudh Estates—*Act I of 1869 § 19—Evidence Act §§ 68, 69 and 115.*

Held that the will having been executed before Act I of 1869 came into force the provisions of § 19 of that Act did not apply to it. The Mahommadan Law does not require that a will, if reduced to writing, shall be attested. The provisions of §§ 68 and 69 Indian Evidence Act were not therefore applicable to the will and the plaintiffs admission in the suit filed by C. B. her mother, who had executed the will in 1862, was sufficient proof of the will.

Held further that the Codicil which was executed by C. B. in 1876 was executed after Act I of 1869 came into force and § 19 of that Act applies to it. That Section made Section 50 of the Succession Act and § 68 of the Evidence Act applicable to the Codicil. Held therefore that there was no evidence to the effect that C. B. executed the Codicil. NAJBAN BIBI *v.* RAZA HUSAIN.—**4 O. C. 408.**

10 *S. 50 Cl. 3—General Rules and Circular Order and § 83 Act V. of 1881,—Security—Shebait.*

No grant of probate can be made unless the will has been proved in accordance with law, and inasmuch as a grant of probate operates as a judgement *in rem*, the Court must be satisfied that the will has been duly executed and attested. *(31 C. 357 refd to)*

An acknowledgement of execution from the testator and attestation of the will in his presence, is a sufficient attestation under S. 50, Cl. 3 of the Indian Succession Act which is made applicable to Hindus by the Hindu Wills Act.

Rule 36, Cl. (a) of the General Rules and Circular Orders (Civil) (1903, Vol. 1, p. 142) is applicable to contested applications for probate or letters of administration, the proceedings in which must, according to the provisions of S. 83 of the Probate and Administration Act, take as nearly as may be the form of a suit, according to the provisions of the Code of Civil Procedure, and a Judge has discretion as to costs, on account of pleaders' fees; he may allow a fee according to the valuation of the estate, or according to such a sum, not exceeding the valuation as may be reasonable, or according to the importance of the dispute. (*C. W. N. 600 Exp*).

The mere fact that a person is appointed a *shebait* or trustee of the whole or a large portion of the estate of the testator,

Sup: Govt. Acts (Act X of 1865) (*Cont.*)

is not sufficient by itself to constitute him an executor by implication. But where the testator uses the word 'trustee or *shebait*, and at the same time imposes upon the person duties involving the functions of an executor, there is a good appointment as executor by necessary implication. In order to constitute one an executor according to tenor of the will, it must appear on a reasonable construction thereof, that the testator intended that he should collect his assets, pay his debts and funeral expenses and legacies which are the essential duties of an executor. I Ves and B. 422 (466); L. R 2 P and D. 379; 3 Sw. and Tr. 562; 3 Curtis 748; 2 Sw. and Tr. 155; 2 Lee 401; 1 Hagg, 80; 4 P. D. 85; (1901) P. 345, (1902) P. 114; (1902) P. 188; L. R. 3 P. and D. 253; 5 C. 756; 26 B. 571; 22 M. 345. *R.* 6 C. W. N. 310 and 10 C. W. N. 232, D.

The appointment of executors by necessary implication is not to be favoured, and the language of the will is not to be strained for this purpose; but in doubtful cases, letters of administration with the will annexed ought to be granted.

S. 78 of the Probate and Administration Act provides that the administration bond is to be given for the due collection getting in, and administering the estate of the deceased. Such security is only required to guard against malpractices, and the security is enough if it affords a reasonable protection against malpractices which require time to be carried out. What the Court is to satisfy itself is, whether the amount of the security affords a sufficient safeguard against serious or continuous mismanagement.—*(1 C. L. J. 180 refd to)*—AMEERCHAND *v.* MOHANUND BIBI **6 C. L. J. 453.**

11 § *51 Will. Execution of—Burden of proof—Construction of Will—Blanks in Will—Alterations in Will—Deed poll confirmed by Will. Probate of, if necessary—Mental condition of testator—Person taking benefit under Will prepared by himself—Fiduciary relationship.*

If a party writes or prepares a Will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased. But there is no rule of law as to the particular kind or description of evidence by which the Court must be satisfied. The degree of suspicion excited and the weight of the burden imposed on the person taking the benefit must depend largely on the nature and amount of the benefit taken by him and all the circumstances of the case. *2 Moore P. C.* 480, (1838) *L. R.* 7 *E.* and *I. App.* 448 *approved.*

Where a member of a firm of solicitors is appointed an executor, it is so usual to

Sup: Govt. Acts (Act X of 1865) *(Cont.)*
allow him to charge for professional work done by him or his firm that the insertion of such a clause would hardly raise a suspicion.

Held, that in this case the suspicion excited by the fact that under the Will written by the solicitor of the testator who was also appointed one of the executors, a benefit, that is, remuneration for his professional services was allowed to the solicitor was removed by the evidence and the circumstances of the case.

Held, also, that it was proved that the blank spaces in the Will were filled in accordance with the wishes and intentions of the testator before the execution of the Will.

A deed poll was referred to in the Will and confirmed by it. It did not appear to have been referred to in the Will for the purpose of making its contents parts of the Will.

Held, that the deed poll was not within section 51 of the Succession Act and did not require probate. BAI GUNGABAI *v.* BHUGWAN DASS VALJI.—**9 C. W. N. 769 (P. C.)=15 M. L. J. 271=29 B. 530 (P. C.)**

12. § *57—Revocation of a will by the birth of posthumous son—S. 3. Hindu Will Act—Scope.*

A will of self-acquired property made by a Hindu is not revoked by the birth of a posthumous son of the testator.

The Hindu Wills Act not only does not provide for revocation on the ground of any alteration in circumstance, but by incorporating S. 57 of the Succession Act, it makes express provision for the way in which a will shall be revoked. The language of the section is, not that a will may be revoked in certain ways, but that no will shall be revoked except in certain ways. The section is exhaustive.

Reading Ss. 56 and 57 of the Succession Act together, there is no doubt that, under that Act, the law as to the revocation of wills is the same as the law under the English Wills Act:— *Per Chief Justice. (8 C. 637, 12 M. 401, R. refd to).* SUBBA REDDI *v.* DORAISAMI BATHAN AND PAPAMMAL, **17 M. L. J. 269**

13. *Section 58—Probate—Will with alterations in pencil—Practice.*

The practice of the High Court regarding Wills containing alterations made by the deceased is to attach, to the document of which probate is sought, a copy in writing with the alterations incorporated on the text. Where the alterations appeared in pencil, the Court directed a photographic *fac simile* to be taken in the presence of the Registrar and of the executors to be attached to the probate as the pencil alterations are likely to fade in course of time. Where the subsequent Codicil confirms the copy of the will as altered §. 58 does not apply. IN THE GOODS OF L. P. D. BROUGHTON. **6. C. W. N. 477=29. C. 311.**

Sup: Govt. Acts (Act X of 1865) *(Cont.)*

14. *S. 78—Will—Power of appointment—Appointment by general bequest—Power created after will.*

A general power of appointment may be exercised by a will executed previously to the creation of the power, and that too by mere residuary gift. DINSHA SORABJI MODY *v.* DINSHA SORABJI MODY, **9 Bom. L. R. 488.=31. B. 472.**

15 §§ *80, 98, 106—Will. Construction of—Vesting of legacy—Bequest—Stock-Parsee Succession Act (XXI of 1865)—Parsis—Succession*

One *H.* died in 1885, having made a Will by which he left a sum of Rs. 25,000 to *D.* upon certain trusts. *D.* was the widow of *D. F.*, a predeceased brother of *H.* The Will provided :—" To *D.*, widow of my deceased brother *D. F.*, the sum of Rs. 25,000 upon trust to invest the same in Promissory Notes of Government of India in the names of my said executors and trustees or the survivors or survivor of them or other trustees or trustee for the time being of this my Will and from time to time to pay the annual or half yearly interest and dividends that shall from time to time become due and accrue thereon to the said *D.* during her life and after her death upon trust to sell and dispose of the said Government Promissory notes for Rs. 25,000 and to pay and divide the sale proceeds thereof to and between her issue by the said *D. F*, according to the law or statute for the time being in force in India relating to intestate succession among Parsees. "

D. F. died in 1871. At the testator's death there were alive *D.* and two sons and two daughters of *D.* by *D. F.* In 1904 *D.* died leaving one son and one daughter behind her. Upon a proceeding between the son and the daughter as to the meaning of the bequest, two questions arose for decision—(1) When the legacy vested in the issue, *i.e.*, whether it vested at the time of the death of the testator or at the time of the death of *D* ?, (2) Who was to be considered the stock —the intestate—in order to ascertain how the fund was to be distributed among the issue ?

Held, that the legacy became vested in the issue of *D.* and *D. F.* at the time of the testator's death.

That *D.* must be taken as the stock.

That the words " without any qualifying terms " in section 80 of the Succession Act refer to the bequest and not to relations, PESTONJI DHUNJIBHOY *v.* KHURSHEDBAI. **7. B. L. R. 207.**

16. § *82—Will—Construction of—Legacy in favor of a Hindu wife.*

The rule of law applicable to a case of gift of immoveable property by a Hindu husband to his wife is, that, though a mere gift of immoveable property does not carry with it the power of alienation, yet, where any such property is given by the husband to the wife with express power of alienation, or where this power is implied

Sup: Govt. Acts (Act X of 1865) *(Cont.)* by the grant, she would acquire an absolute power of disposal over the property; and where the gift is by Will, section 82, of the Indian Succession Act, which applies to the Will of a Hindu, will entitle the legatee to the whole interest of the testator, unless it appears from the will that only a restricted interest was intended to be given.

Upon costruction of the will in dispute *held* that the wife was given an unlimited power of alienation over the property in dispute. *1 C. W. N., 387 S. C., 24 Cal., 834,24 Cal. 406, 4 C.* W. *N., 337 referred to.* SARODA SUNDARI DASS *v.* KRISTO JIBAN PAL. **5 W. N., Cal., p. 300.**

17. §§ *82 & III Hindu Law—Adoption—Adoption by mother after the death of son and son's widow, if valid—Adoption. Power of, when comes to an end and becomes incapable of execution—Life estate—Estate of inheritance —Executory gift over.—*

An adoption by a Hindu widow, who has succeeded by heirship in her character as mother to her son, after his death and the death of his widow, is invalid according to Hindu law.

A left a widow and an adopted son, and gave authority to the widow to take three sons successively in adoption, one after the death of another. The adopted son married and died leaving a childless widow, who succeeded to the state. Upon the death of the widow of the adopted son, the widow of the original owner succeeded to the estate and took a second son in adoption.

Held, that the second adoption was invalid inasmuch as the power of adoption came to an end, and became incapable of execution when the estate vested in the widow of the first adopted son, and that such vesting was a proper limit to the exercise of the power.

The power was not revived upon the death of the widow of the first adopted son. 19 *M. I. A., 279; L. R., 8 I. A.. 229; L. R. 14 I. A., 67; L. R., 16 I. A., 166 applied.* 17 *Bom., 164;* 26 *Bom, 526 approved. 7 W. R., 392 dissented from. 17 Cal., 518 distinguished. 21 W. R., 122; 4 Cal. L. J., 171; S. C.. 10 C. W. N., 921 explained and distinguished.*

A testator left an adopted son and gave authority to his widow to take three sons in adoption one after the death of another. The Will contained a provision that the adopted son shall succeed to the estate on the death of the testator, and that on the death of one adopted son and until the adoption of another son, the estate shall remain in the ownership and possession of the widow as ordinary heir, the estate to vest in the adopted son immediately on adoption.

Held, that the adopted son would take not a life interest but an estate of inheritance, subject to a condition of defeasance.

Held, also, that the executory gift over did not take effect, *L. R., I. A., Sup, Vol. 47; L. R., 23 I. A. 18 applied.* MANIKYA MALA BOSE *v.* NANDA KUMAR BOSE. **4. C. L. J. 357.**

18. *S 84—Will, Construction of—Devise to "eldest son and to his lawful male children according to the law of inheritance"—Justice, equity and good conscience—Marriage—*Nikah *between a Christian man and Muhammadan woman, if valid.*

Thomas Skinner, who was domiciled in the North-Western Provinces and was the owner of a large estate, made his last Will on the 22nd October 1864 by which he provided for the payment of his debts and an annuity for his wife and also allowance for his children, and then as to his zamindari he gave the following directions, namely—:"that my private zamindari, presented to me by Government as a reward for services rendered during the rebellion of 1857, as well as all villages, houses and other property added by me from time to time to the original grant, may at my demise descend to my eldest son, Thomas Brown Skinner, and to his lawful male children according to the law of inheritance. In the event of my eldest son, Thomas Brown Skinner, dying without lawful male children, the above mentioned private zamindari, etc., shall descend to my next male heir, and should all my sons die without lawful male children, the zamindari, etc., shall descend to my female children, or, in the event of their death, to the female children born in wedlock of my sons in succession." The Indian Succession Act was not in force at the time of the testator's death.

Held, that having regard to the circumstances of the family it was impossible to affirm that any particular law *i. e.*, English Law or Indian Succession Act, 1865, was applicable to the construction of the Will or the regulation of the testator's succession. The case must be decided by the principles of justice, equity and good conscience.

That upon the construction of the Will the intention of the testator was not to give an absolute estate in his zamindari to his eldest son, but that his sons who should acquire the property should have a life estate only and that the absolute estate should devolve upon the eldest son of the son of the testator who should be entitled to the property for life and should leave a son surviving him. 13 *M. I. A., 277 followed; I. B. L. R., 87,* 9 *Moo. I. A., 199* and *12 B. L. R., 74. 6 Cal., 17, referred to.*

Semble, that a marriage ceremony performed as *nikah* according to Muhammdan rites between a Christian man and a Muhammadan woman was not a valid marriage. —RICHARD ROSS SKINNER *v.* DURGA PRASAD. THOMAS WILLIAM SKINNER *v.* RICHARD ROSS SKINNER. THOMAS WILLIAM SKINNER *v.* DURGA PRASAD.—**A. W. N. 1904. P. 213.**

19. *Sections 90 and 105—Gift—Requisites*

Sup: Govt. Acts (Act X of 1865) *(Cont.)* *of—Gift to Hospitals—Corporate body not necessary—Revocation of gifts—Codicil—Gifts to Mission—Unenforcible gifts falling into residue—Intestacy.*

Both, under the English Law and the Indian Succession Act gifts to Hospitals which are recognised as existing public institutions are good charitable gifts, provided always that the provisions of Section 105 of the Succession Act as to registration and deposit are complied with.

It is not necessary that the institution, to be benefited by a charitable gift, should be a corporate body. All that is required is, that there should be some responsible authority charged with the general administration of the funds of the Institution.

Where a legacy was revoked by a codicil, the testatrix directing her executor to make over the property, subject of the legacy, to a Mission for the residence of one of its missionaries, but the codicil was not deposited for safe custody, in accordance with Section 105 of the Successions Act, *held*, that the legacy being in the nature of a charitable disposition, could not be given effect to.

It is settled law that *prima facie* property, wich is the subject-matter of a trust, which is incapable of taking effect, falls into the residue, and it can only be prevented from so doing by the express directions of the testator.

Held, upon construction of the Will, that the legacy for the 'inmates of the Hospital' was meant to provide for the general maintenance and support of the Hospital.

In administration suits the practice in cases in which legacies are contested is to deal with the dispute when the case comes up for further directions on the report after usual enquiries have been made, which are directed by the administration decree. FANINDRA KUMAR MITTER *v.* THE ADMINISTRATOR GENERAL OF BENGAL. **6 C. W. N. 321.**

20 *Sections 90, 94 and 54. Will—Attestation by legatee, Effect of—Construction—Acceleration.*

The will provided that interest on certain deposits in banks and shares in companies be enjoyed by the testator's wife for life, and that after the death of his wife the deposits and the shares be divided into equal shares, between his three children; "James Joseph Barefoot, Cornelius Barefoot, and Florence Dinah Barefoot, or the survivors or the survivor of them." James Joseph Barefoot was appointed a trustee under the Will. The wife was appointed residuary legatee of all the property excepting the aforesaid deposits and shares. It was admitted that James Joseph Barefoot attested the Will as a witness, and consequently the bequest to him was void under section 54 of the Succession Act.

A question arose whether the share of the legacy bequeathed to James Joseph passed to Cornelius Barefoot and Florence Dinah

Sup: Govt. Acts (Act X of 1865) *(Cont.)* Barefoot, or fell into the residue.

Held, that if the Will had not contained the words "or the survivors or survivor of them," it would have to be construed in the same way as if James Joseph had died during the life-time of the testator, but the effect of these words was that Cornelius and Florence not surviving Joseph, the bequest fell into the residue and the doctrine of acceleration did not affect the case. CAMANI *v.* BAREFOOT **26 M. 433.**

21 *Section 96—Hindu Law—Will—construction—Sons and grandsons—Heirs—Lapsing of bequest—Heir dying before testator.*

Held, that the words 'sons and grandsons' used in a Will executed by a Hindu have the same effect as the term 'heirs' in an English will.

According to the English Statute and the Indian Succession Act, a gift to the testator's child does not lapse on the legatee dying before the testator, leaving lineal descendants, but the rule cannot be applied to the case of a Will executed by a Hindu. The provision in the Indian Succession Act is an exceptional one made for a certain class of cases only and courts have no power to extend it. RAMAMIRTHAM *v.* RANGANATHAN. **24 Mad. 299.**

22 *Sections 96 and 128.*

Section 96 of the Indian Succession Act can only apply to a case where the legatee predeceases the testator, whether he has been named as an executor or not. The application of Section 128 is limited to the case where the executor survives the testator. So where a child legatee being appointed by the will one of the executors also predeceased the testator leaving a leneal descendant latter can claim the legacy under S. 96, and S 128 has no application. RAMASWAMY IYAH *v.* KUPPUSAWMI. **13 M. L. J. 351.**

23 *S. 96, 321—Hindu Wills.*

The lower appelate Court interpreted a will executed by a Hindu according to S. 96 of the Act.

Held that under § 331 of the Act the provisions of the Act were not applicable to wills executed by a Hindu in Oudh. RAMKISHAN SINGH *v.* SRIPAL—**9 O. C. 159.**

23 *(a) § 98—See 7 B. L. R. 207 Supra No. 15.*

23 *(b)* § 101–See Hindu law Manager. KASHI NATH SHAMJI *v* CHIMANJI SADA SHIV. —**B. L. R. 263**=**30—B. 477.**

24. *Section 105—Bequest to charitable uses in the presence of wife.*

The term "relative" in section 105 of the Succession Act, 1865 refers to kindred only as set forth in the table of consanguinity annexed to section 24 of the Act and has no application to any relationship by marriage.

A Will executed in favour of a charitable institution is not void under section 105 on the ground that the testator left a widow surviving him. ADMINISTRATOR GENERAL OF MADRAS *v.* SIMPSON.—**26 M. 523.**

Sup Govt. Acts (Act X of 1365) *(Cont.)*

24(a) § 105—Gifts to public hospitals are gifts for charitable uses under § 105—FANINDRA KUWAR *v* THE ADMINISTRATOR GENERAL OF BENGAL.—**6 C. W. N. 321.**

24 (b) § *106—7 B. L. R. 207 See No. 15 Supra.*

25. § *107 Act X of* 1865 *and* § *6* (*a*), *19 and 21 T. P. A. and* §§ *17, 18 Registration Act.*

A Mohammadan female executed a document in favour of her father and the plaintiffs her brothers whereby she relinquished her right of inheritance to his property in consideration of receiving from him Rs. 9000. Held the document merely related to heirship and could not be treated as relating to property. It did not fall under § 17 or 18 of the Registration Act.

That the right of a heir of a person to inherit that person's property on his death is not an estate in remainder or in reversion in immoveable property or an estate otherwise deferred in enjoyment. It is neither a vested nor a contingent right. It does not fall within the definition of a vested interest in Section 19 or of contingent interest in § 21 T. P. A. and § 107 of the Succession Act. It is only under § 6(a) T. P. A. the chance of an heir apparent, succeeding to an estate or a mere possibility of succession which can not be transferred. ABDUL HUSAIN MULLA *v* GHULAM HUSAIN ALI.—**7 B. L. R. 1905—P. 742.**

26 *S. III—Construction of will—Bequest to daughter—Absolute estate.*

Where in a Will a legacy was given in the following words:— "On my death, my daughter, Surjamoni, who has got sons, and who is a resident of......shall possess as owner and possessor of all the rights of gift, sale, etc., in respect of all my property moveable and immoveable, and on the death of my aforesaid daughter, the sons born of her womb will equally own all my property."

Held, upon a construction of the Will, that it was the intention of the testator to give to Surjamoni an absolute estate. GOBINDA CHUNDER GUPTA *v.* BENODE CHUNDER DUTT.—**12 C. W. N. 44.**

27 *Sections* 111, 116, 117,—*Married daughter, Estate taken by, under a Will and by inheritance—Will. Construction of "to my daughters and their respective sons." Meaning of—Adopted son. Status of—*

An adopted son holds precisely the same position as a son born as regards inheritance from the adoptive mother's relations. 5 *Cal.*, 615; *L. R*, 10 *I. A.*, 138; s.c., 10 *Cal.*, 232 *followed.*

A childless daughter of a testator attains the status of a daughter with a son by adopting a son.

Where the failure of the bequest to the adopted son is due to the fact that the testator did not live to adopt a son himself and to the fact that the power of adoption given by the Will is void under the Hindu Law, and not to the legal invalidity of the bequest:

Held that such failure of the bequest to an adopted son does not render the subsequent bequest to the daughter of the testa tor void.

The principle well established by 1 *Eq. Ca. Ab.*, 245; *Cowp.* 40; 1 *V. and B*, 124; 2 *V. and B.* 313; 5 *Sim.* 78; 1 *Ves. Sr.*, 420 has been codified in India in section 116 of the Indian Succession Act (X of 1865) which section applies to Hindus. 15 *Cal.* 282 *followed.*

Section 111 of the Succession Act applies only when the prior bequest is capable of taking effect and is not *ab initio* void. If the bequest has failed *ab initio* the principle laid down in section 116 applies.

The rule which has been applied to a bequest in a Will executed before the 1st September 1870 of immovable property by a husband to his wife, *viz.* that she takes only a limited estate when there are no express words creating an absolute estate, cannot apply to married daughter. Though under Hindu Law, a married daughter takes by inheritance a limited estate, she takes an absolute estate under a devise by Will, unless her interest is curtailed by express words or necessary implication. 16 *Mad.* 466; 24 *Cal.*, 406; 24 *W. R.*, 305; 24 *Cal.*, 646; 2 *C. L. J.*, *W. N.*, *Cal.*, *followed.*

The words in the Will "to my daughters and" their respective sons I give, devise, and bequeathe "the same" give an absolute estate to the daughters and not a limited or joint estate. 'Sons,' in this case was intended to have the same effect as "sons, grand-sons etc."

Where it would be premature to decide whether an absolute gift is defeasible in the event of either d ughter dying without male issue, the question was left undecided until it is ascertained what the events are. *L. R.* 24 *I, A.*, 76; 24 *Cal.*, 834 *followed.* RADHAPRASAD MULLICK *v* SM. RANI MONIDASSI. PEARY LAL MULLICK *v* SM. RANI MONI DASSI.—**10 C. W. N. 695 = (F. B.) 3 Cal. L. J., 502 (F.B.)**

27 (*a*) §§ *116 & 117–3 Cal in* J. *502* (*F. B.*) *See supra No. 27.*

28 § *128 See ss. 96 and 128—13 M. L. J. 351 Supra No. 22.*

28 (*a*) § 159 of the Indian Succession Act does not apply where there is a clear indication of the testator in the will. See Hindu Law Wills—NANDAKINA DEBI *v.* ARUMBALA. **3 C. L. J. 515.**

29 *Sections 179 and 221—Limited grant.—Power of administrator—Equity—Burden of proof—Benami transaction.*

In the case of a limited grant under section 221 of the Succession Act, 1865 the administrator has not the power to dispose of any interest outside the limits of the grant.

The law of *benami* is founded on principles which are not limited to India; it is nothing more or less than an application of the

Sup. Govt. Acts (Act X of 1865) *(Cont).* equitable rule that where there is a purchase by *A.*, in the name of *B.*, there is a resulting trust of the whole to *A.* It is an accepted rule of guidance in reference to *benami* transactions to see from what source the purchase money has proceeded, but ordinarily something further is required. It should be shown that the person whose money has gone to effect the purchase furnished it *as purchaser.*

Decree passed in case reported in IV Bom. L. R. 849 *reversed.* JOHN JOSEPH DE SILVA *v.* JOHN JOSEPH DE SILVA. **5. B. L. R. 784.**

30 *Sections 179, 187, 260—& S. 3—Executor, title of—Probate Administration, grant of—Jurisdiction of Court to modify—Bengal Tenancy Act (VIII of 1885). Section 167—Sale for arrears of rent—Incumbrances, annulment of—Notice—Disclaimer.*

Under sections 179, 187 and 260 of the Indian Succession Act, where probate of a Will has been granted, the executor, in order to bring a suit as such, is bound to prove his title. In case of dispute, having regard to the provisions of section 3 of the Indian Succession Act and the definition therein given of the term probate, it is incumbent on him to file, not merely a copy of the grant but also a copy of the Will attached to the grant, which with the grant formed the probate.

But a Court, other than the Court of Probate, cannot go behind the grant and interpret and modify its terms by the provisions of the Will.

In a suit for possession after annulment of an undertenure under section 167 of the Bengal Tenancy Act, absence of due service of notice on a person, who in the suit disclaims all interests therein, cannot prejudice the plaintiff.

Where the application for the issue of the notices against some of the persons jointly interested in the incumbrance is not made within time, the whole suit must fail. DELANEY *v.* ROHAMAT ALI. **32 C. 710.**

31 *Sections 179 and 221.*

In the case of a limited grant under section 221 of the Indian Succession Act, the administrator becomes by virtue thereof the legal representative of the deceased for the purposes of the interest of the deceased in the property; and such interest as the deceased had in the property becomes vested in him as such legal representative under section 179 of the Act.

Under section 191 the letters of administration entitle the administrator to all the rights belonging to the intestate and under section 269 he has power to dispose of the property of the deceased in such manner as he may think fit.

When an administrator conveys the property absolutely, his stating in the conveyance that he acted as administrator of the property as trustee, cannot cut down the legal effect of the conveyance or limit the right of the purchaser to the title wrongly alleged to have existed in the deceased, if, as a matter of fact, the deceased had a higher right. JOHN JOSEPH DE SILVA *v.* JOHN JOSEPH DE SILVA. **4 B. L. R. 849.**

Supr. Govt. Acts (Act X of 1865) *(Cont.)*

32 *Sections* 179 *and* 221.

In the case of a limited grant under section 221 of the Indian Succession Act, the administrator becomes by virtue thereof the legal representative of the deceased for the purposes of the interest of the deceased in the property, and such interest as the deceased had in the property becomes vested in him as such legal representative under section 179 of the Act.

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33 *Sections* 180, 212— *Letters of administration—Probate of Will obtained in England—Subsequent application for limited grant by attorney.*

The probate of a Will was obtained in England. The attorney of the executors of the Will made an application under Section 212 of the Indian Succession Act, for letters of administration with a copy of the Will annexed limited until they come in and take probate of the said Will themselves in India.

Held, that the application could not be sustained.

Held, further, that though an application could have been made under Section 180 of the Act, the attorney not being empowered to obtain any thing beyond a limited grant the application could not be granted. IN THE GOODS OF WILLIAM ASHTON.—**A. W. N. 1905 P. 251.**

34 *Sections* 181, 186, 187 *&* 197.

When in an administration suit the Court directed that the decree should not be drawn up until the plaintiff obtains letters of administration with the will annexed, and it was contended for the plaintiff that the executor named in the will having died it was not necessary to obtain letters of administration:

Held, that the plaintiff, as residuary legatee, could obtain a grant of letters of administration, and that until he did so, he was not entitled to establish his claim in Court.—22 *W. R.*, 174, *followed.* GORDHANDASS SUNDER DASS, *v.* BAI RAMCOOVER. **3 Bom. L. R., 874 =26 B. 267.**

35 § *182—Will—Executor—Death of Executor—Anoth... Executor.*

Sup: Govt. Acts (Act X of 1865) *(Cont.)*

Unless it can be gathered from the will that the testator intended the person named to pay the debts and legacies under the will he cannot be held to the executor thereof.

Where a testator appoints an executor and provides that in case of his dealth another should be substituted on the death of the original executor, though he has proved the will, the executor so substituted may be admitted to the office, if it appear to have been the testator's intention that the substitution should take place on the death of the original executor, whether happening in the testator's lifetime or afterwards.—*(L. R. 2 P. & M, 369, 3 P. & M. 159 5 C. 756 Refd to)* MITHIBAI *v.* CANJI KHERAJ **4 Bom. L. R. 9=26 B. 571.**

36. *Sections 3, 187—Will, proved—Right of legatee to sue.*

The main object which section 187 of the Succession Act has in view is that any Will upon which a claim is founded must be formally proved in a Court of judicature, and that unless probate or letters of administration in respect of such Will have been obtained, the claim should not be allowed to be enforced.

A Will was proved and letters of administration in respect of the entire estate left by the testator were granted to one of the legatees. On appeal it was ordered that a limited grant should have been ordered. The letters of administration remained formally uncancelled by reason of the death of the legatee.

Held, that another legatee was not barred by reason of section 187 of the Succession Act from instituting a suit for recovery of the legacy left to him by the Will.

If a Will is once proved and probate or letters of administration are granted that would be an authority in favor of any one of the legatees or any one claiming under the Will, entitling him to obtain relief from the Court.—KUMAR CHANDRA KISHORE ROY *v.* PROSANNA KUMAR DAS.—**10. C. W. N. 864=4. C. L. J. 523.**

37. §§. *187 and 197—See* §. *181 & 26. B. 267 supra No. 34.*

38. §.*190—See Execution of decree. Chunnilal Bose v. Osmand Bibi. 30 C. 1044.*

38(*a*). § *190—L. B. R. 1900-02, P. 193—See infra No. 50.*

39. §. *197—See* §. *181 &ca:—26. B. 267 supra No. 34.*

40. §. *212—See* § *180 & 212. A. W. N. 1905. P. 251, Supra No. 33*

41. §. *221—See* §. *179 & 221—5. B. L. R. 781 Supra No. 29.*

42 §. *221—See* §. *179 & 221—4. B. L. R. 819 Supra No. 32.*

43 §. *240*—The High Court of Madras has no jurisdiction to grant probate of the will of a testator or letters of administration of the estate of an intestate who did not dwell and who did not leave assets within the limits of the presidency—In the matter of Rose Learmouth.—**24. M. 120.**

44. *Section 246—Letters of administration granted by District Judge—property outside jurisdiction of District Judge—Grant of fresh letters of administration by High Court.*

When letters of administration to the estate of a deceased person are granted by a District Judge, and it is subsequently discovered that some of the property of the deceased is outside the jurisdiction of the District Judge, letters of administration granted by the District Judge, must be revoked before the High Court can be moved to grant fresh letters of administration, which would have its effect throughout British India.—*In the Goods of* ROSEANNE D'SILVA. —**W. N. All. 1903, p. 62.=25. A. 355.**

45 *Section 250—Citations. Publication of—*

This was an application for letters of administration with a copy of the will annexed, made by the attorney of the executors of the will of the deceased, who died at Toronto in Canada, leaving, amougst other property, certain property within the jurisdiction of the High Court. Probate of the will had been duly taken out by the executors in Canada.

On the question as to the mode of issuing citations to the persons interested, the High Court ordered that citations would issue, under the special circumstances, by registered letter, with acknowledgment due, from the High Court. IN THE GOODS OF FREDERIC NICHOLSON—**A. W. N. 1903. P. 31.**

45(a) *S 259 See Practice-mode of issuing citations Frederic Nicholson in re A. W. N. 1903 P. 31.*

46. *S. 263 and S. 86 Act V of 1881.*

The D. J. ordered the applicant to pay Court fees on his application for letters of administration. The applicant appealed against this order contending it was appealable under S. 86 Act V of 1881. *Held* no appeal lay under C. P. Code and the Rules thereunder. KADIRJAHAN BEGAM *v.* UDIT NARAIN **3. B. R. 44.**

47. *S. 282—See Execution sale.* BAI MEHER BAI *v.* MAGANCHAND—**29. B. 96.**

48. *Sections* 297, 326—*Will. Construction of—Trust—Payment of debts and legacies—Residuary legatee—Executor's year.*

The combined effect of sections 297 and 326 of the Indian Succession Act, 1865, is that a residuary legatee becomes entitled to the residue after the executors have paid the testator's debts and legacies, and that no lagatee can insist upon being paid within a year from the testator's death which is here fore, called "the executor's year." For one year from death no legacy, residuary or

Sup: Govt. Acts (Act X of 1865) *(Cont.)* otherwise, can be claimed. One year is given by the law to the executors to liquidate the estate. On the expiration of that year the moment the estate is liquidated, the legatees can insist upon being paid; the moment the debts and legacies have been paid, the residuary becomes entitled to the residue, and if there are more than one residuary, the residue then becomes divisible.

Where the Will is silent, the law says that as soon as on the expiration of "the executor's year" the executors have liquidated the testator's estate, that is, reduced it into possession, and paid his debts and legacies, the residue becomes "free for enjoyment by the heirs" or, in other words, "divisible," whether it is actually divided or not is immaterial, if it is in a condition to be divided.

It was provided in a Will that the share of the testator's son *A.* should be made over to him absolutely "if at the time the said residue is divisible my son *A.* shall have no debts due by him or any liabilities likely to result in a debt or debts of more than Rs 5,000," but "if otherwise the said share shall be held or settled" by the executors "upon trust until the said *A* shall be free from such debts and liabilities or until he shall die.

Held, on construction of the Will, that the words "such debts" could not be treated to mean all debts whenever contracted but they meant only "those debts," which existed at the time the residue became divisible. N. C. MACLEOD *v.* SORABJI EDULJI WARDEN. **7 B. L. R. 755.**

48 (*a*). *S. 321—See 9 O. C. 159 Supra No. 23.*

48 (*b*). *S. 326—See 7 B. L. R. 755 Supra No. 48.*

49 *S. 331—& —Probate and Administration Act (V of 1881). Applicability of— Sikhs—Brahmos—Effect of lapse from orthodox practices—"Hindu."*

A Sikh is included in the term Hindu as used in the Probate and Administration Act, 1881. L. R., 5 I. A., 87, L. R., 6 I. A., 15, 2 Morley's Digest 22, 9 M. I. A., 195 *referred to.*

A Sikh or Hindu by becoming a Brahmo does not necessarily cease to belong to the community in which he was born.

Where it was objected that the deceased testator in matters of diet and ceremonial observance had departed so far from the standard of orthodoxy binding upon him as a Hindu or Sikh as to exclude him from the term Hindu as used in the Letters of Administration Act—

Held, that such lapses from orthodox practices assuming them to be established, could not have the effect of excluding from the category of Hindu in the Act one who was born within it, and who never became otherwise separated from the religious communion in which he was born (RANA) BHAGWAN KOER *v.* J. C. BOSE AND OTHERS.=**135 P. L. R., 1903**=**84 P. R., 1903=5 Bom. L. R., 845=M. L. J., 1903 p. 391.=7 W.N. Cal., 395 (P. C.)=31 C. 11 (P. C.)**

50 *Sections 332 & 190—& Probate & Administration Act V of 1881.*

There are no rules under Section 332 Succession Act, exempting people of the Chin race from the provisions of that Act.

If Chins are Budhists they will be governed by the provisions of the probate and Letters of Administration Act V of 1881. Under S. 85 of this Act it is open to a Judge to refuse letters of administration.

There is no counter part of Section 190 of the Indian Succession Act in the Probate and Administration Act. A suit in respect of the property of an intestate Budhist Chin can be maintained without letters of administration having first been granted.

The necessity of stating clearly under what Act and sections letters of administration are issued pointed out.

An application for letters of administration can not be converted into an application under the Guardians and Wards Act VIII of 1890. MAHLA *v.* MAUNG PYIN. **L. B. R. 1900—1902 P. 193.**

21 Act XXI of 1865—(Parsi Intestate Succession Act)

1 *Parsi Succession Act (XXI of 1865) Section 2.*

Under section 2 of the Parsi Succession Act, 1865, the property of a female dying intestate devolves upon her husband and children so that his share shall be double the share of each of the children. The words of the section are very vide. There is no distinction as to estates whether in possession or remainder, nor does the Act say from what date it shall come into force. SHAPURJI D. SAKLATVALLA *v.* RUSTOMJI SHAHPURJI. **5 B. L. R. 252.**

2 *Parsee Intestate Succession Act (XXI of 1865)—Succession—Parsees—Usage of the community.*

Before becoming into operation of the Parsee Succession Act, 1865, the law governing Parsees in the mofussil was the ascertained usage of the community modified by the rules of equity and good conscience. In such cases the practice of the English Equity Courts would, it is true, be followed with necessary modifications; but the reference to these Courts would be not for the purposes of introducing special or peculiar doctrines of English law, but rather with the purpose of elucidating the principles of equity and good conscience and of giving systematic and uniform effect to them. SHAPURJI BEZONJI MOTIVALL *v.* DOSSABHOY BEZONJI MOTIVALL. **7 B. L. R. 988**=**30 B. 359.**

(**3**) *See Succession Act No. 15.* **7 B. L. R. 207.**

22 Act XXV of 1866 (Unclaimed deposits Act)

Sup: Govt. Acts (Act XXV of 1869) *(Cont)*

Under this Act all monies paid into or deposited in the High Court in the Course of suits and remaining unclaimed for 20 years are to be transferred and paid to Government; but they are liable to repayment on subsequent establishment of claim to High Courts satisfaction. An application for its withdrawal is not governed by any article of the Limitation Act. APURBA KRISHNA ROY *v.* CHUNDERMONEY DEBI 10. **C. W. N. 354.**

23. Act XXVII of 1866—(Trustees Act).

Trustees Act (XXVII of 1866), Section 3—Trustees and cestui que trustent *all Hindus—Applicability of English Law—Trust violating some provision of Hindu Law.*

N. applied for leave to sell a certain portion of certain trust premises for the purpose of raising money to pay for some necessary repairs. It was contended that the Indian Trustees Act was by section 3 limited in its operation to those cases in which the English Law was applicable; and that the law was not applicable to a trust in which the trustees and *cestui que trustent* were all Hindus.

Held, overruling the contention, that to exclude the applicability of English Law it must be shown that the trust was one which violated some provision of Hindu Law.—*In re* NILMONEY DEY SARKAR. **9 W. N. Cal., 79.=32. C. 143.**

24. Act XXV of 1867 (Printing Press and Registration of books).

§. *18—See Act XX of 1847. Nos 1 and 2.*

1. C. L. J. 278=9. C. W. N. 591 and 2. C. L. J. 511=10. C. W. N. 124=33. C. 571.

25. Act XXX of 1867 *(Printing Presses Act).*

See Act XX of 1847 No 2. 2. C. L. J. 511.

26 Act IV of 1869 (Divorce Act).

1 S. 2—The object of Indian Divorce Act is to afford relief to persons, who, while not technically domiciled in India, are resident there, for a considerable time even though without intention of permanent settlement.

In § 2 the word "reside" implies a dwelling either of a permanent nature or for some considerable time.

It does not apply to a person who has a permanent abode elsewhere and who merely comes to India for the purpose of filing a suit under the Act with the intention of returning to his permanent abode on the conclusion of the litigation.—*3 B. 227, 14, B. 541, 21. C. 634, 8. M. 205, 3 C. W. N. 250, L. R. 2 P. D. 223 referred to.* WILFRED COOMBES *v.* MARY LOUISA COOMBES.—**L. B. R. 1900—02. P. 222.**

2 Divorce Act (IV of 1869), S. 3 (8)—*Judicial separation Jurisdiction of Court—"Last resided"—Evidence—Uncorroborated—*

Sup: Govt. Acts (Act IV of 1869) *(Cont.)*

testimony of wife.

On appeal against a decree granting judicial separation passed by the Divisional Judge of Lahore on the application of the wife, it was contended that the Court had no jurisdiction to entertain the application. It appeared that the home of the appellant, the husband, was at Lahore, where he lived till 1898, when he went to Africa for employment. He returned to Lahore after two years on a few months' leave for the purpose of getting married. Having rented a house, he took his wife to this house immediately after marriage, spent one or two days there and returned to Africa with his wife. He again left Africa for India after about a year's residence, spent two or three weeks with his wife at her parents' house at Saharanpur, left her there and never lived with her again.

Held, that the objection had no force and the Lahore Court had jurisdiction.

The Court would not accept the uncorroborated testimoney of the wife, that her husband had committed or attempted to commit an unnatural offence on her person. ALLARD *v* ALLARD—**161 P. L. R., 1905 = 77 P. R. 1905.**

3 Divorce Act (IV of 1869) S. 7—*Suit for judicial separation by wife—Divorce—Wife's costs.*

In this case on the proceedings of divorce and judicial separation the wife sought to make her husband liable for her costs. The husband and wife were Greeks, domiciled in Greece and married at Alexandria.

It was contended that the High Court had no jurisdiction to act in the matter, since the English law applicable in such cases did not apply.

Held, that the contention was wrong. The Court was competent to act and give relief on principles and rules existing in England, and was authorised to make such an order as was sought for.

Held, also, that in considering the substantial question requiring determination, it has to be borne in mind, that the question of whether the wife is or is not to have her costs depends upon the property which the wife may be supposed to have. If either under the Married Woman's Property Act in England, or under the Succession Act in India, it appears that the woman retains her property in spite of her marriage, she will not be entitled to her costs.

Held, further that the wife was entitled to her costs, as her position in relation to her husband as regards her property was governed by the law of Greece and there was no evidence as to what that law might be.

The general principle governing such cases is—It is not considered just either that a wife should be left without the means of putting her case fairly before the Court, or that a practitioner should run the risk of losing the proper remuneration for his labours, if he takes up a case which he honestly believes to be genuine, but which

Sup: Govt. Acts (Act IV of 1869) *(Cont.)* may after all turn out to be unfounded—19 *Bom.*, 295, *followed.* GEORGUCOPULAS *v* GEORGUCOPULAS,—**29 C. 619.**

4. Ss. 7, 11 and 45 S. 7, 11—*and* 45—*Civil Procedure Code (Act XIV of 1882), Section 32—Petition for divorce—Right of alleged adulteress to intervene.*

In a petition for divorce by a wife against her husband on the ground of adultery, the person with whom the husband is alleged to have committed adultery, has no right to intervene as a respondent. (EDITH JANE) RAMSAY *v.* (ELLEN THOMAS) BOYLE,—**7 W. N., Cal., 504=30 C. 489.**

5. Divorce Act (IV of 1869.) S. 17—*Divorce—Adultery of wife—Collusion of parties.*

The petitioner applied to the High Court for confirmation of the decree *nisi* for dissolution of her marriage with the respondent passed by the District Judge on account of adultery and cruelty on the part of her husband. The High Court directed the District Judge to hold a further inquiry in regard to certain allegations of misconduct made by the respondent against the petitioner, his wife; and on inquiry it was found that the petitioner had committed adultery previous to her filing the petition for divorce, and, notwithstanding the prohibition contained in Act No. IV of 1869 against the remarriage of a divorced person at any time within six months after the decree *nisi* was made absolute by the High Court, the petitioner went through the form of marriage with a man exactly one fortnight after the decree *nisi* was passed, and that the parties had colluded in making the application. The High Court on the above grounds refused to make absolute the decree *nisi* passed by the District Judge.—A. CRAWSON *v.* W. CRAWSON.—**2. A. L. J. 420= A. W. N. 1905. P. 141.**

6. S. 22—*Statute 20 and 21 Vic. Cap. LXXXV—Divorce Act (IV of 1869), Sections 22*, et seqq—*Judicial separation—Desertion by petitioner without reasonable excuse.*

Desertion without reasonable excuse constitutes no bar to a suit for judicial separation. 65 *Law Times* 267 *followed.*—MARGARET ARTHUR *v.* HARRY ROBERT ARTHUR. **W. N. ALL., 1904, P. 133=1. A. L. 321=26. A. 553.**

7. *Civil Procedure Code, Section 220—Costs.*

In this case the husband petitioned for dissolution of marriage by reason of his wife's adultery with the co-respondent. Costs but no damages were asked for against the co-respondent. The Court granted a decree *nisi* with costs against the co-respondent; costs as between attorney and client were allowed. OUTHWAITE *v.* OUTHWAITE AND DIAZ. **28 Cal., 84**

8. Divorce Act (IV of 1869), S. 55—*Suit for judicial separation on the ground of adultery and cruelty—Charge of adultery held not proved and petition granted on the ground of cruelty—Appeal against findings by party in whose favor the decree is passed—Civil Procedure Code (Act XIV of 1882), Section 540.*

Sup: Govt. Acts (Act IV of 1869) *(Cont.*

The wife instituted proceedings against her husband for a judicial separation on the ground of his adultery with a certain person. During the course of the trial the petition was amended by adding a charge of cruelty. A decree for judicial separation on the ground of adultery was granted, the Court finding against the wife on the issue as to adultery. On appeal by her to set aside the finding as to adultery—

Held, that the appeal did not lie. 6 *Cal.*, 206 and 319; *(F. B.); 6 W. R., 18 (Mis); 7 All.*, 606; *21 All,* 117; *18 Cal.*, 647; *11 Cal.*, 301 *(P. C.); 35 L. J. P., and M., 104; 43 L. J. P., and D., 6, 1 S. and T., 168; 28 L. J. P., 55; 37 L. J. P., 77, referred to.*—(GRACE HANNAH) WINGROVE *v.* (ARTHUR CLEMENT) WINGROVE. **84 P. L. R., 1904.= 56. P. R. 1904.**

27 Act VII of 1870 (Court Fees Act)

1. Ss. 4, 5, & 16—*Stamp duty on objections filed under Section 561, Civil Procedure Code, not payable before hearing.*

Under section 16 of the Court Fees Act the stamp duty on objections made under Section 561 of the Code of Civil Procedure need not be paid till the time of hearing. REFERENCE UNDER COURT FEES ACT, SECTION 5. **25 M. 24.**

2. Ss. 5 & 12—*Civil Procedure Code (Act XIV of 1882) Sections 2 and 525–Appeal against order rejecting application under Section 525.*

An appeal against an order rejecting a petition under section 525 of the Civil Procedure Code is chargeable with a Court-fee of Rupees ten only.

The order of the Taxing Judge of a High Court upon the question of proper Court-fee payable on a memorandum of appeal is final. LURKHUR CHAUBE *v.* RAM BHAJAN CHAUBE. **A. W. N 1903 P, 214.**

3. Ss. 6, 28—& *C. P. C. Section 582 (a) unstamped memorandum of appeal filed in time—Stamped after expiry of limitation.*

On the last day allowed by limitation, the plaintiff presented an appeal on plain paper in the Court of the Civil Judge, who refused to accept it. On the following day the memorandum of appeal was again presented properly stamped. Held that the Civil Judge rightly dismissed the appeal as time barred 12 A. 129, 26 C. 925, 22 B. 849 followed and 15 M. 73 disapproved. MAROTI GUJRATI *v.* GOVIND RAO BOOTI. **16 C. P. L. R. 1903 P. 89.**

4. Ss. 6, 28—*Insufficiently stamped p[illegible]n[illegible]—Making up of stamp duty, after the period of limitation for the suit—Validity of the plaint—Civ. Pro. Code, Ss. 43 and 54.*

Sup; Govt. Acts (Act VII of 1870) *(Cont)*

Held, (1) that the Court Fees Act and the Civ. Pro. Code should be read together in regard to the presentation of plaints and the making up of stamp duty, but not with the provisions of the Limitation Act, which is not an Act in *pari materia*; (2) that, under S. 54 of the Civ. Pro. Code and S. 28 of the Court Fees Act, deficiency in stamps can be made good by order of Court, even after the limitation for the suit has expired; (3) that, under S. 28 on the making up of the deficiency of stamp duty the plaint and all proceedings are validated from the date of original presentation, and (4) that, once the stamps are taken by the Court, the order cannot be subsequently set aside, nor the original presentation invalidated.—130 P. R. 1890, 74 P. R. 1903, 3 P. R. 1893, 156 P. R. 1888, *Appr*; 27 A, 411, 23 A. 423, *Diss*; 12 A. 129 (F. B.), 15 A. 65 (F.B.) 24 A. 218, 19 C. 780, 27 C. 814, 31 C. 75, 15 M. 29, 15 M. 78, 22 M. 494, 27 B. 330, 11 A. 241 (P.C.), *R. referrd to.*—SAIF ALI KHAN *v* FAZIL MEHDI KHAN. **123 P. R. 1907.**

5 Ss 6 and 28—*Deficiency of Stamp made up.*

In the absence of proof that there was fraud in filing a plaint insufficiently stamped, the payment of stamp duty, relates back to the date of the presentation of the plaint as a proper plaint. ALAYAKAMMAH *v* SUBBARAYA GOUNDAR.—**15 M. L. J. 219.**

6. Ss. 6, 9, 10, 28—*Plaint registered—deficiency of Court-fee subsequently discovered—Limitation Act, S. 4—Civ. Pro. Code S. 392.*

When a plaint has been registered, and the Court subsequently finds that a sufficient Court-fee has not been paid, it is bound to stay the proceedings and to fix a time within which the additional fee can be paid, without any regard to the period of limitation prescribed for the suit. If the fee is paid within the time so fixed, the plaint is as valid as if it had been properly stamped in the first instance when it was presented.

The Court is not bound to appoint a commissioner to hold an investigation under S. 9 of the Act, and S. 10 applies even where the Court itself holds the enquiry as to market value &c.

Mistake is a slip made, not by design, but by mischance, and S. 28 is subject to no such limitations as were suggested in Balkaran Rai v. Gobind Nath Tewari. 12 A. 129 referred to. It is a universal section and embraces a wider area than Ss. 9 & 10.

History of Sections 9 and 10 of the Court Fees Act was fully discussed by Knox, A.C.J.

Per Knox, A.C.J.—The words "insufficiently stamped" cannot be added to the word 'plaint' in the explanation to S. 4, Limitation Act. N. W. P. 1874, 139, referred to.

The plaintiff valued his suit at 15 times the net profits which he alleged to be Rs 45. The plaint was registered. On defendant's objection, the Court of first instance found that the property was undervalued, and dismissed the suit, without giving the

Sup: Govt. Acts (Act VII of 1870) *(Cont.)*

plaintiff time to make good the deficiency in Court-fee.

Held, that the Munsarim's duty not being a piece of perfunctory routine, and the plaint having been registered on his report, the Court was bound to give the plaintiff time to make good the dificiency in Court-fee, if any was subsequently discovered. S. 28 of the Court Fees Act applies to such a case. HARI RAM *v* AKBAR HUSAIN.—**4 A. L. J. 636 (F.B.)=A. W. N. (1907) P. 253=2, M. L. T. 375.**

7. Ss. 6, 9, 10. and 28—*Civil Procedure Code (Act XIV of* 1882), *Sections* 48, 54—*Limitation Act (XV of* 1877*), Section* 4—*Plaint filed on the last day of limitation insufficiently stamped owing to requisite stamp not being procurable in time—Stamp procured later on during the day but not filed owing to Court rising early.*

A plaint was filed in the Court of the District Judge on the 14th April 1903, the last day of limitation for the suit. The plaintiff affixed an 8-anna court-fee stamp to his plaint and stated that the treasurer had no court-fee stamps of the proper denomination and the plaintiff was told by the treasurer to wait until the Treasury Officer should come down to the Treasury and open double locks. The District Judge recorded an order making over the case to the Subordinate Judge, 1st class, and adding a direction that the deficiency should be made up. The plaintiff on the same day procured the requisite stamp but on taking it to the District Judge's Court found that that officer had gone home. Nothing was done on the 15th April 1903. On the 16th the plaintiff filed the full stamp in the Court of the Subordinate Judge. It was contended that the suit was barred by limitation.

Held, by the Full Bench, that the contention was not valid, for the plaint must be treated as properly stamped on the 14th April 1903, when the plaintiff had procured the requisite stamps. 130 *P. R.*, 1890, 3 *P. R.*, 1893, 38 *P. R.*, 1900, s. c. *P. L. R.*, 1900 *p.* 189 *referred to.*—MEHTAB RAI *v* GOPAL RAI. **152 P. L. R. 1905=104 P. R. 1905 (F. B.)**

8. S. 7 (IV)—*Suits Valuation Acts (VII of 1887), Sections 7, 8 and 9. Rules under—Punjab Courts Act (XVIII of 1884), as amended by Act XXV of 1899, Section 70.*

In cases in which a fee is leviable *ad valorem* and which are not governed by rules framed under the Suits Valuation Act, the value for the purposes of section 70 (1) *(b)* of the Punjab Courts Act is the value assessed by the plaintiff for the purposes of Court-fees, and in *ad valorem* Court-fee cases governed by Rules framed under the Suits Valuation Act, the value for the purposes of that clause of the Punjab Courts Act is the value assessed by the plaintiff in accordance with the Rule applicable.

The only *ad valorem* cases in which separate values for purposes of jurisdiction and Court-fees can be assessed are cases governed by rules framed under the Suits Valuation

Sup: Govt. Acts (Act VII of 1870) *(Cont.)* Act, and the effect of rule IV *(a)* framed under section 9 read with section 7 *(iv)* of the Court Fees Act, is that the amount of Court-fee payable is to be computed on the value assessed under clause *(b)* of the Rule. *P. R.*, 63 of 1902; 17 *Cal.*, 680; 24 *Mad.*, 34; 18 *Bom.*, 207; 50 *P. R.*, 1896 *referred to.* NAJM-UD-DIN *v.* MUNICIPAL COMMITTEE, DELHI.—**6 P. R. 1904.**

9 S. 7, Clause (iv)—*Valuation of claim —Plaintiff not entitled to fix arbitrary value of his claim.*

Section 7, clause (iv) of the Court-Fees Act does not contemplate that a plaintiff should assign an arbitrary value to the subject-matter of the suit for purposes of Court-fee inconsistent with his own valuation in the plaint of the property claimed by him.

The plaintiff prayed for settlement of accounts and recovery of one-ninth share of the joint property of the parties, such share being valued at Rs. 50,000. The plaint alleged that plaintiff and defendants were joint, plaintiff's share being one-ninth, and that their business was conducted jointly until August 1900, when defendants repudiated plaintiff's rights and turned him out of the firm. The plaintiff valued the whole property of the firm between four and five lacs of rupees. The plaint fixed the value of the relief sought for at Rs. 5,250 for the purposes of the Court Fees Act.

The District Judge returned the plaint for amendment for re-valuation of the property and for the plaint to be stamped according to the valuation.

Held, that the order of the District Judge was correct. HARI CHAND *v.* JIWAN-MAL.—**65 P. L. R., 1903 = 28 P. R. 1903.**

10 S. 7 (IV) and IX—*Redemption suit—See 27 A. 447 No. 50 infra.*

11 § 7 (iv) (b) and Sch. II Art 17 (6) *Valuation—Computation—Court Fees—Suit for partition—Relief sought—Change in the mode of enjoyment—Enforcement of a disputed right.*

The valuation for the computation of Court-Fees of a suit for a suit for partition depends upon whether the relief sought is merely a change in the mode of enjoyment of the property or the enforcement of a disputed right. 4 C. L. R. 417, 8 C. 757, 20. C. 762, 20 M. 289, 22 B. 315, 21 M. 234, 18 B. 209 referred to.

Where the plaintiffs are admittedly out of possession and the extent of the joint family property as definitely stated the plaint should be stamped on the value of the share claimed *ad valorem.* SRIPATI *v.* SHRI-DHAR,—**15 C. P. L. R. 1902 P. 120.**

12 § 7 (IV) (C)—*Specific Relief Act (I of 1877), Section 39—Cancellation of document.—suit for—Declaratory decree —Consequential relief.*

A suit for cancellation of a sale deed under section 39 of the Specific Relief Act is a suit for a declaration and a consequential relief, and section 7, clause IV (c) of the Court Fees Act applies to it. PARVATIBAI *kom* MAHADEV *v.* VISHVANATH GANESH. **6 Bom., L. R. 1125 = 29 B. 207.**

13. § 7 (IV) (c)—*Suits Valuation Act, Sections 8 and 9—Cancellation and delivery of mortgage bond—Valuation of relief by plaintiff—Jurisdiction of Court to accept or revise plaintiff's valuation.*

In cases falling under section 7, paragraph IV of the Court Fees Act, the law expressly provides (and only in that class of suits) that the plaintiff should state in the plaint itself under sanction of verification the amount at which he values the relief sought, and the Court has no jurisdiction to decline to accept the same or to revise it, a power which is limited to cases provided for by section 9 which relates to an estimate given by the plaintiff of the annual net profits of the land or the market value of the land, house or garden as mentioned in section 7, paragraphs V and VI.

Plaintiff sued for cancellation and delivery up of a mortgage bond for Rs. 4,000 executed in defendant's favour, on the allegation that no consideration had been paid by defedant. For purposes of court fees and jurisdiction the plaintiff valued in the plaint the relief sought at Rs. 50 and verified the same as part of the plaint.

Held that no rules having been framed under section 9 of the Suits Valuation Act applicable to the cancellation and delivery up of an instrument in writing, the plaint was properly stamped and the Court could not revise the valuation or decline to accept the plaint. CHINNAMMAL *v.* MADARSA ROWTHIR. **14 M. L. of 1904 P. 343 = 27. M. 480.**

14. § 7 (IV) (c)—*Specific Relief Act (I of 1877). Section 42—Declaratory suit—Adoption— Declaration of invalidity of adoption—Will—Jurisdiction of Court—Rejection of plaint—Dismissal of vexatious suit without investigation of claim—Abuse of process.*

D. T. was common ancestor of the parties. His eldest son succeeded him and died having adopted his daughter's son. One of his grandsons sued his father, defendant No. 1, the adopted son, defendant No. 2 and his deceased uncle's sons, defendants Nos. 3 and 4, for a declaration that the adoption of the second defendant was invalid and that Will executed by the adoptive father and proceedings and decrees and judgments in certain civil cases were not binding on the plaintiff. The Court of first instance was of opinion that the suit was chargeable with *ad-valorem* fee with reference to the value of the estate in dispute in regard to which the declarations were sought. It was contended for the defendants that the suit was vexatious and the plaint should be rejected, and that the declarations asked for should not be made.

Sup. Govt. Acts (Act VII of 1870) (*Cont*).

Held, that the suit was for mere declarations and *ad-valorem* Court-fee was not required. VIJIA SAMY TEVAR *v.* SASI VERMA TEWAR, **15. M. L. J. 469=28. M. 560**

15 S. 7, Clause iv (c)—*Suit to enforce registration.*

Held, that for a suit to enforce registration the institution fee must be calculated under Section 7, Clause iv (c) of the Court-fees Act, according to the amount at which the relief sought is valued in the plaint. PYDAL NAMBIAR *v.* KANNAN NAMBIAR. **12. M. L. J. 87.**

16 S. 7 IV·C—*Suit by a member of Malabar Tarwad to set aside contract made during his minority by adult members of the Tarwad—Nature of suit—Rule No. 2 of High Court Rules (Madras).*

Where a member of the tarwad brought a declaratory suit that his right as a member is unaffected by a *karar*, entered into during his minority by the adult members of the family including the kranavan, *held* that the transaction would bind members who are not actually consenting parties, only if the considerations, which pass, and the other attendant circumstances, constituted it a valid exercise of the power of the karnavan and the others, but, otherwise, it is altogether void. Though a transaction, which is void, may, under certain circumstances, be cancelled by a Court, at the instance of a person not party to it, on the ground that it would throw a cloud on his title, it is not true that such a person must get rid of the transaction by having it actually cancelled, in order to rely on its invalidity as against him. The above suit is a suit for a mere declaration, and not one for declaratory decree with consequential relief falling with in S. 7, IV C. Nor does Rule No. 2 of the High Court rules (dated 26th February, 1903) apply to such a case. That rule must be confined to cases of the precise description provided for by S. 7, IV C. *viz.*, suits to obtain a declaratory decree or order where consequential relief is prayed. CHINGACHAM YITTIL SANKARAN NAIR *v.* CHINGACHAM YITTIL GOPALA MENON, **1. M. L. T. 412=30 M. 18.**

17 S. 7 (IV) (C)—*Civil Procedure Code (Act XIV of 1882), Section 283—Execution of decree—Attachment—Objection against—Declaratory suit—Value of suit for purposes of jurisdiction.*

Where the sole question between the parties to the suit is whether the property attached in execution of a decree is or is not liable to be attached and sold, the value of the suit is the value of the property sought to be sold in execution of the decree, when the amount of the decree exceeds the value of the property sought to be sold, and the value of so much of the property sought to be sold as will, on sale, satisfy the amount sought to be realized by sale of the property sought to be sold, when the value of the property attached exceeds the amount sought to be realized. In the latter case the amount, which is sought to be realized by a sale under the decree, may be taken as the value of that portion of the property, the sale of which will be sufficient to satisfy that amount by the sale.

Where the judgment-debtor is also a party to the suit, and the suit is by the unsuccessful claimant objector for the establishment of his right both against the execution creditor and the judgment-debtor, the value of the suit must be deemed to be the value of the attached property, although the amount of the decree be smaller than the value of the property, but where the object of the suit is only to establish either the right of the decree-holder, as against the objector or the right of the objector as against the decree-holder, the value of the subject-matter, where the amount of the decree is less than the value of the attached property, is the amount of decree. DHAN DEVI *v.* ZAMURRAD BEGAM. **A. W. N. 1905 P. 37=27 A. 440.**

18. S. 7 IV (c)—*Court Fees Act (VII of 1870) Section 17—Suit to obtain a declaratory decree or order where consequential relief is prayed.—S. 7 IV C.*

When the plaint prayed to set aside an alleged illegal auction sale and a declaration of right and possession in respect of the property in dispute, *held*, that the suit fell within clause C. section 7 of the Court Fees Act, as a suit to obtain a declaratory decree or order, where consequential relief was prayed for.—9 *Cal.*, 230 *approved.* MAHOMED TAKIBUDDIN *v.* THE COLLECTOR OF THE 24 PARGANAS, **6 C. W. N. 157.**

19 S. 7 (IV) (c) (d)—*Suits Valuation Act (VII of 1887), Section 8—Valuation of suit—Jurisdiction—Court-fee—Suit for declaration of title, compensation and injunction.*

The plaintiff claimed to be in possession of a jungle and brought a suit for declaration of his title thereto, for damages for trees cut therefrom by the defendant and for an injunction restraining the defendant from cutting any more trees.

Held, that in such cases the valuations both for the purposes of jurisdiction as well as the court-fees, is to be determined by the value of the relief stated by the plaintiff in his plaint, and it is no part of the duty, nor is it within the power of the Court, to ascertain the value for the purposes of determining the jurisdiction or the amount of court-fee. Such cases fall within section 7 (IV), cls. (c) and (*d*) of the Court-Fees Act 17 Bom., 56, 18 *Bom.*, 207, 4 *All.*, 320, 15 *All.*, 378, and 20 *Mad.*, 289 *followed.* 8 *Cal.*, 757, 17 *Cal.*, 680 *distinguished.* HARI SANKAR DUTT *v.* KALI KUMAR PATRA. **9 C. W. N. 690=32 C. 734.**

Sup Govt Acts (Act VII of 1870) *(Cont)*

20 S. 7 sub-sec. (IV), cls (c) and (d) *—& C.P.C.§. 54 (b) Suit for declaration and consequential relief—Valuation—Court's power to revise valuation of plaintiff.*

Although in cases under S. 7, (IV), cls. (c) and (d) of the Act, it is for the plaintiff to state the amount, at which he values the relief sought, yet it is open to the Court, to determine the true valuation and take action under S. 54 of the Civil Procedure Code, if it is established that the valuation was incorrect.

Where the suit was for a declaration that a mortgage-decree for Rs. 10,000 obtained by the defendant was fraudulent, and for an injunction to restrain the defendant from executing it by a sale of the mortgaged properties.

Held—that the prayer for injunction was a prayer for consequential relief within S. 7 (IV), cl. (c) of the Act.

That the proper value of the relief by way of injunction was the amount sought to be realised under the decree, and the plaintiff's valuation of the same at Rs. 100 was so manifestly unjust that the Court was justified in rejecting the plaint under S. 54, C.P.C. 32 C. 734, R., 17 C. 680 approved. MUSST. BIBI UMATUL *v.* MUSST. NANJI KOER, **11 C. W. N. 705 = 6 C. L. J. 427.**

21. S. 7 Cl. IV (c) Art. 15 of Sch. II—*Suit for possession of wife—Appeal against order of costs.*

Held, that the class of suits contemplated by Article 15 of Schedule II of the Court Fees Act are suits in which the questions of the marital relation is admitted, and in which there is a contest between the parties, as to whether the defendant is justified in leaving the protection of her husband or in resisting his attempts to obtain possession of her; that article cannot apply to cases in which the parties are disputing as to whether the defendant was ever married to the plaintiff or not, and in which the plaintiff seeks for a declaration that the defendant is married to him, and only in the event of his obtaining this declaration prays for the consequential relief that the defendant should be ordered to live with him. In the latter class of cases Court-fees must be paid under Section 7, Clause IV (c) of the Court-Fees Act, according to the amount at which the relief sought is valued in the plaint.

A party cannot place his suit under 2 different articles of the Act saying that he pays Rs. 10 for declaration and Rs. 5 for possession of his wife. AMIR-UL-HUSSAIN *v.* KHAIR-UN-NISA. **28 Cal., 567.**

22. S. 7 Cl. (4) Sch. II Art. 17 Cl. 1—*Suits Valuation Act (VII of 1887), Sections 3, 7, 8, 11—Suit for declaration of title to land—Valuation fixed for purposes of jurisdiction—Court's power to fix valuation when it is disputed.*

Per Russell, Ag. C. J.—A suit for a declaration with consequential relief falls under paragraph 4 (c) of section 79 of the Court-fees Act and so it is a suit "other than" those referred to in paragraphs 5, 6, 9, and 10 (*d*) of that Section.

The words "as determinable" in Section 8 of the Suits Valuation Act mean determinable by the Court which has to try the case.

Per Aston, J.—There is no express provision in the Suits Valuation Act making the valuation for the purposes of jurisdiction *prima facie* determinable by the plaintiff in any suit which can be valued lower for the computation of Court-fees. Section 4 of the Suits Valuation Act indicates that the principle adopted by the legislature for valuing a suit mentioned in Schedule II, Article 17, which relates to land or an interest in land, is that the value of such a suit for purposes of jurisdiction shall be governed by the value of the land or interest in land. Where such value is not determined by Rules made under Section 3 of the Suits Valuation Act, the value must be (where disputed) determined by judicial decision in the suit, such determination being subject to the provisions of Section 11 of the Act. DAYA RAM JAGJIVAN *v.* GORDHAN DAS DAYA RAM. **8. B. L. R. 885 = 31 B. 73.**

23 S. 7 Cl. (IV) (c) and Sch. II Art. 17 (iii)—*Suit to set aside decree.*

A plaint in a suit to set aside a decree falls within article 17 of the second schedule to the Court Fees Act sub-section (*iii*) and not under Section 7 sub-section (*iv*) clause (*c*). ZINNATUNNESSA KHATUN *v.* GIRINDRA NATH MUKERJEE. **30. C. 788.**

24 S. 7 (IV) C and Sch. II Art. 17 Clause (6)—*Suit to enforce registration.*

The Court-fee payable on a plaint or memorandum of appeal in a suit to enforce registration, is a fixed fee of Rs. 10 under Article 17, Clause 12, Schedule IV of the Court-fees Act —*I. L. R. VIII Cal., 515, followed; 12 Mad. L, J. 87 not followed.* SAVARIMUTHU PILLAI *v.* ALAGIAM PILLAI. **12. M. L. J. 88.**

25.—S. 7 (IV) (c) and Sch. II Art. 17 (6).

A brought a suit under §. 77 Registration Act to direct registration of a will which disposed of property more than Rs. 2,000 in value, held Sch: II Art: 17 (6) of the Court Fees Act applied to the case and not §. 7. IV (c) as it is a suit in which it is not possible to estimate at money value the subject matter in dispute and is not otherwise provided for in the Act 8. C. 515, 12. M. L. J. 88 followed, and 12. M. L. J. 87 dissented from. RAMA AIYAR *v.* SANKARA AIYAR. **17. M. L. J. 573. (F. B.)**

26. S. 7 (IV) C, and Sch. II Art. 17 (c).

The cancellation of a document involves consequential relief, and the plaint in suit for cancellation must be stamped, under

Sup: Govt. Acts (Act VII of 1870) (*Cont.*) section 7 subsection (*iv*), clause (*c*), of the Court-fees Act, 1870, according to the amount at which the relief sought is valued.

Tacorden Tewarry v. *Nawab Syed Ali Hossein Khan and others*, (*1874*) *21 W. R., 340; Fog Narain Giree* v. *Grish Chunder Mytee and others*, (*1874*) *24 W. R., 438; Samiya Mavalu* v. *Minammal*, (*1900*) *I. L. R., 23 Mad. 490;* followed.

Shrimant Sagajirao Khanderao Naik Nimbalkar v. *Smith*, (*1896*) *I. R. R., 20* Bom. *736; Karam Kham* v. *Daryai Singh*, (*1883*) *I. L. R., 5* All. *331:* dissented from. MAUNG KYIN *v.* PO THIN AND ONE. **2. L. B. R. 1904 P. 266.**—

27—S. 7, Clause IV (d)—*Suit for injunction.*

Section 7 Clause IV (*d*) of the Court Fees Act 1870 requires that in a suit for an injunction the plaintiff shall state the amount at which he values the relief sought and the Court has no power to increase the value stated by the plaintiff, GURUVAJAMMA *v.* VENKATAKRISHNAMA CHETTI. **24 Mad., 34.**

28.—S. 7 (iv) (d)—*Suits Valuation Act (VII of 1887), Sections 8 and 9. Rules framed under—Suit for injunction—Valuation for purposes of court-fees and jurisdiction.*

Section 8 of the Suits Valuation Act so far governs section 7 (iv) of the Suits Valuation Act as to indicate that it was not the intention of the Legislature that a purely arbitrary value should be fixed by the plaintiff.

It follows from section 8 and the rules under section 9 of the Suits Valuation Act, framed by the Chief Court, that the court-fee is payable in an injunction suit (when no damages are claimed) on the jurisdictional value fixed by the plaintiff within the limits (Rs. 100 to 500) laid down by Rule IV.—*XVII Cal., 680; 50 P. R., 1896; XVIII Bom., 207, referred to.* NANAK *v.* GURANDITTA. **63. P. R. 1902.**

29. §. 7 (IV) (f)—*Jurisdiction—Accounts.—Suit for—Amendment of plaint—Valuation.*

In a suit for an account the valuation for purposes of Court-fees and jurisdiction does not disentitle the plaintiff to recover in the suit such higher amount as the evidence may shew he is entitled to. The only restriction is that he cannot execute the decree without paying such additional Court-fee as may be due on the amount decreed.

The valuation of a suit for accounts fixed *bona fide* by the plaintiff determines the Court-fees and jurisdiction of the Court, and cannot be altered so as to alter the jurisdiction of the Court in which the suit is instituted. Where a suit was instituted in a Munsiff's court, for accounts, the Munsiff appointed a Commissioner to take the accounts, and it was found that the Plaintiff would be entitled to a larger sum. Plantiff amended the plaint with court's permission and the value of the suit was increased. The

Sup: Govt. Acts (Act VII of 1870) (*Cont.*) Munsiff returned the plaint to be presented to proper court: Held he acted illegally in allowing the value to be revised and he ought to have tried the case. AROGYA UDDAYN *v.* APPACH. **12. M. L. J. 35=25 M. 543**

30. S. 7 (IV) (f) *Accounts—Suit for—Valuation—Court-fees—Jurisdiction.*

In a suit for an account the valuation first fixed in the plaint is final for purposes of jurisdiction and stamp duty on the plaint, but does not preclude the plaintiff from getting a decree for such higher amount as the account may show he is entitled to. He must, however, pay extra stamp duty in execution on such higher amount.

Where in a suit for accounts the Court required the plaintiff to pay additional Court-fees on the higher amount which might be due to him over and above the amount claimed on the plaint and the plaintiff offered to relinquish his claim for the excess amount but did not pay the extra Court-fees, and the Court dismissed the suit:

Held, that the order of the Court was erroneous, and the relinquishment made by the plaintiff would not bind him. SELLAMUTHU SARVAGAR *v.* RAMASWAMI PILLAI. **12 M. L. J. 66.**

31. S. 7 (IV) (f). *Civil Procedure Code, Section 215 (a)—Suit for Accounts—Appeal—Small Cause Court suit—Punjab Courts Act, Section 40 (l) (i)—Further Appeal—Deficiency for Appeal to the Lower Appellate Court—Application for heirs to be brought on record—Limitation.*

In this suit the plaintiffs prayed (1) that accounts might be taken and explained to them; (2) to be allowed to inspect the strong-room in which the offerings were stored; (3) for partition of such of the offerings as were partible, and for their share on partition. The suit was valued at Rs. 130, as the approximate share of the plaintiffs, and at Rs. 500, on account of the inspection of the strong-room. The suit entailed the consideration of rules for the management of the Bajreshuri temple at Bhaun, Kangra.

The defendants were the Chowdhris and the plaintiffs were the rest of the *pujaris* and shareholders of the temple. It was declared by the First Court that the plaintiffs were entitled to have accounts taken every six months.

Held, that the suit was a suit for an account though a share in the collections was claimed; and the suit was excluded by article 31, schedule II, Act IX of 1887, from the jurisdiction of the Court of Small Causes. 21 *Bom.*, 248; 17 *Bom.*, 42, *referred to.*

A further appeal lay under section 40 (1) proviso (*i*) under certificate granted by the Divisional Judge.

Held, also that the preliminary order directing accounts to be taken, being a decree was appealable—8 *All.*, 520; 9 *Bom.*, 183 *and* 18 *Cal.*, 464, distinguished.

Held, further, that further appeal was chargeable with *ad-valorem* Court Fee under

Sup: Govt. Acts (Act VII of 1870) (*Cont.*) section 7 (1V) (*f*) of the Court Fees Act. No question as to the amount of the fee payable having been raised in, or decided by the Divisional Court, the appellants were not called upon to make up the deficiency in that Court. *P. R.*, 115 *of* 1884, *followed*.

Having regard to the number of parties, applications for representatives to be brought on the record for the parties who died pending the appeals filed after the expiry of the period of limitation were allowed. KAKA RAM *v.* RAM SARAN. **P. R. 13 of 1901.**

32. S 7, Clauses 1 IX—*Mortgage—Suits for sale of mortgage property only—Valuation of suit—Principal and interest—Suit for money not for foreclosure—Mortgage money. Meaning of—*

A suit instituted by the mortgagee against the mortgagor to recover the mortgage debt (principal and interest) by sale of exclusively the mortgaged property and not from the mortgagor personally or from his other property, is virtually a suit for money and not a suit for foreclosure. The suit does not fall within the provisions of Section 7 Clause IX of the Court Fees Act. The court fee is chargeable on the whole amount of the claim inclusive of interest. 18 *Bom.*, 696 *followed*. NAMA *v.* HARI. **7 B. L. R. 1905 P. 194.**

33. S. 7 (V) (b) (d)—*Court-fee—Claim for definite share of estate paying revenue to Government—Civil Procedure Code (Act XIV of 1882), Section 57—Jurisdiction of Court—Return of plaint.*

The plaintiffs claimed, 2½ shares out of 5 shares forming a Khewat measuring 46 *bighas*, 5 *biswas* and bearing a *jama* of Rs. 92 together with all the appurtenances. The village was a *Bhayachara* one and what the plaintiffs claimed was a half share of the *khata* paying annual revenue to Government, the area of the *khata* being 56 *bighas* 5 *biswas*.

Held, that the claim being one for a definite share of an estate paying revenue to Government, court-fee on the plaint was payable under clause (*b*) of sub-section V of section 7 of the Court-Fees Act.

When the Court holds that the plaint was filed in a wrong Court intentionally with a view to give jurisdiction to a Court which had no jurisdiction to entertain the suit, the proper course would be not to dismiss the suit, but to return the plaint to be presented to the proper Court. 16 *All.*, 286, *referred to* ZAHARIA *v.* GOPAL. **3 All., L. J., 511=A. W. N., 1906 P. 195.**

34. S. 7 (V). *Grazing rights—injunction—Possession.*

The plaintiffs claimed their right to use the land in suit for grazing purposes and sued for possession and injunction restraining the defendants from preventing the plaintiffs from using the land for such purposes. Held that for purposes of Court-fee the suit must be considered as one for possession of land and that no extra Court-fee was required on

Sup: Govt. Acts (Act VII of 1870) (*Cont.*) the value of the wells and buildings erected on the land subsequent to their dispossession—*4 A.* 320 (*F. B.*) *referred to.* RAMZAN *v.* ALLAH YAR. **78 P. L. R. 1903.**

35. S. 7 (V)—*Suit for possession of land and not for redemption of mortgage—Court fee—Refund.*

Where the suit was clearly one for possession of land, and not one for redemption of mortgage on payment of a certain sum due as mortgage money, the nature of the suit as originally brought is in no way affected by the fact that the Court decreed possesion of the land on payment of a certain sum and that so far as that amount is concerned, the decree was accepted as correct by the plaintiff.

There is no provision in the Court Fees Act under which a Court is empowered to direct the refund of the additional Court fee paid on demand by the taxing officer of the Court. PURAN SINGH *v.* KESAR SINGH. **39 P. R. 1907.**

35 (a). S. 7 V. (b) and (d) and S. 28—*Court fee—Document received by mistake or inadvertence.*

The plaint in a pre-emption suit stated: "The suit is valued at Rs. 197-8, five times of Rs. 39-8, the amount of revenue of the property." The property claimed was described as 41 bighas, 10 biswas, 5 biswansis, paying a revenue of Rs. 39-8, entered as holding No. 2 in the khewat, out of 3 biswa, 10 biswansi, 18 kachwansi, 9 nanwansi, 15 tanwansi share, comprising an area of 101 bighas, paying a revenue of Rs. 95, situate in village Ukarua. The plaint was presented on the last day of limitation, and the Court Munsarim accepted this valuation and reported that the plaint was properly stamped.

Held that, as the plaintiff had not stated whether the revenue payable in respect of the share claimed had been separately assessed and recorded in the collector's register as such, it became the duty of the Munsarim to enquire whether it was separately assessed. The plaint having been admitted through the mistake or inadvertence of the officer of the Court, the plaintiff was entitled to the benefit of S. 28 of the Act. HASIB-UL-NISSA *v.* GHAFUR-ULLAH KHAN **A. W. N. 907, P. 110=4 A. L. J. 363=29 A. 382.**

36. S. 7 (V) (b)—*A suit for pre-mortgage (by way of pre-emption) is to bear Court Fees on 5 times* the Revenue of the land. UMRA *v.* HARU. **106 P. L. R. 1903=46 P. R. 1903.**

36 (a) S. 7 Cl. V (c) and 12—*Court-fee—Pre-emption suit—Valuation of land for purposes of Court-fee—Appeal.*

The words "the year next before the date of presenting the plaint" in Cl. V (*c*) of section 7 of the Court-fees Act mean a period of 365 days next before the date of presenting

Sup: Govt. Acts (Act VII of 1870) *(Cont.)* the plaint, the last day of which period will be the date on which the plaint was presented.

Where the valuation of land, the subject-matter of a suit, was made in respect of a year other than the year mentioned in Cl. V (*c*) of section 7 of the Court Fees Act—

Held, that the valuation was not final under section 12 of the Court Fees Act, and an appeal would lie from an order making such a valuation. GHASI RAM *v.* HAR GOBIND. **W. N, All., 1906, p. 66=3 A. L. J. 244=28 A. 411.**

37. S. 7 (V) (d) Proviso (3)—*The annual survey assessment.*

This Proviso has apparently reference only to "the annual survey asssessment which is remitted," that is to say, to the rate of remission at the date of suit and has no reference to remissions previously made but no longer existing. BALWANT RAMCHANDRA NATU *v.* THE SECRETARY OF STATE. **7 B. L. R. 497=29 B. 480.**

38. S. 7 (V) (e)—*Suit for land and Indigo Factory situate thereon.*

When the plaintiff claimed by right of pre-emption land assessed with revenue and a share of indigo factory situate thereon.

Held, that upon the facts disclosed in the case it could not be held that the factory purchased by the vendee formed any part of the zamindari property, or that it passed to her as such, or as appurtenant thereto.—4 *All*: 381; *W. N., All.*, 1900, *p.* 31; 7 *N. W. P. H. C. R.* 38, *referred to.*

Substantial and permanent buildings, such as constitute a factory clearly, come within the meaning of the expression 'house' and not "land," as used in the Court Fees Act. DURGA SINGH *v.* BISHESHAR-DAYAL. **W. N., All., 1902, p. 27=24 A. 219.**

39. S. 7 V (e) and Sch. II, Art. 17 (6) – *Ejectment Suit—Court-fee on plaint.*

Where a plaintiff prays for the ejectment of a tenant from premises for the breach of his covenant contained in his lease or for holding over after his tenancy has expired:

Held, that the suit is for possession of immoveable property and the plaint should be stamped according to the value of the subject matter under Section 7 V (*e*) and not on a Rs. 10 stamp under Sch. II, Art. 17 (6), 11 C. L. R., 91 and 15, A. 63 disstd. from. MAHOMED EBRAHIM SAHIB *v.* BHYMEAH A. ISMAILJI. **1, L. B. R, 1900-02, p. 303.**

40 S. 7 (V) (e) & Sch. II Art. 17 (VI)—*Ejectment of tenant suit for*—

A suit by a land-lord to eject a tenant from his house is governed as regards Court Fees by Sch. II, Art. 17 (*VI*). Held also when a particular construction of the Court Fees Act which is a fiscal enactment in favour of the suitor has prevailed for many a years, strong presumption in favour of that construction arises and no other construction unfavourable to the suitor should afterwards be put upon the enactment, except for some very cogent reason.

Therefore Rs. 10 stamp is sufficient and the suit need not be stamped under Section 7 (V) (*e*).—

15 A. 63, 15 A. 363, 8 C. 593, 8 C. 280, 8 B. 31, 11 C. L. R. 91, 1 P. R. 1887 *referred to*, and 1 L. B. R. 1902, p. 303 disstd. from. P. J. NARAYAN *v* MADAN. **U. B. R. 1903, p. 1.**

41. Ss. 7 (V) (f), and 11.—*Suit for settlement of accounts—Arbitrary value fixed by plaintiff—Finding of Court as to amount actually due exceeding its jurisdiction, effect of—Suits Valuation Act, 1887, S. 8.*

In a suit for settlement of accounts, where the actual amount due to the plaintiff is, in the beginning, unknown to him and can be ascertained definitely only after enquiry, the plaintiff can place an arbitrary value on the relief sought by him and pray for a decree for such sum as may on the settlement of accounts be found due to him from the defendant. This valuation is, however, merely tentative, and the actual value of the suit is the amount, which the Court subsequently finds to be due to plaintiff, and if, in any such case, such actual value is found to exceed the pecuniary limit of the Court's jurisdiction, the Court can not pass a decree in the case but should return the plaint for presentation to a Court having jurisdiction in the case.—169 P. R. 1888, 56 P. R. 1902, and 31 C. 365, Appr., 21 C. 550, Diss. MANNA LAL *v.* SAMANDU. **46 P. R. 1906=94 P. L R. 1906.**

42. Ss. 7 (V) (C) and VI. and 28—*C. P. C. (1882) S. 854 (a) and (b) Time for paying deficiency of Court fees.*

A pre-emptor stated in his plaint the profits of zamidari land to be Rs. 8/4/- and instead of paying stamp on Rs. 123/12/: paid it on Rs. 108/12/- which was wrongly valued in plaint. Defendant objected that the relief was undervalued. The plaintiff applied to be allowed to reduce the amount of profits stated in the plaint to Rs. 6/14/-. The Court rejected the plaint under § 54 C. P. C.

Held this was not a case under § 28 Court Fees Act but one to which § 54 C. P. C. applied.

The mistake or inadvertance referred to in Section 28 of the Court Fees Act is the mistake or inadvertance of the Court or its officer.

Held, that when a case falls within Section 54 of the Code of Civil Procedure, the Court cannot fix a time either under Clause (*a*) or Clause (*b*) of that section, so as to extend the time for making up the deficiency in the Court Fees beyond the expiry of the period of limitation and the plaint was rightly rejected. MUHAMMAD AHMAD *v.* MUHAMMAD SIRAJ-UD-DIN, **W. N., All., 1901, p. 118=23 A. 423.**

Sup: Govt. Acts (Act VII of 1870) *(Cont.)*

43. S. 7, cls. 5 and 11 (e)—*Suit by tenant to recover possession of land against landlord and persons claiming under him—"Occupancy of land" and "ejected"—claim of melwaram in land.*

A suit for possession by a tenant against the landlord and persons claiming melwaram rights under him is governed by cl. 5 and not by cl. 11 (*e*) of Sec. 7, 32 Cl. 628 followed.

The terms of cl. 11 (*e*) and especially the words "occupancy of land" and "ejected" apply to the case of ryots in actual and physical occupation, rather than to persons who are only entitled to the melwaram rights. PALANIAPPA CHETTI *v.* SITHRAVELU. **17 M. L. J. 478 = 3 M. L. T. 8 = 31 M. 14.**

44. S. 7 Clause VI—*Suit for pre-emption on transfer of equity of redemption of house.*

Upon a plaint in a suit for pre-emption on a transfer of equity of redemption of a house the Court-fee must be paid in accordance with section 7 clause VI of the Court Fees Act on the market value of the house which forms the subject of the mortgage.—*—P. R., 1 of* 1896 (*F. B.*) *referred to.*—GHASITA MAL *v.* KANSHI RAM. **123 P. L. R. 1903.**

45. S. 7 Cl. 8—*Suit to set aside sale and attachment—Practice—Proper Court-fee not paid on plaint—Appeal—Duty of Appellate Court.*

A suit to set aside a sale on the ground that the attachment was not binding on the plaintiff being virtually a suit to set aside attachment is chargeable with court-fee under clause 8 of section 7 of the Court Fees Act on the amount for which the property in suit was attached when such amount is lower than the value of the property.

Where a decree is passed in a suit in which proper court-fee has not been paid by the plaintiff and the defendant appeals and the appeal is written on insufficiently stamped paper the defendant should be directed to pay the deficient stamp duty on the appeal within a time to be fixed by the Court before calling upon the plaintiff to pay deficiency in respect of his plaint. GANGATHARA AIYAR *v.* VETA CHETTY. **14 M. L. J. 144.**

46. S. 7 Clause IX Sch. I Art. 1—*Appeals in mortgage suits for redemption.*

In appeals arising in mortgage suits for redemption the court-fee is to be calculated with reference to the value of the subject-matter in dispute in appeal, whether the appeal is by the mortgagor or by the mortgagee.

The word "suits" in sub-section IX of S. 7 of the Court Fees Act does not include appeals; and appeals unless otherwise provided for are governed by Article 1 of the first Schedule. The article applies to appeals in suit for redemption and the words "subject-matter in dispute" therein mean "subject-matter in dispute" in appeal. REFERENCE UNDER THE COURT FEES ACT, S. 5. **29 Mad., 367 = 16 M. L. J. 287.**

Sup: Govt. Acts (Act VII of 1870) *(Cont)*

47. S 7 (9) and 16—*Suit for redemption—Court Fees—Cross objections on appeal C. P. C. § 561.*

The appellant paid on his memorandum of appeal a court-fee on the principal mortgage money though he challanged the redemption decree allowing a certain sum to the respondant who preferred cross objections under § 561 C. P. C. claiming a sum in addition to that allowed to him, but paid a court fees of Rs. 2/- payable on a petition.

Held, that where a mortgagor or mortgagee appeals, not raising the question as to the right to redeem but the question only as to the amount which is payable to effect redemption, the Court-fees should be computed advalorem on the difference between the amounts alleged to be due on the one side and the other.

When no question is raised in appeal as to the right to redeem, the nature of the suit is changed from a suit to redeem a mortgage and the subject matter of the dispute is money only. MOHAMMAD HUSAIN *v.* SAYED JAHAN BEGAM. **2 O. C. 87.**

48. S. 7 Cl. (9)—*Redemption, suit for—Court fee on appeal.*

In a suit for redemption when the mortgagor or the mortgagee appeals, not raising the question of the right to redeem, but challenging the amount held by the Court below to be payable by the mortgagor, the Court-fee should be computed *ad-valorem* on the difference between the amount found to be payable by the Court below and the amount which the appellant alleges should be paid. 2 O. C. 87, *F.*, 6 A. 488, S. C. A. No. 189 of 1905, A. W. N. 87, (1905), 40, 13 A. 94, *R.* RAM ADHIN *v.* HANUMAN. **9 O. C. 153.**

49. § 7 Cl (9) and 17.—A brought a suit for redemption of land in respect of 4 mortgage deeds of different dates for different amounts, and paid the Court-fee upon the sum total of the principal amounts of those deeds and the defendant-appellant who appealed against the whole decree paid the same fee on his memorandum of appeal. It was suggested that the suit embraced 4 "distinct subjects" within the meaning of Section 17 and the plaint and the appeal were each chargeable with the aggregate amount of the fees which would have been payable if there had been 4 separate suits one in respect of each of such subject.

Held Section 7 (IX) applied to the case and that the fee paid was sufficient.

Held, further that Section 17 applies only where there are two or more distinct causes of action and a suit for redemption means only one cause of action, no matter how many deeds may have to be considered to determine the amount payable to the plaintiff. THAKAR JAWAHER SINGH *v.* THAKAR BALWANT SINGH. **7 O. C. 152.**

Sup: Govt. Acts (Act VII of 1870) *(Cont)*

50. S. 7 (IX) & Sch. 1, Art. I—*Mortgage suit—Redemption decree—Appeal—Valuation of memorandum of appeal—Rules of High Court—Rule 19 A.*

In a suit for redemption of a mortgage, the plaintiffs obtained a decree on the condition that they should pay a specified sum. The plaintiffs, considering that this amount exceeded the amount properly payable under the security, preferred an appeal and valued their appeal at the sum which they disputed.

Held, that the appeal was properly valued. That in the case of an appeal when the value of the subject matter of the appeal can be determined, the appellant is only bound to pay a court-fee on the amount ascertained to be the value of subject matter of the appeal. 13 *All.*, 94 *dissented from.* NEPAL RAI *v.* DEBI PRASAD. **2 A. L. J., 105=A. W. N. 1905, p. 49=27 A. 447.**

51. S. 7, Cl. IX—*Redemption suit—Additional sum demanded in taking accounts—Whether Court Fee necessary.*

In a suit for redemption the mere fact that the plaintiffs claimed in the suit payment of any sum which might be found to be due to them on the taking of account, does not alter the nature of the suit so as to necessitate the payment of an additional fee on the plaint, because to such a relief they would be entitled under the ordinary decree for redemption. HUSENI KHANAM *v.* ALI HUSENI KKAN. **A. W. N. 1907, p. 133=4 A. L. J. 375.**

52. S. 7 (IX) (3)—*Mortgage—Regulation XVII of* 1806, *Sections 7 and 8—Suit for possession—Suit for a declaration that the condition of sale has become absolute—Amendment of plaint.*

A suit for a declaration that the conditional sale has become absolute is chargeable with Court-fee under Section 7, paragraph IX, clause 3 of the Court Fees Act.

The term 'demand' in Regulation XVII of 1806 means a demand made immediately before the application for notice of foreclosure is filed in Court.

In a suit for a declaration that the conditional sale has become absolute the plaintiff must prove that the foreclosure proceedings were perfectly regular.

Where the plaint stated that proceedings under Regulation XVII of 1806 had been taken by the plaintiff and prayed that possession of the land mortgaged be decreed in favor of the plaintiff and apparently at the suggestion of the Court prayed for possession was withdrawn and a decree for a declaration that the conditional sale had become absolute was granted to the plaintiff, the Chief Court declined to allow withdrawal of the prayer for the declaration but permitted to add a prayer for possession as mortgagee. CHAUDHRI HAZARA SINGH *v.* MUHAMMAD KHAN. **P. L. R. 134 of 1901.**

53. S. 7, Clause IX, Sch. 1, Art. 1.—*Appeals in mortgage suits for redemption.*

Sup: Govt. Acts (Act VII of 1870) *(Cont)*

In appeals arising in mortgage suits for redemption the court-fee is to be calculated with reference to the value of the subject matter in dispute in appeal, whether the appeal is by the mortgagor or by the mortgagee.

The word "suits" in sub-section IX of Section 7 of the Court Fees Act does not include appeals: and appeals unless otherwise provided for are governed by Article 1 of the first Schedule. The article applies to appeals in suits for redemption and the words "subject-matter in dispute" therein mean "subject-matter in dispute" in appeal. REFERENCE UNDER THE COURT FEES ACT, SECTION 5. **16 M. L. J., 287=29 Mad., 367.**

53 (a). S. 7 (IX) & Sch. I Art. 1.—30 M. 96.

54. S. 7 (X)—*Jurisdiction—Suit for a fractional share, of land assessed to land revenue—Claim for specific performance of agreement—Illegal agreement.*

The plaintiffs claimed $\frac{3}{11}$ share of two plots of land on the allegation that the parties to the suit agreed to buy them in partnership at an auction and they were so purchased in the names of the defendants.

Held, that the suit did not fall within Section 7 (*X*) of the Court Fees Act, and that it was unmaintainable because the plaintiffs had not paid their share of the price for the land purchased.

Held, that for purposes of jurisdiction the suit was properly valued calculating the value of the share claimed at thirty times the land revenue assessed.

Held, further, that an agreement between two persons not to bid against each other at an action is legal and forms a valuable consideration for an agreement giving to the party withdrawing his opposition at the auction. *I. L. R.* 18 *Bom.*, 342, 16 *Cal.*, 194, 13 *Cal.*, *L. R.* 1, *referred to.* NANDA SINGH *v.* SUNDAR SINGH. **P. R. 37 of 1901.**

55. S. 7. (XI) (e)—*Suit for possession of property by tenants against his landlord and persons placed in possession of property by him.*

Section 7, cl. xi (*e*) of the Court Fees Act does not apply to a suit for possession of an occupancy holding brought by the tenant against the landlord and as well as the person whom the landlord has inducted into the land; the Court-fee payable on the plaint in such a case must be computed on the market value of the property which the plaintiff seeks to recover. FURZAND ALI *v.* MOHANTH LAL PURI. **32 C. 233.**

56. S. 7, cl. XI, sub-section cc, (*as amended by Act VI of 1905*)—*Court fee—Ejectment.*

The Court fee payable, on a suit for ejectment from a house against, a tenant is chargeable on one year's rent under S. 7. cl. XI, sub-section cc of the Court Fees Act, as amended by

Sup: Govt. Acts (Act VII of 1870) *(Cont.)*
Act VI of 1905 and not on the market value of the house. DIWAN DILBAGH RAI *v.* FATEH DIN, **24 P. L. R. 1907.**

57. S. 7, Cl. XI (e) and V—*Suit to recover possession of land—Landlord and tenant—"Occupancy of land"—"Ejected"—Suits against landlord and persons claiming melwaram under the landlord.*

A suit by a tenant for possession as against his landlord and other persons in possession claiming under the landlord does not fall under Cl. XI (*e*) of S. 7 of the Court Fees Act, especially where the persons claiming under the landlord are not persons in actual possession; but merely lay claim to the melwaram rights in the land. The suit falls under Cl. V of S. 7 and is a "suit for possession of lands, houses, etc."—*Semble*;—The words "occupancy of land" and "ejected" in Cl. XI (*e*) are applicable to cases where the defendants are ryots or persons in actual physical occupation and not to cases where the defendants lay claim only to the melwaram in the land. PALANAIPPA CHETTI *v.* SETHRAVELU CHETTI. **17 M. L. J. 478.=3. M. L. T. 8=31. M. 14.**

58. Ss. 7, 9 & 10—*Court fee—Net profits or market value wrongly estimated—Limitation—Procedure.*

On a question as to whether the plaint in a suit for pre-emption had been properly stamped, with reference to the net profits of the property in suit, for "the year next before the date of presenting the plaint", an issue was remitted to the lower appellate Court. The finding of that Court was that the amount of profits had been slightly under-estimated. The plaintiff appellant, while contesting the principle upon which the Court below had arrived at its finding, was ready to pay the small deficiency in the Court fee.

Held, that the suit should be remanded to the Court of first instance to be heard on the merits, subject to the payment by the plaintiff of the deficiency in the Court fee. (27 A 197 followed) GHASI RAM *v.*—HARAGOBIND **A. W. N. 1907 P. 18.**

59. Ss. 8 & 11—*Land Acquisition Act (I of 1904) - Appeal against award of compensation—Decree limited to amount claimed on which Court-fee is paid.*

On an appeal against an award as to compensation payable to the owner of property acquired, the decree must be limited to the amount at which the memorandum of appeal has been valued for purposes of Court-fee. MAHOMED ALI AMJAD KHAN *v.* SECRETARY OF STATE FOR INDIA. **30. C. 501.**

60. Ss. 9 & 10—*See §§. 6, 9, 10 & 28 supra No. 7, 152 P. L. R. 1905=104, P. R. 1905. (F. B.)*

61. Ss. 9, 10 & 12—*Appeal.*

Held, that Section 12, Clause 1 of the Court Fees Act, is no bar to an appeal when the question before the Lower Court to decide was merely the class of the suit in order to ascertain under what Schedule of the Act it must be taken to fall for the purpose of fixing the Court-fee payable on the plaint or memorandum of appeal—12 *C. L. R., 148; 1 All., 360 4 Mad., 204; 14 Mad., 169, and 23 Bom., 486, concurred.* H. C. STUDD *v.* MATI MAHTO. **28 Cal., 334.**

62. S. 10 Clause (2)—*Abandonment of portion of claim—Deficiency of court-fee respecting that portion.*

Held, that when a plaintiff, in the initial stage of the litigation, abandons a portion of his claim, he is not compellable to pay court fees upon that claim under penalty of having the whole of his suit dismissed. RAM PRASAD *v.* BHIMA. **A. W. N. 1904. P. 193=1. A. L. J. 577=27. A. 151.**

63. S. 10 (2)—*Civil Procedure Code (Act XIV of 1882), Section 54—Property claimed not properly valued and plaint insufficiently stamped—Deficiency made up after expiry of period of limitation.*

The plaintiff sued for a declaratory decree and in the alternative for a decree for possession. It was objected by the defendant that property was under valued and the plaint in consequence insufficiently stamped. After an enquiry it was found that the court-fee was inadequate. The additional fee was paid in within the time fixed by the Court.

Then the period of limitation for the declaratory decree had expired. The suit was dismissed on the ground that the period of limitation had expired before the additional fee was paid in.

On second appeal it was contended that the Court-fee paid being adequate, having regard to the value stated in the plaint, and that the question of the Court-fee not being raised until after the plaint had been admitted and registered section 10 of the Court-fee Act applied to the case and the suit was improperly dismissed.

Held, that the contention was valid, that section 54 of the Civil Procedure Code and section 10 of the Court-fees Act have reference to different stages of a suit, and that, there being no suggestion here that the plaintiff had fraudulently undervalued the property which he was claiming, section 10 of the Court Fees Act applied in this case. 2 *Mad.*, 308 *followed*, 15 *All.*, 65 *and* 12 *All.*, *distinguished*, 24 *All.*, 218 *referred to.*

Per Aikman J.—That it was open for the plaintiff to ask in the same suit for the two reliefs claimed by the plaintiff.

That the suit should not have been dismissed also on the ground that the deficient Court-fee on the claim for possession was made good within the period of limitation fixed for a suit for possession. BABU LAL *v.* ASI KUNWAR. **1 A. L. J., 641=A. W. N., 1904, p. 224=27 A. 197.**

Sup: Govt. Acts (Act VII of 1870) *(Cont.)*

64. §§ 10 & 12 *Court-fee—Appeal—Memorandum of appeal insufficiently stamped filed in lower appellate Court—Second appeal—Deficiency not made up within fixed time.*

Held, that where an insufficiently stamped memorandum of appeal is admitted through inadvertance and the appeal is decreed, and the attention of the High Court is called to the insufficiency on second appeal and the respondent fails to make good the deficiency within the time allowed to him, the proper order to pass is to discharge the decree of the lower appellate Court and to restore that of the Court of first instance. MADAN LAL *v.* JAI KISHAN DAS, **A. W. N. 1905. P. 277=1 A. L. J. 392.**

N. B.—This case was over ruled by A. W. N. 1905 P. 280 See next below.

65. Ss. 10 & 12.—*Appeal insufficiently stamped filed in Lower Appellate Court—Second Appeal—deficiency not made up within fixed time.*

Where it was discovered in second appeal in the High Court that the respondents when appellants in the lower appellate court, had not paid a sufficient Court-fee on their memorandum of appeal in that Court, and up to the date of the hearing of the plaintiff's appeal in the High Court, though called upon to do so, had not made good the deficiency—

Held, that the proper procedure was not to dismiss the respondents' appeal to the lower appellate Court, but to stay the issuing of the decree, if any, of the High Court in favour of the respondents until such time as the additional Court-fee due by them might be paid. 20 *All.*, 362 *followed*, *W. N. All.*, 1905 *p.* 277 *overruled.* MOHAN LAL *v.* NAND KISHORE. **A. W. N. 1905. p. 280=2. A. L. J. 839. (F. B.)=28. A. 270 (F. B.)**

66 S. 11—*Decree—Construction—Execution on payment of extra court fee.*

The decree in the suit, which was one for possession and rent, ran as follows:—"This Court doth further order and decree that plaintiffs do pay court fee Rs....... on the subsequent rent awarded to him after plaint within 9th September 1904."

Held—That the clause did not form part of the decree and that no amendment of the decree was necessary before the time for payment could be extended. The latter part of the decree was a mere surplusage and did not make the execution of the decree conditional upon the payment of the extra court fee within the time named.

Held, also—The intention of the first part of S. 11 of the Court Fees Act is not that a time should be fixed for the payment of the extra court fee, but merely that execution should be stayed until the extra court fee payable is paid. PERIANAN CHETTY *v.* NAGAPPA MUDALIAR. **16. M. L. J. 543=2. M. L. T. 23=30. M. 32.**

Sup: Govt. Acts (Act VII of 1870) *(Cont.)*

67 S. 11—*Past and future mesne-profits—Civil Procedure Code (Act XIV of 1882), Sections* 209, 211 *and* 212.

Where a plaint asked for past as well as future mesne profits, and an amount was claimed and Court-fee payable paid for past mesne profits only—

Held, that Section 11 of the Court-fees Act applied.—15 *Bom.*, 416; 2 *All.*, 682; 24 *Cal.*, 173 *referred to.*

There is no analogy between interest awarded under Section 209 of the Code and mesne-profits claimed and awarded under Secs. 211 and 212. Interest may be awarded under Sec. 209 as an inducement to prompt satisfaction of the decree and as a penalty for non-compliance with it. Such interest is no part of the claim or relief granted as in the case of mesne-profits. DWARKA NATH BISWAS *v.* DEBENDRA NATH TAGORE **33. C. 12 32.**

68 S. 11. *Mesne profits determined in execution.*

Where the amount mesne-profits is ascertained in execution, further execution until payment of the additional Court fees should be stayed under §. 11. If the Court omits to fix a time for such payment the execution is in abeyance and whenever the fee is paid the decree would be executed. SUBHAGGA SINGH *v.* SHIVA NATH SINGH. **1 A. L. J. 350.**

69. S. 11.—Mesne profits accruing after the institution of suit were also decreed to the plaintiff along with his decree for possession and their amount was to be determined in execution. On his application for execution for those mesne-profits the court ordered that if the decree holder failed to pay court-fee within one month on the amount of mesne profits, accruing after the institution of the suit, his claim for that amount shall stand dismissed.

Held, (per curium) that no court-fee is payable on account of mesne profits for the period after the institution of the suit for immoveable property whether such profits are claimed in the plaint or not.

Held, (per Scott J.) that in cases of ambiguity, an order of a court must be interpreted so as to make it in accordance with law, and that the order passed by the Court must be read as one directing the decree holder to pay additional Court fees or the mesne profits found to be due to him after the date of the institution of the suit. JAFRI BEGAM *v.* ALIRAZA. **6. O. C. 351.**

70. S. 11—*Accounts—Suit for—Portion of suit which claims relief.*

Held, that the words "suit for account" in the first para of section 11 of the Court Fees Act, are applicable to such portion of any suit as claims that relief, *viz.*, relief by way of account. BHOGILAL ASHARAM *v.* JAGJIVAN ASHARAM. **6. B. L. R. 1102.**

70 (a). S. 11, Sch. II Art. 17 (IV)—*Court-fee—Appeal in respect of future interest.*

Sup: Govt. acts (VII of 1870) *(Contd.)*

In a suit upon a mortgage-deed for recovery of principal and interest from the date of the institution of the suit up to the date of the realization, the Court awarded interest up to the date fixed by the decree for payment. The plaintiffs filed an appeal in respect of interest from the date fixed by the decree for payment up to the date of realization. The appeal was allowed and Rs 47,400 were awarded in respect of future interest.

Held, that the memorandum of appeal was liable to a Court-fee of Rs. 10 as provided by sub-section VI of Art. 17 of the second Schedule of the Court Fees Act, for the interest claimed on appeal could not be calculated at the time when the appeal was filed. 12 *Bom. H. C. Rep.* 227 *followed*. BHAWANI PRASAD *v* KUTUB-UN-NISSA BIBI **A. W. N. 1905 P. 84=2. A. L. J. 263=27. A 559.**

71 § *11 and Art: 17 (6) U. B. R. 1903. P. 1. —See § 7 V (e) No 40 supras.*

72. S. 11—*Past and future mesne profit:*— Where a plaintiff asked for past as well as future mesne profits and paid Court fees on the amount claimed for past mesne profits only, the provisions of S. 11 of the Court Fees Act are applicable in respect of the whole suit.—AJJATULLA BHOIYAN *v.* CHANDRAMOHAN BANERJEE.—**6 C. L. J. 255= 11 C. W. N. 1133=34 C. 954.**

73. S. 11—*Suit on Tort—for fraud Assessment of damages in plaint—Large amount found due—More due.*

Even in a suit for damages based on fraud, it is open to the plaintiff to enter in his plaint an approximate estimate of damages paying Court-fee thereon and offer to pay additional Court fee in case a larger amount is found to be due before the decree is passed. S. 11 of the Court Fees Act will not apply to the case, and consequently the plaintiff cannot be allowed to pay Court fee after the decree is passed and before execution. RAGAVAJI SAIT *v.* ANNAMALAI MUDALI.—**17 M. L. J. 625.**

74. §§ 11, 12—*Jurisdiction—Valuation—Suit for dissolution of partnership—Course of appeal.*

This was a suit for dissolution and winding up of a partnership, rendition of accounts by the defendants, and a decree for such sums as the plaintiffs may be found entitled to against the proper parties. The plaintiffs valued their suit, for purposes of Court-fees, at Rs 2,000; but added the usual clause that they would pay the additional fee if more was found due. The District Judge passed a decree for an amount over Rs 5,000. The defendants appealed to the Divisional Judge, who modified the decree on certain points. The defendants filed a further appeal in the Chief Court, and objection was taken that the Divisional Judge had no jurisdiction to hear the appeal which lay to the Chief Court.

Sup: Govt. acts (VII of 1870) *(Contd).*

Held, that the contention was sound, and the Divisional Court had no jurisdiction to hear the appeal.—*XX Bom., 265; 1 P. R., 1887 (F. B.); 63 P. R., 1891; 169 P. R., 1888; 20 P. R., 1879; 40 and 86 P. R., 1892, referred to.* MAMAN MAL *v.* ABDUL AZIZ.—**58 P. R. 1902.**

75 § **12**—*See § 5 and 12 supra No. 3 A. W. N. 1903. P. 214.*

76. § **12**—*See 9 and 10—28 C. 334 supra No. 61.*

77. S. 12.—*See 10 and 12 supra Nos. 64 and 65.*

78. S. 13—*Civil Procedure Code (Act XIV of 1882), Sections 112, 113, 588 (10)—Written statement—Compliance with order requiring written statement to be filed—Dismissal of suit—Appeal— Decree—Costs—Court-fees—Refund of Court-fee.*

In a suit for ejectment of the defendants, the Court called upon the plaintiffs to furnish particulars on the following question:

"Whether the defendants jointly took possession of the entire plot now claimed at the same time, or, whether each took possession of a separate portion and at a different time." The plaintiffs put in a written statement, in which they expressed their inability to give the exact date of the trespass by each of the defendants. The Court then dismissed the suit under section 113 of the Civil Procedure Code.

Held, on appeal, that the order of dismissal was wrong, for the order was complied with so far as the information of the plaintiffs permitted.

With reference to the question of costs, it was urged, on behalf of the respondent, that they should be allowed on the footing that the appeal was one against an order under section 588 (*10*) and not an appeal against decree.

Held, that though in acting under section 113 of the Civil Procedure Code the Court may pass a decree if the circumstances admit of any decree being passed, yet to operate as a decree the decision should be such as to come within the definition of that term in section 2 of the Civil Procedure Code and the present order was not within that definition, as no right or defence set up was adjudicated upon. Notwithstanding that the order was one dismissing the suit, it must have been described as an order only. Vakil's fee allowed as if it were an appeal against an order.

The High Court allowed refund of court-fee under section 13 of the Court Fees Act, as the court-fee was payable on the footing of the appeal being against an order and not against a decree. R. G. ORR *v.* NAGAPPA CHETTY. **16, M. L. J. 30.**

79. S. 16.—*Stamp duty on objections filed under Section 561, Civil Procedure Code, not payable before hearing.*

Sup: Govt. acts (VII of 1870) *(Contd).*

Under Section 16 of the Court Fees Act the stamp duty on objections made under Section 561 of the Code of Civil Procedure need not be paid till the time of hearing. REFERENCE UNDER COURT FEES ACT, SECTION 5. **25, M. 24.**

80. S. 17, *"Two or more subjects – meaning of—Mortgage—S. 17 of the Court Fees Act not confined to cases where the reliefs claimed are cumulative.*

The phrase "two or more subjects" may not admit of a precise definition applicable to all cases; and it may be that when reliefs are claimed in the alternative with reference to the same cause of action, Sec. 17 will not govern the case. They may be so also when the relief claimed is one and the same though the claim is sought to be made out on distinct alternative grounds. But where the plaintiffs claim two reliefs in the alternative, and both are based on different causes of action, and are such as can be made the grounds of separate suits, the reliefs claimed are "distinct subjects" within the meaning of Sec. 17 of the Court Fees Act. Where a plaintiff prayed for redemption of a mortgage, the principal amount secured whereby was Rs. 3,000 and, in the alternative, for recovery from the defendants of various sums aggregating more than Rs. 2,000 on the footing of a mortgage to be executed by the plaintiff to the defendants, in accordance with certain provisions contained in an earlier mortgage.

Held, that the suit embraced two *distinct* subjects and was chargeable with the aggregate amount of the Court-fees to which the plaints embracing separately each of the reliefs prayed for would be liable; and that, consequently, the appeal from the Subordinate Judge lay to the High Court and not to the District Court. NELLA KHANDAN *v.* ANANTAKRISHNA PATTAR. **1, M. L. T. 426 = 16 M. L. J. 462 = 30 M. 61.**

81. S. 17.—*Pre-emption—Suit for pre-emption of two villages out of a large number conveyed by the same sale deed—Court-fee—Distinct subjects.*

The plaintiffs brought a pre-emption suit for certain shares in two villages out of several villages sold by one and the same conveyance. The court-fee which they paid on their plaint was calculated on five times the total Government revenue of the lands in suit of the two villages. The plaintiffs were required to pay court-fee calculated separately on five times of the revenue of lands of each village.

Held, that the plaint was sufficiently stamped originally. The words "distinct subjects" in Section 17 of the Court Fees Act must be taken to mean "distinct causes of action."

The two villages were not distinct subjects and therefore the court-fees were not leviable in respect of each village separately. 1 *All.*, 552, 2 *All.*, 676 *and* 16 *All*, 401 *followed.* DURGA PRASAD *v.* PURANAR SINGH. **A. W. N. 104 p. 210 = 27 A. 186.**

Sup: Govt acts (VII of 1870) *(Contd).*

82. S. 17, Art. 1.—*Practice—Consolidation of cases.*

The appellants filed 44 appeals against orders of the Subordinate Judge in references made to the Court under the Land Acquisition Act. Upon their application it was ordered that one of the appeals should be treated as a test case, and the proceedings arising out of the other references should be stayed until the decision of the said test case. After the decision of that case the appellants applied that their other appeals should be taken up and heard, and that they should be allowed to make up any deficiency that there might be in the Court-fee stamps upon which the appeals were preferred. The parties to these appeals were the same.

Held, that the appeals should be consolidated and the appellants be required to pay Court-fees upon the value of the consolidated appeals under Section 17 of the Court Fees Act as involving distinct subjects, subject to the limitation under Article 1, Schedule I of that Act, namely, Rs. 3,000. The plots of land, subject of the references, being different and in the occupation of different tenants who were not parties to the appeal, did not affect the order. KASHI PROSAD SINGH *v.* SECRETARY OF STATE FOR INDIA. **29 C. 140.**

83. S. 17—*Suit embracing two or more distinct subjects—Claim on an agreement to sell with an alternative claim for pre-emption.*

The plaintiff claimed firstly specific performance of an alleged agreement to sell to him certain immovable property, and secondly, in the alternative, the enforcement of a pre-emptive right in respect of a mortgage of the same property executed by one of the defendants in favour of the other. *Held*, that the suit was within the meaning of S. 17 of the Court Fees Act, 1870, a suit embracing two distinct subject matters and therefore chargeable with the Court fee assessable upon each alternative relief separately. HASHMAT-UN-NISSA BEGAM *v.* MUHAMMED ABDUL KARIM.—**4. A. L. J. 127 = 1907 A. W. N. 4; 29 A. 155.**

84. S. 17—*Redemption Suit—7 O. C. 152 See §§ 7 & 17 Supra No. 49.*

85. S. 19 (C)—*Schedule I, Article 11—Property—Like grant—Will conferring general power of appointment—Exercise of the power.*

The testatrix by her will exercised a general power of appointment created by the will of her deceased husband. The will of the testatrix recited that by the will of her deceased husband it was stated that Rs 7,000 out of his property should be lent out on interest: that the interest derived, from time to time, should be added to the principal amount; and that the amount so accruing should be paid to those whom the testatrix might appoint by will. The fund was paid into Court under an order made in a suit to administer the husband's estate, and was invested in Government promissory notes. The will of the testatrix appointed an executor and directed that he

Sup: Govt. acts (VII of 1870) *(Contd).*
should take the aforesaid amount after payment of debts and funeral expenses, should pay certain specified amounts to certain specified person, and the residue to *A.B.*

On the death of the husband of the testatrix his will was proved, and probate duty was paid on the principle amount of Rs 7,000. The executor appointed by the will of the testatrix applied for probate of her will, and a question arose, whether the executor was liable to pay probate duty on the fund or any part thereof.

Held, that power of appointment to the fund held by the testatrix was 'property' within the meaning of Article 11 of the Schedule to the Court Fees Act and of the statutory form of affidavit as to valuation, and that the estate of the testatrix was liable to probate duty in respect thereof. Section 19 *(c)* had no application since the grant; which was applied for in the present case, was not a 'like grant' to that which was obtained in respect of the husband's estate, as the two estates were different. *In re*—LAKSHMINARAYANA AMMAL—**25. M. 515.**

86. S. 19 (D).—*Trust estates—Exemption from probate duty—Joint family property—Survivorship.*

H. D., the head of a joint Hindu family, died, having in his name as their registered holder certain shares valued at Rs. 11,980 in Joint Stock Companies. After his death, his sons applied for letters of administration limited only to one share valued at Rs. 275 and the letters of administration were granted. Subsequently they applied for letters of administration in respect of the entire property left by the deceased except the one share for which letters were already granted to them, claiming exemption of duty in respect of the letters of administration asked for.

Held, that as the property, in respect of which the letters of administration were asked for, was the property held in trust by the deceased as surviving trustee, for the joint family, the letters of administration should be exempted from court fee.

The exemption of trust estates from the payment of *ad valorem* court fee is not conditional on the circumstance that there has been a previous grant of probate or letters of administration on which a Court fee has been paid. 27 *Bom.*, 140 s. c., 4 *Bom., L. R*, 974, *dissented from* 27 *Cal*, 280, *followed*. THE COLLECTOR OF KAIRA *v.* CHUNILAL HARILAL. **6 B. L. R., 652 = 29 B, 161.**

87. S. 19 (D).—*Letters of administration granted to son of a Hindu governed by Mitakshara—Exemption from payment of Court-fee—Appeal—Collector's right of.*

Where a Hindu governed by Mitakshara obtained letters of administration in respect of certain moneys due to his deceased father, stating that the moneys belonged to the deceased, and on his application court-fee deposited by him was refunded by the District Judge, on the ground that the deceased was joint with his sons and held the estate as a trustee, and the Collector appealed to the High Court against the order of the District Judge—

Held, that as Collector was not a party to the proceedings the appeal did not lie. 23 *Bom.*, 386 *referred to.*

The High Court treated the appeal as an application for revision, and *held*, that the District Judge had exercised a jurisdiction not vested in him by law in allowing the refund.

For the operation of section 19 D of the Court Fees Act it is an essential condition that there must be a previous probate or letters of administration in which Court-fee has been paid. That is the basis of the exemption from the payment of Court-fee allowed by the section; where no such duty has been paid there is no case for the section to apply. 23 *Cal.*, 980 *not followed.*

In an undivided Hindu family when a coparcener dies there are no effects or property of his to which the surviving co-parceners can succeed as heirs but they take the whole of the family property by right of survivorship. THE COLLECTOR OF AHMEDABAD *v.* SAVCHAND LADUKCHAND. **4 B. L. R., 974 = 27 B. 140.**

88. S. 19 (H) as amended by Act XI of 1899.—*Application by Collector for enquiry—When enquiry may be made—Costs of enquiry.*

A Collector making an application under section 19 *H* of the Court Fees Act must make out a case for enquiry upon definite facts, and is bound to place before the Court proper materials to show that an enquiry is needed. It is not enough for the Collector simply to make an application for enquiry,

The Act does not specify in what way or by whom costs to be incurred in making enquiry should be met. It is the duty of the Court if possible, and if the circumstances permit to hold the enquiry itself and so save further expenses of the parties. *In the goods of* JAMES RALEY AUGUSTUS STEVENSON. **6 C. W. N. 898.**

89. S. 19 (I)—*Letters of administration—filing of valuation of property—payment of court-fee.*

S. 19. (I) of the Court Fees Act prohibits an order entitling a petitioner to the grant of probate or letters of administration until the petitioner has filed in the court a valuation of the property in the form set forth in the third schedule to the Act, and the court is satisfied that the fee mentioned in No 11 of the first Schedule has been paid on such valuation. MAUNG YE GYAN *v.* MA HME AND OTHERS. **1 L. B. R. 1900 1902 p. 229.**

90. S. 19 (1). *Letters of Administration—Objector asking for letters himself—procedure—Probate and Letters of Administration Act S. 64.*

When a caveator files a petition objecting to the grant of Letters of administration

Sup: Govt. acts (VII of 1870) *(Contd)*
and concluding with a prayer that letters may be granted to him, this does not constitute a sufficient application for letters within the meaning of S. 64 (Probate and Letters of Administration Act).

No order entitling a petitioner to letters ought to be made until the petitioner has filed in Court a valuation of the property in the form set forth in the third schedule of the Court Fees Act and the Court is satisfied that the fees mentioned in the first Schedule has been paid on such valuation.

When an objector asks for letters for himself he should be required to put in a petition setting out the facts required in S. 64 of the Probate and Letters of Administration Act together with a proper valuation of the estate. MAUNG PO AND ANOTHER v. MAUNG KYA ZANG. **1 L. B R. 1900-1902 P. 178.**

91. S. 23 and Specific Relief Act (1 of 1877),—*Section 42—Declaratory suit—Hindu Law—Reversioner's rights—Receiver—Suit for appointment of—Injunction to restrain waste by life-tenant, Court Fees—Money value of relief.*

As a general rule of law, a presumptive reversionary heir, that is the person who would succeed if the person having the life-interest in property were to die at the moment of the suit, is entitled to bring a suit for a declaration that as against the life-tenant he is entitled as next reversioner, for an injunction to restrain the defendant from wasting the property in dispute and for the appointment of a Receiver. *L R*, 8 *I. A.*, 14 *followed*, 10 *Mad*, 90 *referred to*, 8 *Cal*; 12 *dissented from.*

In a suit for an injunction and for the appointment of a Receiver, no money-value need be put upon a claim for the appointment of Receiver, as there is no standard for fixing the same. Assuming that such a claim could be valued, the Court should call upon the plaintiff to make good the deficiency in Court-fee, if it is of opinion that what was paid is inadequate; it will not be justified in dismissing the suit, without giving an opportunity to the plaintiff to supply the deficiency. MANMATHA NATH BISWAS v. ROHILLI MONI DASI **2 A. L. J. 84—A. W. N. (1905), 6=27 A. 406.**

92 §. **28**—*See* § *6 and 28—123 P. R. 1907 Supra No. 5.*

(93) §. **28**—*Civil Procedure Code (Act XIV of 1882), Section 54—Plaint insufficiently stamped—Deficiency paid after expiration of limitation period prescribed for suit—Limitation.*

The date of the institution of a suit should be reckoned from the date of the presentation of the plaint, and not from that on which the requisite Court-fees are subsequently put in, so as to make it admissible as a plaint.

A Court has discretion to enlarge the time originally fixed for making good the requisite stamp. 19 *Cal.*, 780, 27 *Cal.*, 814 *followed.* RAJKISHORI KOER *v.* MADAN MOHAN SINGH. **31. C. 75.**

Sup: Govt. acts (VII of 1870) *(Contd).*

94 S. 28—*Plaint insufficiently stamped when filed—Deficiency made up after expiration of limitation.*

When an insufficiently stamped plaint is filed within the period of limitation prescribed for the suit but the deficiency in court-fee is made up after the expiry of such period, the suit must be dismissed. The deficiency in court-fee cannot be made good after the limitation has expired 23 *All. 423 followed.*

Limitation is not saved on the ground that the deficiency was due owing to a mistake of the plaintiff which the *munsarim* had failed to detect. CHATARPAL v JAGRAM.—**2 A. L. J. 55=W. N., All, 1905, p. 12=27 A. 411.**

95. S. 28—*Civil Procedure Code (Act XIV of 1882), Section 54—Court fee—Plaint file insufficiently stamped—Deficiency made up after expiry of limitation period—Limitation.*

The plaintiff instituted a suit on the last day allowed by limitation for the filing of the suit. The plaint was insufficiently stamped. The mistake in regard to the stamp was not a mistake of the Court or any officer of the Court. It was a mistake on the part of the plaintiff, attributable to him, and it was not discovered in the Court of first instance, and when it was discovered the period allowed by limitation for the presentation of a valid plaint had expired.

Held, that the suit was time barred—*12 All., 57, 129, 23 All., 423, W. N. All., 1904, p. 133, followed : 24 Mad., 331, dissented from* — RAM TAHAL SINGH *v.* DUBRI RAI. **3 A. L. J. 838=A. W. N. 1906 P. 21=28 A. 310.**

96. § **28**—*Civil Procedure Code (Act XIV of 1882), Section 54—Plaint insufficiently stamped filed on the last day of limitation—Time granted to file additional court-fee—Limitation—Pre-emption suit.*

When an insufficiently stamped plaint is filed within the period of limitation prescribed for the suit but the deficiency in court-fee is made up after the expiry of such period the suit must be dismissed. *23 All., 433 followed.*

When a Court fixes a time under clause (*a*) or clause (*b*) of section 54 of the Civil Procedure Code it must be a time within limitation prescribed for the suit. *15 All., 65 followed.*

The mistake or inadvertence referred to in section 28 of the Court Fees Act is a mistake or inadvertence on the part of the Court or its officers. *12 All., 143 followed.*—JAGRAM *v.* CHATARPAL.—**A. W. N. 1904. P. 133.**

97. §**28**—*Civil Procedure Code (Act XIV of 1882), Sections 54, 117, 562—Partition—Rejection of plaint without framing issues—Remand.*

In a suit for partition of joint family property it was alleged by the plaintiffs that they and all the members of the family were still in joint possession of the entire family property.

Sup: Govt. acts (VII of 1870) *(Contd).*

The plaintiff paid a Court Fees of Rs 10 and prayed for a declaration that he was entitled to partition as well as possession of joint family property.

The Court, under the provisions of section 117 of the Civil Procedure Code, examined some of the parties, and without framing any issues rejected the plaint under section 54 of the Code on the ground that the plaintiffs were not in joint possession of the whole property in dispute and sufficient court-fee had not been paid on the plaint though time was granted to them to do so.

Held, that the Court was wrong in dismissing the suit without framing any issues. The case was remanded under section 562 of the Civil Procedure Code. NAKCHED SINGH *v* JHAGRUSINGH.—**A. W. N. 1905. P. 170.**

98. S. 28 *and Civil Procedure Code (Act XIV of 1882),—Section 582 A—Appeal insufficiently stamped—Order to make up the deficiency—Payment within the time fixed but after limitation period.*

A memorandum of appeal was not properly stamped, but the Court officials passed it as hearing a sufficient stamp. The Court, however, refused to determine the question raised in the appeal about which the Court fee was not paid, but fixed a time for or the payment of the deficient stamp and adjourned the hearing of the case. The payment was made within the time specified by the Court, but beyond the statutory period of limitation, within which the appeal ought to have been filed. On the adjourned hearing of the case, the Court declined to entertain the question mentioned above, on the ground that the Court-fee had not been paid within the time prescribed for filing the appeal.

Held, that the Court was not justified in practically allowing an appeal against its own decision. The Court was competent to cure the defect of a deficient stamp by exercise of the power conferred by section 582 A of the Code of Civil Procedure, and it was also within the power of the Court, under section 28 of the Court-fees Act to allow an extra stamp to be affixed to make up the deficiency. It ought not to have declined to entertain the questiont referred to—*W. N. All*, 1901, *p.* 21, *referred to.* ANUPA *v.* MADHO SINGH. **A. W. N. 1902. P. 153.**

(98a) S. 28—See § 7 (V) (c) and 28, 23, A. 424, No. 42 *supra.*

99 S. 23.—*Civil Procedure Code 1882 Section 582 A.*

A plaint was filed stamped insufficiently through mistake of law as to the court-fee payable.—The suit was dismissed. An appeal was filed and the Court fee paid on the memorandum of appeal was also insufficient. The plaintiff then filed a second appeal and paid the proper Court-fee.

An order under section 28 of the Court Fee Ac twas passed directing the plaintiff to make up the deficiency in regard to stamp duty payable on the plaint and the memorandum of appeal disallowing the objection of the defendant that the suit was liable to be dismissed. VALAMBAL AMMAL *v.* VYTHILLINGA MUDALIAR. **11 M. L. J. 119 =24 M. 331.**

100 Ss. 28 and 30—*Stamp bearing names of different persons and different dates—Refusal to punch.*

The plaint was written on an impressed stamp of Rs. 15, and an adhesive stamp of Rs. 2 was affixed to it. The stamp of Rs. 15 was in the name of an attorney for the plaintiff, and the adhesive stamp was in the name of another person. The dates of the two purchases were different. The punching officer seeing the difficulty refused to punch the stamps. The matter was brought to the Registrar's notice, who asked the attorney for a letter stating the circumstances so that they might be on record. The attorney, instead of complying with that intimation and thinking it implied an indulgence, chose to refuse it.

Held, that the punching officer was justified under the circumstances in refusing to punch the stamp. GEORGE GERSON *v.* RADHA KISSEN. **6 C. W. N. 785.**

101. S. 28.—*Documents in advertently received—Appeal challenging the whole decree —Court fee.*

A decree for sale on several mortgages was obtained by the plaintiffs against a number of defendants. Some of the defendants appealed. So far as their interest in the mortgaged property was concerned, the appellants valued their appeal at Rs 11, 648, the total amount of the decree being Rs 28, 313, and they paid a Court fee in accordance with this valuation. Two of the grounds of appeal, however, challenged the decree in its entirety. *Held*, that the memorandum of appeal should have been stamped to the full value of the decree, also that the insufficiency of the Conrt fee could not be said to be due to a mistake within the meaning of S. 28 of the Court Fees Act, 1870. DALAWAR HUSAIN *v.* BHAGWAT DAS.—**4 A. L. J. 130 = A. W. N. 907 P. 63.**

102. S. 28—See §§ 7 Cl. (V) & (VI) C. & 28–23 A 423—*See supra No. 42.*

103. S. 28—See §§ 6, 9, 10 & 28—152 P. L. R. 1905 = 104 P. R. 1905—*See supra No. 7.*

104 S. 30 and 28—See § 28 & 30—6 C. W. N. 785—*Supra No. (90.)*

105 S. 31—*Process fees to be paid by the accused—Criminal Procedure Code, 1898, Section 515—Compensation to be awarded to the complainant.*

The accused was convicted of an offence under section 323 I. P. C. and was ordered to pay a fine of Rs 15 and also to pay 'the complainant's costs of the prosecution.' A warrant was issued for the collection of Rs 12-4 from the accused. This sum was made up as follows. Rs. 2-4 Court and process fees paid

Sup: Govt. acts (VII of 1870) (*Contd*).
by the complainant; Rs. 10, two fees of Rs. 5 each, paid by complainant to the medical officer for a certificate and for giving evidence in the case.

Held, that the order as regards Rs. 2-4 was valid. Under section 31 Court Fees Act it is the imperative duty of the magistrate to order payment of Court and process fees. But the order as to Rs 10 was illegal; for although the medical officer's fees were expenses properly incurred in the prosecution, they could only be awarded to the complainant out of the fine levied from the accused and could not be levied from the accused in addition to the fine.

Section 545 of the Criminal Procedure Code must be taken to exclude those expenses in regard to which the court has no discretion. QUEEN-EMPRESS *v* YAMANA RAO.—**24 Mad. 305**

106. S. 31.—*Refund of Complaint and process fees—Cattle Trespass Act 1871 S. 20.*

§ 31 as to Refunds of complaint and process fees on conviction applies to complaints of illegal seizure of cattle under S. 20 Cattle Trespass Act 1871. EMPEROR *v* THA NIZAU,—**4 L. B. R. 1907 P. 11.**

107. S. 31—*Complaint—Report by Superintendent of Vaccination—Vaccinations Act, 1880, S. 18—order for costs.—*

A report made by a Superintendent of Vaccination under section 18 of the Vaccination Act, that a notice issued by him has not been complied with, is not a complaint of an offence, and a Magistrate who makes an order for compliance with such notice cannot direct the refund of Court-fees under section 31, Court-fees Act, or the payment of costs. KING-EMPEROR *v* PO KAN.—**4 L. B. R. 1907 P. 12.**

108. S. 31 -*Costs payable in addition to fine imposed.*

The amount of the Court Fees paid on the complaint and of the process fees incurred by the complainant should be paid in addition to the fine imposed and not out of the fine imposed on the accused. QUEEN EMPRESS *v.* NGA TUN—*S. J. L. B. 595 followed* CROWN *v* PO HLAW.—**1 L. B. R. 1900-1902 P. 209.**

109. S. 34—*Stamp Act 1899, Section 69—Sale of stamps by one who has stolen them.*

A person who exchanges for money a stamp which he has stolen is guilty of the offence under section 69 of the Stamp Act or section 34 of the Court Fees Act according to the kind of the stamp sold. QUEEN EMPRESS *v.* VIRASAMI. **24 Mad. 320.**

110 S. 34 Cl. (3).—*Mukhtar exchanging a Court-fee stamp.*

A mukhtar transferred a Court-fee stamp purchased on behalf of one client to another on the promise that the latter will transfer another stamp of equal value. He was convicted of an offence under section 34 of the Court Fees Act.

Sup: Govt. acts (VII of 1870) (*Contd*).

Held, that the conviction was illegal as the transaction was not a sale. EMPEROR *v.* KEDAR NATH SAHA. **7 C. W. N. 704=30 C. 921.**

111. Sch. I, Act. 1—*Civil Procedure Code, (Act XIV of 1882) Section 526—Arbitration—Award. Decree made in accordance with—Appeal—Court-fee.*

An appeal was filed in the High Court against a judgment and decree directing that an award made on a reference to arbitration by the parties themselves should be filed under the provisions of section 526, Civil Procedure Code. The amount of Court-fee paid on the memorandum of appeal was Rs 2 The decree was in terms to the effect, that the plaintiff was to recover the sum of Rs. 3,248 and odd, as awarded by the arbitrators. A preliminary objection was taken to the hearing of the appeal on the ground that the appellant had not paid the proper court-fee and that the memo of appeal ought to bear an *ad valorem* fee in accordance with Schedule I of the Court Fees Act.

Held, (*Gosh and Geidt J. J.*)—That an order directing that such an award be filed is an order having the force of a decree and is in effect a decree. The memorandum of appeal ought to bear a court-fee in accordance with Art. I Schedule I of the Court Fees Act. 29 *Cal.*, 167 and 5 *All.*, 333 *referred to*, 23 *Cal.*, 723 *distinguished.* HARI MOHAN *v.* KALI PROSAD CHALIHA. **33 C. 11.**

112. Sch. I, Art 1—*See S. 17 Art. 1. 29 C. 140. Supra No. 72.*

113. Sch. I Art 1—*See 27 A. 417 No. 50 Supra.*

114 Sch. I, Art 1.—*Decree payable by instalment—Appeal—Court-fees.*

The first Court granted a decree payable by instalments conditionally upon the defendants furnishing security.

Held, that the proper fee on a memorandum of appeal by the defendants against the condition imposed was Rs. 10, as the defendants do not claim to be relieved from any part of the decretal amount, but only ask to be allowed to satisfy the debt in a particular way. 10 *M.* 187 *and* 19 *C.* 272 *distinguished.* RAI SAHAB BIHARILAL *v.* SETH NANHE LAL. **14 C. P. L. R. 1901 p. 172.**

115. Sch. I Art. 1—*Muhammedan Law—Mother's power to mortgage property of minor children—Minor—Order to make restitution—Appeal by minors—Court-fee.*

Where a Muhammedan mother mortgaged the property of her minor children, and did not profess to do so as their guardian *de jure* or *de facto*, *held*, that the mortgage was void. The mother of the minors not being their natural guardian according to Muhammadan Law, being only their mother and not one of their paternal relations, and not being a certificated guardian appointed

Sup: Govt. acts (VII of 1870) *(Contd).*
under any Guardian and Wards Act in force at the time of the mortgage, the mortgage could not, in any way, bind the minors or their property.

Plaintiffs obtained a decree on a mortgage executed by a Muhammadan mother for herself and on behalf of her minor children, directing her minor children, who were defendants in the case, to make restitution to the plaintiffs in proportion to their shares. On the appeal of the minors, *held*, that the appeal was liable to be charged *ad valorem* Court-fee, and a Court-fee of Rs. 10 was insufficient, and that the decree ordering restitution was contrary to law.

Held, also, that if the minors had been suing to recover possession of their shares of the property, they could be ordered on the principle that he who seeks equity must do equity, to refund the consideration-money of the mortgage to the extent to which they had benefitted by it. MOYNA BIBI *v.* BANKU BEHARI BISWAS. **6. C. W. N. 667 =29. C. 473.**

116. S. 7, Schedule I, Article 1—*Appeal from decree exonerating property from liability to debt—Mortgage suit—Value of the subject-matter in dispute in appeal—Debt exceeding value of property exonerated.*

§. 7 of the Court Fees Act has no application to an appeal where the dispute is as to the liability of certain lands to be proceeded against in respect of the mortgage debt, *i.e.*, where the relief sought in appeal is the right to proceed upon certain of the mortgaged properties exonerated by the decree of the Lower Court.

The value of the subject-matter in dispute in an appeal against a decree exonerating certain lands from their liability to the debt is the value of the property, where the debt exceeds the value of the property exonerated; and court fees need be paid only on such value. 4 *Mad. 336; 10 Mad. 187; approved, 16 Mad. 326; distinguished.* KESAVARAPU RAMAKRISHNA REDDI *v.* KOTTA KOTA REDDI. **16. M. L. J. 458=1 M. L. T. 311. (F. B.).=30. M. 96.**

117. Sch. 1, Art. 1.—*Civil Procedure Code, S. 523—Appeal from a decree in accordance with an award.*

Held, that the proper Court fee payable upon a memorandum of appeal from a decree passed in accordance with an award based on an order of reference under S. 523 of the Code of Civil Procedure is an *ad valorem* fee and not a fixed fee of Rs. 10.—REFERENCE UNDER S. 5 OF ACT No. VII OF 1870. **1907 A. W. N. 177.**

118. Sch. I Art. 1—Consolidation of the values of appeals, 29 C. 140 See No. 85 *Supra.*

Sch. I Art. 1—*Memorandum of appeal—Court fee.*

G, A and K were co-defendants in a suit. K valued his appeal at a certain amount and paid full court fee thereon, G and A filed a

Sup: Govt acts (VII of 1870) *(Contd).*
separate appeal valuing it at the same amount, but paid Rs. 2/- court fee on their appeal.

Held, that their appeal was not sufficiently stamped. GHAZANFAR ALI KHAN *v.* RAM DIAL. **3 O. C. 164.**

119. Sch. I. Art 1—*Mortgage—Payment of mortgage—Debt by a third party—Extinction of Mortgage—Charge—Subrogation—Presumption Intention of parties—Protection of interests.*

The general rule of equity is that a man having a right to act in either of two ways shall be assumed to have acted according to his interest.

The question whether a mortgage is extinguished when the mortgage-debt is paid off by a stranger, or whether it is kept alive in favour of the person making the payment, is a question of intention of parties.

In the absence of any express declaration of the intention of the parties, the general rule is to be applied and it shall be presumed that the mortgage is kept alive in favor of the person paying off the debt.

This presumption becomes even stronger when at the time of making some of the payments the mortgagor is already indebted to the lender, and by the application of the doctrine of subrogation the lender is entitled to the benefit of the first mortgage, when it is his debt that is paid off JAGATHAR NARAIN PRASAD *v.* A. M. BROWN, GOPI LAL *v.* A. M. BROWN. **4 Cal. L. J., 121 10 W. N., 1010=33 C. 1133.**

120. Sch. Art. I.—*Civil procedure Code (Act XIV of 1882), Section 330—Execution of decree—Obstruction by third party—Decree—Appeal Court-fee on appeal—Court Fees Act.*

When a claim is registered as a suit under Section 330 of the Civil Procedure Code, and a decree for possession is passed in favour of the decree-holder, and appeal is preferred against the decree, the memorandum of appeal is charged with *ad-valorem* Court-fee on the value of the property. BALASUNDRA MUDELLY *v.* RAJALINGAM CHETTIAR. **29. M. 172.**

121. Sch. 1 Art. 1 & Sch. II Art. 11—*Land Acquisition Act (I of 1894), Sections 8 and 30—Compensation for land acquired by Government—Application for apportionment dismissed and parties referred to Civil Court—Appeal—Court-fee—Decree—Civil Procedure Code (Act XIV of 1882), Section 2—*

When in a reference under section 18 of the Land Acquisition Act the District Judge dismissed the application made to him for apportionment of compensation allowed for land acquired by Government and referred the parties to Civil Court—

Held, that the order was made without jurisdiction. The case was remanded to the District Judge to apportion the amount of compensation as he thought fit.

Held also, that the order of the District Judge was not a decree, and an appeal against the order was chargeable with court-fee

Sup: Govt. acts (VII of 1870) *(Contd).*
under article 11 of the second Schedule of the Court Fees Act. HARRISH CHANDRA CHATTERJI *v.* BHOBA TARINI DEBI.— **8. C. W. N. 321.**

122. Sch. I, Arts. 4 and 5—*Application for review of judgment.*

Application for review of judgement was filed after more than 90 days on half the Stamp.

Held it was insufficiently stamped under art. 5 and that a full fee was required under Art 4. JAGOT PAL SINGH *v.* JAGESHWAR BAKHSH SINGH. **2. O. C. 302.**

123. Sch. I Cl. 11.—*Valuation of chose in action.*

Where there was no material upon which the Court could assess the value of a chose in action, the Court accepted the valuation of the executor and directed him to file in Court on the termination of the suits filed by the deceased testator a statement showing the result of these suits and to furnish the Government Pleader with a copy of the statement. SALDANHA *v.* THE SECRETARY OF STATE FOR INDIA. **24 Mad., 241.**

124. Sch. II Art. I.—25 *M.* 515 *Supra No.* 86.

125. Sch. I Art. 13.—*Civil Procedure Code (Act XIV of 1882) Section 336—Surety—Execution of decree against—Appeal—Revision.*

No appeal lies against an order rejecting an application by a decree-holder for execution of his decree against one who became surety for the judgment-debtor, under section 336 of the Civil Procedure Code.

An application for revision against such order is chargeable with a court-fee of Rs. 2 under Article 13, Schedule I of the Court Fees Act. LILLO MAL *v.* HARJI MAL. **72 P. R. 1902.**

126. Sch. II Art. 1.—*Partition—Application for appeal—Court fees.*

Where a woman co-sharer applied for a perfect partition of her share and a cosharer objected to it alleging that she was not an owner but only in possession by way of maintenance, and her objection being disallowed, she appealed to the Judicial Commissioner on Rs. 2 Court-fees only.

Held, that the proceedings, as the enquiry of the objections, could not be regarded to be a suit, and the appeal only as an application was sufficiently stamped under Schedule II Art. 1 Court Fees Act. CHEDI *v.* JAIKORA. **4 O. C. 289.**

127. Sch. II Art. 1—*Partition—Court-fee on appeal.*

Certain co-sharers applied for partition under section 107, N.-W. P. and Oudh Act III of 1901, some of co-sharers objected to the partition. Their objection being disallowed without any enquiry they appealed to the Judicial Commissioner on Rs. 2 Court-fees only.

Sup: Govt. acts (VII of 1870) *Contd.)*

Held, following 4, O. C. 289 that the memorandum of appeal was sufficiently stamped. THAKAR BALDEO BUKHSH *v.* THAKAR BALBHADAR SINGH. **6, O. C. 372.**

128. Sch. II, Art. 11 (b).—*Mesne-profits—Appeal—C. P. C. Sec. 244 (c).*

B. obtained a decree for possession and mesne profits from the date of the suit till the delivery of possession. He applied for execution for both the mesne profits which amounted to Rs. 9,870. R. appealed against this order on Rs. 2 court-fee only.

Held, the Court-fee was sufficient. Under notification of the Government of India No. 4344, dated 6th October 1893, the fee payable on a memorandum of appeal against an order under Cl. (c), Sec. 244, C. P. C. was chargeable under Art. 11 (b) Sch. II Court Fees Act. RANI ITRAJ KUAR *v.* BACHA MADHO KUAR. **60. C. 86.**

129. Sch. II Art. 11.—*See 8 C. W. N. 321, (p. 42).*

130. Sch. II Art. 15 and 17, 28 C. 567.—*See Sec. 7 (IV) (c), No. 21 Supra.*

131. Sch. II Art. 17 (1).—*31 B. 73 See No. 22 Supra.*

132. Sch. II Art. 17 (3).—*30 C. 788 See No. 23 Supra.*

133. Sch. II Art. 17 (3).—*2 L. B. R. 1904 p. 266 See No. 26 Supra.*

134. Sch. II Art. 17 (4)—*Appeal regarding future Interest.—27 A. 559 See No. 70 Supra.*

135. Sch. II. Art. 17 (vi).—*Court-fee—Suit to recover possession of a share in immovable property after partition.*

The plaintiff filed a suit to establish his title to a one-third share in certain property, and to recover possession of the same and a claim for partition was added to make the relief sought effectual.

Held, that an *ad valorem* fee was payable on the plaint and not a fee of Rs. 10 as provided by Art. 17, cl. (*vi*) of the second Schedule to the Court Fees Act.—18 *Bom.*, 209 *followed* 8 *Cal.*, 757, *referred to.* WALI ULLAH *v.* DURGA PRASAD. **W. N., All, 1906. p 38 3 A. L. J. 181=28 A. 340.**

136. Sch. II Art. 17 (6)—*12 M. L. J. 85 See No. 24 Supra.*

137. Sch. II Art. 17 (6).—*17 M. L. J. 573 See No. 25 Supra.*

138. Sch. II Art. 17 (6)—*1 L. B. R. 1900 to 1902 p. 303, See No. 39 Supra.*

139. Sch II Art. 17 (6)—*Tenant's ejectment—U. B. R. 1903, p. 1 See No. 40 Supra.*

Sup: Govt. acts (VII of 1870) *(Contd)*.

140. Sch. II Art 17 (1).—*Suit to contest an order under Section 282 of the Civil Procedure Code.*

Held, that the Court-fee on the plaint in a suit to contest an order passed under section 282 of the Code of Civil Procedure is rupees ten as prescribed by Article 17 (1) Schedule II of the Court Fees Act—*Punjab Record* 51 of 1897, *followed*. ILAM DIN *v.* BHAGAT SINGH. **12 P. L. R. 1902.**

141. Sch. II Art. 17 (6)—*Ss. 520, 521 and 525, C. P. C.—Application to file a private award—Rejection of such application—Memorandum of appeal—Defective private award—Award effecting partition of immoveable property used for purposes of S. 525 of C. P. C. - Registration Act, S. 17 (b).*

Art. 17 Cl. 6 of the second schedule of the Court Fees Act applies to a memorandum of appeal from an order rejecting an application to file an award under S. 525 of the Code. The memorandum of appeal is sufficiently stamped, if it bears a Court Fee of Rs. 10 and not an *ad valorem* fee.

33 C. 11 and 70 P. R. 1881, D. 109 P. L. R. 1902, *Diss.* A. W. N. (1903), 214, *F.*

In proceedings started by an application under S. 525 of the Code, the Court has no power to amend the award or to remit it for re-consideration, but must either affirm it in its entirety or wholly reject it. 27 A. 526, 18 P. R. 1892 referred to.

Where the arbitrators appointed under an agreement between the parties made an award which was defective, and in which the arbitrators exceeded the power given to them under the agreement, *held* that the Court had no power to file the award.

Semble.—An award of arbitrators privately appointed does not require registration, even if it effects a partition of joint immoveable property and is signed by the parties to signify the acceptance of the award, in case the award is merely sought to be filed and to be made a rule of Court under S. 525 of the Code. BHAGAT RAM *v.* PARAS RAM. **84 P. R. 1907.**

142. Sch. II. Art 17 (6).—*U. B. R. 1903 p. 1 See Sec. 7 (V) (e) No. 40 Supra.*

143. Sch. II Art 17 (6).—*14 C. P. L. R. 172 See Sch. 1 Art. 1 No. 114 Supra.*

144. Sch. II Art. 17.—*Civil Procedure Code (Act XIV of 1882). Section 283 Court-fee —Declaratory suit—injunction—Consequential relief.*

A suit of the nature referred to in section 283 of the Civil Procedure Code to establish plaintiff's right to property attached, and for a perpetual injunction to restrain its sale in execution of a decree, is one in which consequential relief is prayed for, and, therefore, subject to an *ad valorem* Court-fee duty. 13 *Cal.*, 162; 15 *Cal.*, 104; 15 *B. L. R.*, *Ap.* 1; s. c., 22 *W. R.*, 422, *followed.* FULKUMARI *v.* GHANSHYAM MISRA. **31 C. 511.**

Sup: Govt. acts (VII of 1870) *(Contd)*.

144 (a). Sch. II Art. 17 (6) *and C. P. C. §. 283—Declaratory title without consequential relief—Suits Valuation Act, Section 11.*

The valuation of a suit under section 283, C. P. C., for the declaration of a right to attach certain property, the attachment on which had been removed, is for purposes of jurisdiction; the value of the decree which it is desired to execute, if that be less than the value of the property, or the value of the property if that be less than the amount of the decree (I. L. R. 15 C. 104 followed) Article 17 of Schedule II Court Fees Act applies to a suit brought under section 283, C. P. C., and the stamp required for the plaint is Rs. 10 only (9 P. 20, 10 B. 610 followed) 2 A. 63, 11 A 355 cited, 13 C. 162 dissented from. It is not necessary for a plaintiff bringing a suit under section 283 C. P. C. to ask for any further relief than a declaration of his right to attach the property in dispute. On such declaration being made the order removing attachment would fall and the attachment should be restored (10 B. 610 followed). SEVA RAMAN CHETI *v.* MAUNG PO YEN. **1 L. B. R. 1900-1902 p 1.**

145 Sch. II Art 17 (6) *16. C. P. L. R. 1902 P. 120 See §. 7 (IV) 6. No. 11 Supra.*

146 Sch. II Art 17—*28 C. 334 at 338. See §. 12. No 6. supra.*

147 Sch. II, Art 17—*Specific Relief Act (I of 1877) §. 39. Declaratory suit.*

Held, that plaints in suits (which are in their nature simple declaratory) under §. 39 of the Specific Relief Act are chargeable with Court Fees under Sch: II Art 17 (iii) of the Court Fees Act and not *advalorem* under §. 7 (IV) of the same Act. DURGA BUX *v.* MIRZA MOHAMMAD ALI BEG. **1. O. C. 123**

148 Sch II, Art 17 Cl. (3)—*5. C. W. N. 157. See §. 3 (17) No. 1 supra.*

149. Schedule II, Art 17 (vi)—*Court-fee—Suit to recover possession of a share in immovable property after partition.*

The plaintiff filed a suit to establish his title to a one-third share in certain property and to recover possession of the same and a claim for partition was added to make the relief sought effectual.

Held, that an *ad valorem* fee was payable on the plaint and not a fee of Rs. 10 as provided by Art. 17, cl. (*vi*) of the second Schedule to the Court Fees Act.—*18 Bom, 209 followed. 8 Cal, 757, referred to.* WALI ULLAH *v.* DURGA PRASAD. **W. N., A. 1906, p. 38.=3. A. L. J. 181.=28. A. 340**

150 Sch: II Art 17 (6)—*A. W. N. 1904 P. 210. See §. 17 No 81 supra.*

27 Act XXI of 1870 (Hindu Wills Act).

1. *Will—Probate—Letters of administration—Institution of suit.*

The plaintiffs sued for possession of certain property on the basis of a will executed in their favour by one B., a Hindu.

Sup: Govt. acts (XXI of 1870) *(Contd).*

Held, that it was not necessary for the plaintiffs to take out probate or letters of administration before institution of their suit. MATA DIN *v.* GAYA DIN. **2 O. C. 33.**

2. **S 3**—*Will—Revocation—Posthumous son.*

A Hindu will is not revoked by the subsequent birth of a posthumous son to the testator. S. 57 of the Succession Act which is general and exhaustive and S. 3 of the Hindu Wills Act, read together, mean that Hindu wills should not be revoked except in the manner mentioned in S. 57 of the Succession Act subject to the proviso contained in S. 3 of the Hindu Wills Act.

Per *Chief Justice*:—Under the Succession Act, the law as to the revocation of wills is the same as the law of England under the English Wills Act. SUBBA REDDI *v.* DORAISAMI BATHEN; SUBBA REDDI *v.* PAPAMMAL. **17 M. L. J. 269=30 M. 369; F. B.**

28 Act XXIII of 1870 (Indian Coinage act)

1. *Tender of arrears of rent due—Valid Tender—Tender by cheque—Waiver—Current coin—Interest, if chargeable after tender and before deposition Court—Bengal Tenancy Act (VIII of 1885), Ss. 56, 61—Effect of Deposit—Indian Paper Currency Act (XX of 1882)—Indian Coinage and Paper Currency Act (XXII of 1899).*

A tender to be valid must be made in the current coin of the realm 5 Co. Rep. 114*a*, 2 Cr. and Jer. 15=37 R. R. 623 and 12 Wallace (U.S.) 457 *R.*

A legal tender, under the Indian Coinage Act (XXIII of 1870), the Indian Paper Currency Act (XX of 1882) and the Indian Coinage and Paper Currency Act (XXII of 1899), includes coins and currency notes, and not a tender by a cheque, which is not a legal tender.

When a tender is made, in a currency different from that required by the law, for instance by a cheque on a banker, the objection to the form of the tender may be expressly or impliedly waived by the creditor, and he will be deemed to have waived the objection, if he rejects the tender not on the ground of its quality but on the ground of its insufficiency in amount, or on some other ground. 2 Cr. and Jer. 15; 37 R. R. 623=8 Dowl. 442; 59 R. R. 833=5 Yerger 199; 26 Am. Dec. 263—1 H. and C. 764=7 Wallace (U. S.) 447, and 4 C. 572, *R.*

A tender is not vitiated, because a receipt is asked 8 Dowl. 442; 59 R. R. 833=8 M. and W. 298. JAGAT TARINI DASI *v.* NABAGOPAL CHAKI. **5 C. L. J. 270=34 C. 305.**

30 Act XXIII of 1871 (Pensions act).

1—*Pensions Act (XXIII), §. 3 and 11—Civil Procedure Code (Act XIV of 1882), Section 266 (g)—Attachment—Political pension—Land gifted by Government.*

The word "pension" in section 11 of the Pensions Act, 1871, and clause (g) of section 266 of the Civil Procedure Code, implies periodical payments of money by Government to the pensioner in the manner prescribed by section 8 of the Pensions Act. It does not include land given by Government by way of gift. *4 Bom., 432; W. N. All., 1902 p. 161; L. R., 17 I. A., 181, referred to.* LACHMI NARAIN *v.* MAKUND SINGH. **A. W. N. 1904. P. 144=1 M. L. J. 338 =26. A. 617.**

2. **S. 3, 11 12**—*Grant of land revenue.*

Where on the abolition of a hereditary office a grant of land revenue was made by way of compensation:

Held, that such grant fell under § 3 and not within Ss. 11 and 12 of the Act. S. 12 applies to assignments made on account of any such pension, pay or allowance as is mentioned in S. 11 and pensions referred to in S. 11 are granted by Government on political considerations or on account of past services or present infirmities or as a compassionate allowance, as distinguished from payment by Government in respect for any right, privilege, perquisite or office. SUBRAYA MUDALI *v.* VELAYUDA CHETTY. **2. M. L. J. 33=30 M. 153.**

3. **S. 4**—*Grants for charitable purposes—Suit to set aside order imposing full assessment—Jurisdiction.*

S. 4 of the Pensions Act applies only to personal grants; and not to endowments for religious or pious purposes. Consequently, a suit for setting aside a Government Order imposing full assessment on lands granted to plaintiff's ancestors for the charitable purpose of feeding Brahmins is cognizable by Civil Courts. VENKATESWARA AIYAR *v.* THE SECRETARY OF STATE. **3. M. L. T. 104=17 M. L. J. 549.**

4. **S. 4**—*Suit for possession.*

Section 4 of the Pensions Act is entirely silent as to suits to recover possession of land the revenue of which has been remitted. It enacts merely that "no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue." These words could not, without a manifest strain of words, cover a suit to recover the possession of land or to obtain a declaration of right to hold land. The phrase "relating to" as occuring in an enactment restrictive of the right to sue, must be construed strictly, *i. e.*, in favour of the right to proceed.

The right to hold land is a right distinct from the right to money or revenue, and a suit relating to the former is distinct from a suit relating to the latter.

The right of an alienee of the revenue to possession of the land may survive the resumption of the grant of exemptions from liability to land revenue.

The right which an alienee of the revenue only may enjoy as to the possession of the land comprised in his grant was recognized not only by Government in the Government Resolution of 27th May 1854 but by the Court of Directors too in a Despatch of 27th March 1844.

Sup: Govt. acts (XXIII of 1871) *(Contd)*

The authorities make no distinction between holdings which an *inamdar* has acquired by purchase from a *kadim* occupant or by lapse of prior occupancies, and the rights which he may have obtained directly from the grant itself to hold at his disposal lands comprised therein which at date thereof no other person had a right to occupy. If the grant places land at the disposal of the alienee of the revenue, where there are no pre-existing claims to hold it, the alienee, though not an owner of the soil, is entitled to dispose of it as he chooses. He is not bound to give it out to tenants but may retain it in his own possession; and becomes the holder thereof within the meaning of the Bombay Land Revenue Code, 1879, and his rights are as indefeasible so far as the right to possession is concerned as the rights of an occupant of unalienated land.

The right to hold land, even though it be not as proprietor of the soil, is incontestably one of which the Civil Courts can take cognizance, if not barred by statutory provision.

The fact that the holding is claimed to be exempt from payment of land revenue, does not change the suit into one relating to the grant of money or land revenue. BALWANT RAM CHANDER NATH *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **7. B. L. R. 497=29 B. 480.**

5. S. 4.—*Agreement relinquishing claims to pension and family property in consideration of maintenance—Suit for recovery of maintenance not barred.*

Where by an agreement the plaintiff, a Hindu woman, gave up to the defendant various claims which she had in regard to the family property and also her claim to portion of the pension granted to her by Government and in consideration therefor the latter, as the person liable to maintain the plaintiff, agreed to pay her Rs. 100 per mensem until her death.

Held, that a suit by her for the recovery of such maintenance is one not "relating to any pension" and is not barred by S. 4 of the Pensions Act. RAMACHANDRA ROW *v.* LAKSHMI NARASAMMA ROW. **2 M. L. J. 138=17 M. L. J. 139; 30 M. 267.**

6. *Pensions Act (XXIII of 1871), Section 4—Suit—Execution proceedings—Dekkhan Agriculturists Relief Act (XVII of 1879), Section 44—Partition—Joint family property—Conciliation agreement—Consent decree—Execution of Decree executing Court cannot question jurisdiction of Court passing decree.*

The word "suit" in section 4 of the Pensions Act does not include execution proceedings.

A conciliation agreement was filed under section 44 of the Dekkhan Agriculturists' Relief Act. It effected partition of family property between two brothers, *N.* and *A.*, who were joint. One of the items to be partitioned was the income of a Saranjam village. Out of that *A.* was to pay every year Rs. 456-0-6 to *N.* They both died. The payment was duly made during their lives and even afterwards by *T.*, son of *A.*, to *N.* The payment was stopped and thereupon *B.*, son of *N.*, filed a *darkhast* to enforce payment. It was contended that *A.*'s interest having terminated with his death, the Saranjam must be considered as a fresh grant to his son, and that the latter was not bound by the decree and liable to continue the yearly payment.

Held, overruling the contention, that *A.* was a trustee in respect of the Rs. 456-0-6 for *N.*, the obligation to pay which was attached to the succeeding holders of Saranjam, and that therefore, *N.*, and his descendants, had the right to call upon *A.* and his descendants to account for their management of the Saranjam and pay to them the sum of Rs. 456-0-6 per annum.

Where a decree is passed by consent, it can only be set aside upon the same grounds as an agreement can be set aside, *e.g.*, fraud or mistake or misrepresentation.

Per Batty, J. - A Court executing a decree cannot question the jurisdiction of the Court which passed it. TRIMBAKRAO ANANDRAO *v.* BALWANTRAO NARAYANRAO. **7 B. L. R. 659.**

7. S. 4.—*Collector's certificate—Agreement to receive maintenance out of cash allowance—Suit relating to a pension or grant of money.*

The plaintiff under a mutual agreement being entitled to an annual payment of Rs. 52 for her maintenance out of a cash allowance which was received by defendants from Government, brought this suit to enforce her right under the agreement, but did not produce the certificate from the Collector required by S. 4 of the Pensions Act, 1871.

Held, that the certificate was necessary for the maintenance of the suit. The words of the section are wide enough to include any suit or to enforce such a claim provided it relates to a pension or grant of money or of land revenue. It is immaterial whether the claim is based on an agreement between the parties or arises out of any other legal rights or liability and whether it is a claim for a share by way of partition or maintenance or otherwise. DAMODAR VAMANBOWA *v.* SATYABHAMABAI. **9 Bom. L. R. 859= 31 B. 512.**

8. Ss. 4 and 6.—*Suit relating to right to realize revenue—Time granted to procure certificate.*

In the absence of a certificate from a Collector, the Civil Court has no jurisdiction to deal with a case relating merely to a right to realize the revenue granted by the Government as reward for services rendered.

Where the plaintiff had applied for a certificate under section 6 of the Pensions Act, but was informed that no certificate was necessary, the High Court, considering that the certificate was necessary before the dis-

Sup Govt. acts (XXIII of 1871) *(Contd.)*

pute could be dealt with by a Civil Court, granted time to the plaintiff to take steps for the purpose of obtaining the certificate.—17 *Bom.*, 169, *followed.* IHTASHAM ALI *v.* SHAM SUNDAR. **A. W. N. 1902, P. 187 =25 A. 73.**

9. S. 4, 5 & 6.—*Suit for declaration of legitimacy—Specific Relief Act (I of 1877), S. 42.*

The appellant sued the respondants for a declaration that she was the legitimate daughter of the respondant No. 1 on the ground that they had denied that she was daughter of respondent No. 1. The object of seeking this declaration was that when the respondent No. 1 dies the appellant may, if she obtains it, be in a position to claim the right to inherit a Government pension on the death of respondent No. 1, and any other property which he may leave.

Held, that a person may obtain a declaration under Sec. 42, Specific Relief Act, that he is the legitimate son of another person, notwithstanding that no present existing right in him as to property is involved by the question whether he is legitimate or not.

Held further that the appellants' suit was not one relating to *wasika*, but one for the declaration of her legitimacy and that the suit was not barred by Sections 4 to 6, Act XXIII of 1871. QAMAR ARA BEGAM *v.* PEARE SAHABA. **2 O. C. 57.**

10. Ss. 4 & 9.—*Suit for arrears of land revenue—Limitation Act (XV of 1877), Schedule II, Article 120—Bombay Land Revenue Code (Act V of 1879), Section 85.*

The plaintiff claimed as a proprietor of a share of arrears of revenue. It was not disputed that the plaintiff was a grantor of the land revenue and that his claim as such was admitted by Government and the amount claimed was recoverable from the defendants under the ordinary law relating to the recovery of rent. It was contended for the defendants on second appeal that a certificate under the Pensions Act was necessary before the suit could be decreed, that the claim was time-barred and that under section 85 of the Bombay Land Revenue Code, Act V of 1879, the plaintiff could recover only through the village officers.

Held, that certificate under the Pensions Act was not necessary for section 9 of the Act was applicable to the case, that article 120 of the second schedule of the Limitation Act governed the suit and the claim was not barred and that section 85 of the Bombay Land Revenue Code did not apply for the existence of a hereditary *patel* and a village accountant was not established. 10 *All.*, 395; 25 *Bom.*, 556; 5 *Bom., L. R.*, 700 *followed.* ANTAJI VASUDEV *v.* KASHINATH DHONDO. **6 B. L. R. 423.**

11. S. 4 and 11.—*Pension—Resumption of rent-free land by mistake—Grant made to compensate loss—Attachment.*

Where the Government, by mistake, at the time of permanent settlement resumed certain rent-free lands and, when the mistake was discovered, made an annual grant of a certain amount to the grantee to compensate the loss caused by the mistake.

Held, that the grant was not pension within the meaning of section 11 of the Pensions Act and was liable to attachment. 4 *Bom.*, 432, *followed.* JIBAN KRISHNA GHOSH *v.* SRIPATI CHARAN DEY. **8 C. W. N. 665.**

12. S. 5.—*See Sections 4—6. 2. O. C. 57. No. 9 Supra.*

13. S. 6.—*Pension—Grant—Construction of —Grant by Government of village upon payment of quit rent—Grant of land revenue.*

In a *sanad* under which a village was granted by British Government in confirmation of a previous grant by the Maharaj of Scindhia there was a declaration that the village in question shall be continued by the British Government to Jagdeo Rao and his heirs, inclusive of all lands, allowances and rights belonging to others so long as he and his heirs shall continue loyal to the British Government and shall pay Rs. 800 to Government as quit rent. In a later portion of the *sanad* there was a guarantee against any further payment by the holder on account of Imperial Land Revenue beyond the amount specified and a declaration that the village and its holder should be liable for any local taxation which might be imposed in the district generally.

Held, that this did not amount to a grant of land revenue and consequently did not come within the purview of the provisions of the Pensions Act. 1 *Bom.*, 523 *referred to.* GANPAT RAO *v.* ANAND RAO. **W. N. All., 1905, p. 206=28 A. 104.**

14. S. 6—*Certificate by Collector, Effect of—*

If the Collector once gives the certificate which entitles a party to claim a certain right in a Civil Court, then the effect of that certificate is to give to the party the right to claim in a Civil Court whatever he is entitled to in virtue of that right. The certificate may refer only to the plaintiff's share in the pension or allowance for particular years.

Where the Collector permitted the plaintiff to establish his right to a share in a Civil Court—

Held, that the plaintiff was not bound under the Pensions Act to get a certificate for each year's allowance before suing for it. If the general right is allowed and established, the right to each year's share follows as consequent upon it. KRISHNAJI SAKHARAM PINGLE *v.* ANANT. **5 Bom L. R, 95=28 B. 241.**

15. S 6—*See §§. 4 and 6—A. W. N. 1902 P. 187=28 A. 73. No. 8 supra.*

16. S 6—*See §§. 4, 5 and 6—2 O. C. 57. No. 9 supra.*

17. S. 9—*See §§. 4 and 9—6 B. L. R. 423. No. (10) Supra.*

Sup: Govt. acts (XXIII of 1871) *(Contd).*

18. *Execution of decree—Interpretation of decree—Reference to judgment and award—Civil Procedure Code (Act XIV of* 1882), *Sections* 13, 206—*Amendment of decree*—Resjudicata—Jagir. *Attachment of—Objection—Pensions Act (XXIII of 1871), Section* 11—Jagir *income is exempt from attachment under Section* 11 *of the Pensions Act*, 1871.

When the terms of a decree are clear and unambiguous the Court cannot refer to the judgment or the award in case the judgment is passed on an award.

The fact that property not liable to attachment *e. g.*, Jagir income, has been improperly attached on one or more occasions does not debar the judgment-debtor from pleading exemption when it is subsequently attached. 35 *P. R.* 1900; *P. L. R.*, 1900, p. 357; 31 *Cal.*, 822, *referred to.* MUHAMMAD QAMAR-UD-DIN KHAN *v.* LACHMI NATH **95 P. R 1906 = 83 P. L. R. 1907.**

19. *Pensions Act (XXIII of* 1871*), Section* 11—*Pension*—Jagir—Khush-hais-i-yati *income, Attachment of—Execution of decree—Power of execution Court—Interpretation of decree—Charge.*

Held, that the *khush-hais-i-yati* income or water-advantage rate must be regarded as part of a *jagir* within the meaning of section 11 of the Pensions Act and is therefore exempt from attachment in execution of a decree for money. The fact of its attachment on any previous occasion would not legalise its subsequent attachment. When a decree specifically charges the income with the payment of the decretal money a Court executing the decree cannot raise the question of illegality.

Where the decree directed the defendant to pay the decretal debt by instalments out of the *khush-hais-i-yati* income, and the decree further provided that the defendant shall not be competent to alienate such income until payment of the decree money—

Held, that the decree could not be construed as specifically charging the income with the payment of the decree money. QAMAR-UD-DIN KHAN *v.* MANI RAM. **96 P. R. 1906 = 138 P. L. R , 1906.**

20. *Civil Procedure Code (Act XIV of* 1882), *Section* 266 *(g)—Pensions Act (XXIII of* 1871*) attachment—Pensions, politicat—Code. Essence of—*

The decree-holders attached pensions due to the judgment-debtors, descendants of two families, who at one time occupied the throne of Ceylon. The judgment-debtors resided in British India, and the pensions were paid to them by the Collector of the district under the orders of the Government of India.

Held, that the pensions being political pensions, were exempt from attachment under the provisions of section 266 *(g)* of the Civil Procedure Code, though they did not come under the provisions of section 11 of Act XXIII of 1871.

Sup: Govt. acts (XXIII of 1871) *(Contd).*

If the Government of India were to be regarded as merely the Agent of the Ceylon government, for the purpose of paying the pensions, the Courts in British India would have no jurisdiction to proceed by way of attachment, since the rights of the pensioners (assuming them to be enforceable at law) would only be enforceable in Ceylon—5 *Bom.*, 249; 18 *Cal.*, 216, at *p.* 223, *referred to.*

The essence of a Code is to be exhaustive on matters in respect of which it declares the law, and it is not the province of a judge to disregard or go outside the letter of the enactment according to its true construction 29 *Cal.*, 707 *referred to.* MUTHUSAMI NAIDU *v.* PRINCE ALAGIA MANAVALA SIMMALA RAJA. **26 M 423.**

21 S. 11. *See* §. *3 & 11—A. W. N. 1904 P. 144 = 1. M. L. J. 338 = 26 A. 617. No. 1 supra.*

22 S. 11. *See* §. *3, 11 and 12—2. M. L. T. 33 = 30. M. 153 No 2 supra.*

23 §. 11. *See* §. *4 and 11. 8. C. W. N. 665 No. 11 supra.*

24. *Civil Procedure Code (Act XIV of 1882), Section 266 (g)—Pensions Act (XXIII of* 1871) *Section* 11—*Pension--Assigned Government revenue—Profits.*

The word 'pension,' in section 11 of the Pensions Act, is used in its ordinary and well-known sense, namely, that of a periodical allowance or stipend granted, not in respect of any right, privilege, perquisite or office, but on account of past services or particular merits, or as compensation to dethroned princes, their families, and dependents.

The revenue assessed upon a certain estate was at a favourable rate. Disputes having arisen between the different members of the family, who owned the estate, the Local Government directed that the estate should be resumed, and that out of the increased revenue 'as an act of grace,' the memmbers cf the family other than the judgment-debtor should have certain shares assigned to them.

Held, that a share of revenue so assigned cannot be held to be a political pension within the meaning of clause *(g)* of the proviso to section 266.

The estate was taken by the Government under its own management, and out of the assets of the estate certain portions of the profits were set apart for the maintenance of the different members of the family, the remainder going to the discharge of arrears of revenue due to Government.

Held, that the allowance which the judgment-debtor was to get out of the assets was substantially his share of the profits and was not exempted from attachment—4 *Bom.*, 432 *referred to.* BALKRISHNA BHAN *v.* GOVIND RAO **A. W. N. 1902. P. 161.**

25 S. 12. *See* §§. *3, 11 and 12—2. M. L. T. 33 = 30 M. 153. No 2 supra.*

90—Act I of 1872 (Evidence Act)

1 Evidence Act S. 2, 11, 116—*Claim to rent of land m t by allegation that the land is defendant' —issues—*

Where a plaintiff, alleging a sale of certain land to him by defendant followed by a lease from him to the defendant, claims rent of the land from defendant, and the defence is a denial of the sale and lease, the lease is the fact in issue. The sale is not a fact in issue, but it is a relevant fact. KAUNG HLA PRU *v.* SAN PAW. **3. L B. R. 90.**

1 (*a*). **S 3**. *See* §§. *111 and 3. 1. O. C. 63. No. 239 infra.*

2. S. 4 and Oaths Act (X of 1873), *Section 11—Oath—Statement by witness—Conclusive proof.*

When a party agrees to bind himself by a statement on oath of a certain witness, a statement by the latter is in point of law, admissible evidence of the fact in dispute and under section 11 of the Oaths Act, 1873, it is conclusive proof of the matter stated, 4 *Ben. L. R. 97* (F. B.) *followed.*

There is nothing in the Oaths Act that requires any written agreement by the party offering to be bound by the statement on oath of a witness.

The expression 'conclusive proof' in section 11 of the Oaths Act, 1873, is to be understood in the sense in which it is defined by section 4 of the Evidence Act 1872. 4 *Bengal L. R. 97* (F. B.) *followed.* VITHU GOVINDA *v.* RAMJI YELLUJI. **8. B. L. R. 19.**

3. S. 4—*Act (Local) No. II of 1901 (Agra Tenancy Act), s. 201—Evidence—Record of plaintiff's name as a co-sharer—Presumption.*

The presumption enjoined by clause (3) of section 201 of the Agra Tenancy Act is not conclusive, even in a Revenue Court, but may be rebutted, as, for instance, by evidence showing that the plaintiff has not been in possession of the property in respect of which profits are claimed for more than twelve years before suit, and the defendants have openly denied the plaintiff's title for more than that period. *F. A. f. O. No. 70* of 1904: May 22 1905 *distinguished.* DIL KUNWAR *v.* UDAI RAM. **A. W. N. 1906. P. 316 = 4. A. L. J. 3.**

3 a. S 4 *See* §§. *114* (*g*) *and 4—1 A. L. J. 121 infra No.*

4. Ss. 4, 32 & 90—*Proof—Title of plaintiff Privy Council—Findings of fact—Concurrent decisions—Document thirty years old—Presumption.—Discretion.*

A plaintiff can only succeed on the strength of his own title.

Their Lordships of the Privy Council did not consider it necessary to review all the evidence at length on a point on which both the lower Courts had given a concurrent decision.

Sup: Govt. act (I of 1872) *(Cont'd)*

Their Lordships of the Privy Council would always be extremely slow to overrule the discretion exercised by a subordinate Court under section 90 of the Evidence Act in not admitting in evidence without proof a document more than thirty years old. SHAFIQ-UN-NISSA *v.* SHABAN ALI KHAN **6 B. L. R. 750 (P. C.) = 31. I. A. 217 = 26. A. 581 = 7. O. C. 290.**

5. S. 4 & 90.—*Custom—Alienation—Gift to wife and daughter in the presence of son—*Sials *of Jhang—Presumption as to the genuineness of documents thirty years old.*

In this case the parties belonged to the *Siat* caste, residing in the Jhang District. The plaintiffs, who were sons and grandsons of one Ahmad, son of Haji, by his wife *Mussammat* Alam Khatun, alleged that about 45 years before suit Haji gave half of his ancestral immovable property to his wife, *Mussammat* Allajawai, and his daughter by the said wife, *Mussammat* Daulat (defendant No. 1), for maintenance, on a tenure which was to extend to the life of the daughter as wall as to that of the wife; that he effected mutation of names in their favour; that *Mussammat* Allajiwai died about 2½ years prior to suit; that thereupon *Mussammat* Daulat obtained sole possession of the said property, and on the 10th May 1898 made a gift thereof in favour of her two sons (defendants Nos. 2 and 3); and that *Mussammat* Daulat had only a life interest in the property, Haji being incompetent to give her and her mother an absolute estate therein in the presence, and to the prejudice, of his son, Ahmad. The plaintiffs prayed for a declaration to the effect that the gift by *Mussammat* Daulat, defendant No. 1, to her sons, defendants Nos. 2 and 3, would not affect the reversionary rights of plaintiffs after the death of defendant No. 1.

Among other pleas the defendants contended that Haji had gifted his property to his wives, and *Mussammat* Daulat absolutely, by two *tamliknamas*, dated the 29th April 1854 and 25th May 1854, with the consent of Ahmad and Haji's brothers, who had signed the two deeds in token of their assent. It was admitted by the parties that in this family at all events females succeed to life estate and are not given maintenance only.

Held, that the two *tamliknamas* were not proved to have been executed by Haji, and their execution could not be presumed under section 90 of the Evidence Act.

The words 'may presume,' in section 90 of the Evidence Act, ought *generally* to be construed in the more vigorous of the senses allowed by section 4, and, in view of the danger of a blind acceptance of a document as genuine for all purposes, merely because it purports to be more than 30 years old, and is produced from the proper custody, before any such document can be held rightly entitled to receive the benefit of the presumption for which section 90 makes provision, it should, as a rule, not be found wanting when adjudged by the very reasonable test laid down in *Raikunt Nath Kundu* v. *Lukhun*

Sub: Govt. act (I of 1872) *(Contd)*
9 *Cal. L. R.*, 445; namely as to whether it has been produced on those previous occasions when it would naturally have been produced, if in existence, at the time, and as to whether it has ever been acted on previously to its production in Court.

Held, further, that the gift to the females by Haj must be regarded as one merely for their joint lives, and the life of the survivor and the plaintiffs were entitled to the declaration prayed for. MEHAR AMIR *v.* NUR MUHAMMAD. **110. P. L. R. 1902 =82. P. R. 1902.**

6. *Section 8—Evidence—Departmental enquiry. Statements made at—*

The answers to his superior officer, given by an accused person in explanation of an official irregularity, can be proved against him if subsequently ascertained to be false. The subordinate is under no legal obligation to attend an official inquiry, but if he does attend and answers the questions put to him, the answers that he gives fall under the category of statements which accompany and explain acts other than statements. KING-EMPEROR *v.* GANESH. **4. B. L. R. 284.**

7. Ss. 8, 18 (2), 21, 66, 91, 157 and 167—*Distinction between secondary evidence of the contents of a document and oral evidence of the transaction.*

The plaintiff respondent sued for redemption alleging that there was a document of mortgage. He produced oral evidence as to the factum of mortgage. The Lower Court decreed his claim. The document was not shown to be lost or destroyed and the defendant appellant got no notice to produce it. The Lower Court should have taken notice of §§. 65 and 66 of the Evidence Act. The evidence of the witnesses that the mortgagor told them that she had mortgaged the land in suit might have been admissible under §. 157 if it was proved that she made the statement at or near the time of the transaction and the evidence of other witnesses as to the mortgagee's conduct under §. 8 would have been admissible if the mortgagee was present and heard the mortgagor saying that he had mortgaged it to the mortgagee and the latter had preserved silence and the mortgagee's statement that the land had been mortgaged to him would have been admissible as an admission under §§. 18 (2) and 21. But the provisions of §. 91 stand in the way. The terms of the mortgage could only be proved by the production of the mortgage deed or of secondary evidence of its contents, in case it was shown to be lost or destroyed, or the defendant appellant, after notice, failed to prduce it. It was not shown to be lost or destroyed, and the defendant appellant got no notice to produce it. If the oral evidence adduced had been in the nature of secondary evidence the case should have been remanded to be put on a proper footing.

Sup: Govt act (I of 1872) *(Contd).*

But the evidence of the mortgagor nor of the witnesses was secondary evidence. It was oral evidence, either direct or as to admissions of the mortgage transaction which §. 91 does not admit.

There being no admissible evidence whatever of the mortgage, the plaintiff respondant's suit is dismissed.

The Lower Court by deciding in plaintiff's favour on inadmissible evidence contravened the Law of evidence (§. *167) M. B. R. 1892—95 P. 586 and U. B. R 1897—01, 382, & 556 referred to.* MI LE BYU *v* MI SHWE MYA AND NGA BAO. **U. B. R. 1907. P. 13.**

8 Ss. 9, 11 (3) and 43—*Judgments convicting wife's paramour of adultery—Practice—Decree against several co-widows—Appeal by one of them—Power of Appellate Court to disturb the decree as against non-appealing widows.*

Held, that in the Ferozepur District, among agricultural tribes, if a widow up to the time of her husband's death, is living unchastily in open revolt against him, she is no longer a member of his household, and cannot succeed to the usual widow's interest in his estate after his death. In a suit claiming succession, judgments convicting her paramour of adultery with her are admissible in evidence under Section 43 read with Sections 9 and 11 (3) of the Evidence Act.

Where one of five widows of the deceased got a decree for one-fifth of the immoveable property, and Rs 4,000 cash left by him, and one of the defendants appealed to the Chief Court with regard to Rs. 1,000 and the whole land decreed, and the plaintiff was found not entitled to succeed to the property left by the deceased on account of her unchastity during his lifetime, the Chief Court allowed the appeal as regards the immoveable property without disturbing the decree for Rs. 3,000 against the widows who had not appealed. *MUSSAMMAT* BHOLI *v. MUSSAMMAT* SUTTI, **24 P. L. R. 1903.**

9 S. 10—*Conspiracy.*

To show that the Will was a forged one statements of one of the attesting witnesses, which were said to have been made to an attorney and attested by him, were tendered in evidence under section 10 of the Evidence Act. It was contended that a conspiracy had been alleged by the impugnants between the alleged attesting witness, certain beneficiaries under the Will and others, evidence had been given of such a conspiracy, the attesting witness was one of the conspirators and his statements showing how the thing had been done could be proved under section 10.

Held, that the statement could not be admitted in evidence. There was no issue before the Court as to whether there was a conspiracy and even if there were it could not be held on the evidence as it stood at the time that there was any reasonable ground that the plaintiff was a party to the alleged

Sup: Govt. act (I of 1872) *(Contd).*
conspiracy. *(In the goods of* GOPAL LAL SEAL) KADAMBINI DASSI *v.* KUMUDINI DASSI. **7 W. N., C. 806. 30. C. 983.**

10. S. 11.
In proceedings for probate of a will, one of the witnesses, a plague nurse, who saw the testatrix while she was a patient in the plague hospital and had a conversation with her about her ornaments was asked in reference to this conversation.—What did the testatrix say? The question was disallowed by Court.

Held, that the question was improperly disallowed. The statement of the testatrix was relevant, as a statement by her suggesting an inference as to the execution of a will would be an admission relevant against her representatives. NANA *v.* SHANKAR. **3 B. L. R., 465.**

11. S. 11—*Collateral facts. Relevancy of—Collector's books. Purpose of—Muhammedan law—Gift—Rule relating to possession. Interpretation of.*

The requirements of the law to make a collateral fact admissible in evidence as relevant fact under section 11 of the Evidence Act are—

1stly, that the collateral fact must itself be established by reasonably conclusive evidence, and secondly, that it must, when established, afford a reasonable presumption or inference as to the matter in dispute.

The Collector's books are intended only for the purpose of revenue, and it has been repeatedly held that they are evidence neither of title nor of possession.

The important question as to the validity of gifts is, not whether there was a transfer of the properties to the name of the donee in the Collector's or the Municipal books, but who paid the Government or Municipal taxes.

Under the Muhammadan law when the subject matter of the gift, *e. g.*, land, is occupied by tenants, a request to them to attorn to the donee is the only possession that the donor can give of the land in order to complete a proposed gift.

Under the Muhammedan law when a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession. An appropriate intention where two are present on the same premises may put the one out as well as the other into possession without any actual physical departure or formal entry, and effect is to be given, as far as possible, to the purpose of an owner, whose intention to transfer has been inequivocally manifested.

In the case of gifts under the Muhammedan law, if possession were once taken, and the deed of gift took effect no subsequent change of possession would invalidate it.

And in the eye of law, whether Muhammedan or other, one day's exclusive possession should be as good as that for 20 years.

The proposition in the Muhammedao law that the donor should leave nothing belonging to him, not even a straw should be interpreted in the light of common sense and according to the exigencies and necessities of modern life. It can only mean that the donor should not reside and use the property as owner. BIBI KHAVER SULTAN *v.* BIBI RUKHA SULTAN. **6. B. L. R. 983.**

13. S. 11. *See* §§. *2, 11 and 116—3. L. B. R. 90 No. 1 supra.*

14. S. 11 (3) *See* §§. *9. 11 (3) and 43—24. P. L. R. 1903. No 8 supra.*

15. S. 11 (b) and 13—*Recitals in documents, when admissible, against persons not parties to deeds.*

Per Rampini J:—Documents, such as deeds of sale and mortgage deeds, containing recitals that a particular land belongs to a particular howla which is in question are admissible in evidence under either S. 11 (*b*) or 13 of the Evidence Act, although they are not *inter partes.* They are not conclusive or binding evidence and may be very weak evidence or even of no weight at all. 16. M. 194, 23 W. R. 293 and 25 C. 522 ref. to.

Per *Geidt* J.—Documents containing recitals that a particular plot of land is included within a particular howla though not *inter partes* are admissible in evidence under S. 13 of the Evidence Act as transactions by which the right to hold the land as part of the howla is recognised and particularly when the existence of that right is a question raised in the case and is a relevant fact. DWARKA NATH BAKSHI *v.* MUKUNDU LAL CHOWDHURY. **5 C. L. J. 55.**

16. S 11 (2), 92, 115—*Estoppel—Matter of law. Landlord and Tenant*—"Mokurari Istemrari—*construction of.*

The words *mokurari istemrari* do not in their lexicographical sense primarily imply any heritable character in the grant, as the term *mowrusi* does; but they imply permanency from which in a secondary sense, such heritable character might be inferred, it being always doubtful whether they mean permanent during the lifetime of the persons to whom they were granted, or permanent as regards hereditary character. These words in a lease do not *per se* convey an estate of inheritance, but such an estate can be created without the addition of any other words, the other terms of the instrument,—the circumstances under which it was made or the subsequent conduct of the parties might show the intention with sufficient certainty to enable the Court to pronounce that the grant was perpetual.

Section 92 of the Evidence Act precludes admissibility of oral evidence as to the alleged assurances given by the grantors of the leases that they were intended to last for ever.

The construction of a document is a matter of law and there can be no estoppel by reason of misrepresentation on a point of law which was clear and free from doubt.

Sup: Govt. acts (VII of 1870) *(Contd).*

Quaere whether there can be no estoppel by reason of misrepresentation on a doubtful question of law?

Held, that nothing had been shown from the circumstances under which the leases were granted, or the subsequent conduct of the parties to indicate that the leases were intended to be perpetual. NARSINGH DYAL SAHU *v.* RAM NARAIN SINGH. **3 C.C. 883.**

17 S. 11, 13 and 43—*Evidence—Judgment inter alios—Award—Partner of lessee. Right of lessor against—Judgments* in personam. *Effect of—*

The plaintiff, lessor, brought a suit to recover rents from defendants Nos. 1 and 2, sons of the lessee, and defendant No. 3, a third party, alleging that the lessee and the defendant No. 3 had entered into a partnership business and that the lease was acquired for the same purpose. The defendant No. 3 denied his liability and alleged that he was not a partner of the lessee. In order to establish the fact that the lease of the property was taken by the lessee and the defendant No. 3 jointly, the plaintiff relied principally on an award made by an arbitrator in a suit for dissolution of partnership between the lessee and the defendant No. 3. It was contended by the plaintiff that both the parties were equally liable to the debts and equally entitled to the outstanding dues.

It was found that in a previous suit by the lessee to recover some outstanding dues, the defendant No. 3 had, on the authority of the award, claimed and recovered a share of the amount sued for.

Per Ghose, J.—That the judgment passed upon the arbitration award in the previous suit between the lessee and the defendant No. 3 was relevant evidence in this case, upon the question whether the lease was acquired by the lessee for his own benefit or as partneship property, though the lessor (plaintiff) was no party to that suit. 1 *C. W. N.*, 265; s. c., 19 *All.*, 277, 6 *Cal.*, 171; 13 *Cal.*, 352, 2 *C. W. N*, 501; s. c., 25 *Cal.*; 522, 22 *Cal.*, 533 *referred to.*

Per Geidt, J.—That neither the award nor the conduct of the defendant No. 3 in the suit was admissible as evidence to prove that the defendant No. 3 was liable to the plaintiff for the rent of the property leased.

That the mere existence of a judgment, its date and legal consequences are conclusively proved as against all the world by the production of the record, but it furnishes no proof whatever of collateral facts, even though as between the parties to such judgment themselves, such facts must have been proved.

That judgments *in personam* are conclusive *against* third persons (but not in their favour) of the relationship between the parties and of the extent of the relation.

Held, that the lessor was entitled to decree against both the lessee and the third party, the liability of the third party being restricted solely to his interest in the leasehold. ABINASH CHANDRA CHATTERJEE *v.* PARESH NATH GHOSE AND NOBIN KANT CHATTERJEE. **9. C. W N. 402**

18 S 11, 13. & 43.—*Suit for damages for malicious prosecution—Judgment of Magistrate in the prosecution—How far evidence.—*

A judge deciding a suit for damages for malicious prosecution ought not to take the judgment of the Magistrate in the prosecution to be in itself a record of the facts found and to decree the suit, S. 11, 13, & 43, Evidence Act, do not apply to the case. 11 A C. 247 ref. to.—GULAB CHAND *v.* CHUNILAL **9 B. L. R. 1134.**

19 S. 11, 32.—*Statements by persons who cannot be found or called as witnesses.*

As a general rule S. 11 is controlled by S. 32 of the Act when the evidence consists of statements of persons who are dead or who cannot be found, but this rule is subject to certain exceptions. The whole scope and object of section 32 centres upon securing the highest degree of truth possible in the circumstances for the statement of the person who cannot be produced in court to give his own evidence. It follows that where the person tendering such a statement is indifferent as to the truth or falsehood there is nothing to bring that section into play. The test, whether the statement of a person who is dead or who cannot be found is relevant under S. 11 and admissible under that sec., although it would not be admissible under S. 32, is this. It is admissible under S. 11 when it is altogether immaterial whether what the dead man said was true or false, but highly material that he did say it. In these circumstances, no amount of cross-examination could alter the fact, if it be a fact that he did say the thing and if nothing more is needed to bring the thing said in under S. 11 then the case is outside S. 32.—R. D. SETHNA *v.* MIRZA MAHOMED SHIRAZI **9 B. L. R. 1047.**

20 S. 13. *Riparian owners—Right to construct dams on a stream—Prescription—Custom—Injunction—Civil Procedure Code (Act XIV of 1882), Section 30 Suit by plaintiffs on behalf of a class.*

The Court is justified upon proof of custom and prescription to pass a decree in favor of the plaintiffs for a declaration that plaintiffs and their co-villagers are entitled to erect and maintain a *band* on a stream every year during the rainy season at a specified place letting out the surplus water for the use of the holders of servient tenements and for an injunction restraining the defendants interfering with any *band* the plaintiffs might construct at the specified place.—24 *Cal.*, 865; *S. C.*, *L. R.*, 24 *I. A.*, 60, *distinguished.*

The grant of permission under Section 30 of the Civil Procedure Code may be inferred from the circumstances of the case. The mere fact, that the order granting per-

Sup: Govt. acts (VII of 1870) *(Contd).*
mission was not recorded in the order sheet, does not vitiate the proceedings. KALU KHABIR *v.* JAN MEAHA. **29. C. 100.**

21 S. 13. *Evidence—Objection as to admissibility on appeal.*

The High Court declined to entertain on appeal an objection as to the admissibility in evidence of a judgment and a decree of a previous case on the ground that objection had not been taken in the original Court and the appellant had referred in that Court to these documents as affording a basis of two of his objecsions 19 *All.*, 76, *S. C.*, *L. R.*, 23, *I. A.*, 106, *distinguished.* HRIDOY KRISHNA *v.* PARASANNA KUMARI. **28. C. 142.**

22 S. 13. *Exparty decree between the parties is admissible.*

An exparty decree which was not obtained by fraud and which is between the same parties on a question in issue between them is admissible in evidence in a subsequent suit between them. ASHUTOSH NATH ROY *v.* ABDUL. **28. C. 676. on P. 679.**

23 S. 13—*Alluvion, diluvion—Evidence—Possession—Burden of proof—Order under Section* 145, *Criminal Procedure Code (Act V of* 1898)—*Reports, maps, etc., referred to in such order.*

Orders under Section 145 of the Criminal Procedure Code are merely police orders made to prevent breach of the peace. They decide no question of title, but under the section the Magistrate is, if possible, to decide which of the parties is in possession of the land in dispute, and, if he decides that one of the disputants is in possession, the Magistrate is to make an order declaring such party to be entitled to retain possession until evicted in due course of law, and forbidding all disturbances of such possession until such eviction.

When such order is passed, the burden of proving title is thrown on the party against whom the order is made. The person in possession can only be evicted by a person who can prove a better right to the possession himself.—*Ambler* v. *Pushong (I. L. R., XI Cal.*, 365, *referred to).*

Such orders are admissible in evidence on general principles, as well as under Section 13 of the Indian Evidence Act, to show the fact that such orders were made. This necessarily makes them evidence of the following facts, all of which appear from the orders themselves, *viz.*, who the parties to the dispute were, what the land in dispute was, and who was declared entitled to retain possession? For this purpose, and to this extent, such orders are admissible in evidence for and against every one, when the fact of possession at the date of the order has to be ascertained.

If the lands referred in such an order are described by metes and bounds, or by reference to objects or marks physically existing, these must necessarily be ascertained by extrinsic evidence, *i. e.*, the testimony of persons who know the locality.

Sup: Govt. acts (VII of 1870) *(Contd).*
If the orders referred to a map, that map is admissible in evidence to render the order intelligible, and the actual situation of the objects drawn or otherwise indicated on the map must, as in all cases of the sort, be ascertained by extrinsic evidence.

Reports accompanying the orders may be admissible as hearsay evidence of reputed possession (2 Taylor's Evidence, Section 517). But they are not otherwise admissible, unless they are made so by Section 13 of the Indian Evidence Act.

When the High Court has found, regarding title, in favour of the plaintiff, the defendant-appellant must do something more than show that the plaintiff's title is not free from doubts. The appellant must at least give some acceptable explanation of the circumstances which led the Court below to its conclusion.—*Raj Coomar Rey* v. *Gobind Chander Roy* (*L. R., XIX, Ind. App.*, *140, referred to*).

Kabulyats, Chittas, accounts and receipts do not prove themselves, and are valueless without proper oral evidence respecting them. DINOMONI CHOWDRANI *v.* BROJOMOHINI CHOWDRANI. **6. C. W. N. 386 =12. M. L. J. 8 29. I. A. 24.=29. C. 187. P. C.**

24 S. 13—*Judgment:*—Where in a suit between a Zemindar and the Mirasidars of a village the question of title to the poromboke lands came in for decision *held*, that a judgment in a prior suit between the Zemindar and some Mirasidars in which it was held that the waste lands in the village were the property of the Mirasidars was relevant under S. 13 of the Evidence Act.—NATESA GRAMANI *v.* VENKATARAMA REDDI. **17 M. L. J. 518=2. M. L. T. 455.**

25 S. 13—*Suit for possession—previous inter parties judgment whether admissible.*

A bare expression of opinion in a judgment as to the fact of possession which was not given effect to by the decree is not admissible in proof of possession either at the date of the judgment or at any other time. Such an opinion is not a recognition of a right within the meaning of S. 13 of the Evidence Act. KARIMA BIBI *v.* SRIGOVIND **7. O. C. 122.**

26 S. 13—*See custom—Pre-emption—entry in Wajib-ut-Arz.*

124. P. L. R. 1903—As to entry in *wajib-ul-arz*

65. P. R. 1903=139. P. L. R. 1903 *(ibid.)*
172. P. L. R. 1903=64. P. R. 1903 *(ibid.)*
106. P. L. R. 1903=46. P. R. 1903 *(ibid.)*

27. S. 13—*See Custom Pre-emption—Houses in towns.*

70. P. L. R. 1903=*17.* P. R. 1903 *(Houses in Towns)*
92. P. L. R. 1903—43. P. R. 1903 *(ibid.)*
169. P. L. R. 1903=52. P. R. 1903 *(ibid.)*
2. P. R. 1903=53. P. L. R. 1903 *(ibid.)*
44. P. R. 1903=75. P. L. R. 1903 *(ibid.)*

Sup: Govt. acts (VII of 1870) (*Contd*).

28 S. 13—*See Custom—Pre-emption on mortgages.*—

46. P. R. 1903=106. P. L. R. 1903 *(Pre-emption on mortgages.)*

28(a) S. 13—*Mohalla Parachian, Rawalpindi City—Pre-emption based on vicinage—Sale of house—Value of cases decided on admission.*

The custom of pre-emption based on vicinage does exist, in respect of sales of house property in Mohalla Parachian or Matta or Waris Khan, Rawalpindi City. Where the right of pre-emption is shown to exist, there is *ex-necessitale rei* a presumption in favour of vicinage.—83 *P. R.* 1888 *Referred to.*

Confessions of judgment and admissions are, of course, of much less value than contested cases properly decided where the custom has been found to exist after due enquiry, but such admissions are not irrelevant and by no means valueless, as they may proceed from the oonciousness of the existence of the right and the hopelessuess of contesting it 69. P. R. 1901, 44. P. R. 1903. 42. P. R. 1905. R.—THAN SINGH *v* TARA SINGH, **26 P. R. 1907=69 P. L. R. 1908.**

29. S. 13 (a), 32 (7)—*Admissibility against person not a party to the document—Statement of deceased person—Right or custom—Nakdi or bhaoli rent.*

To prove or disprove a right or custom, it is not sufficient to produce evidence of a transaction in which the right or custom was asserted or denied. The transaction will be relevant under S. 13, Cl. *(a)*, if it be one by which the right or custom was asserted or denied. Where the question was whether a tenant held lands under the nakdi or bhaoli system of rent and the Court based its decision on a statement contained in a *hebanama* executed by the deceased grand father of the tenant.

Held, that the *hebanama* was not admissible in evidence under S. 32 (7) read with S. 13, Cl. *(a)* of the Evidence Act.—BANSI SINGH *v.* MIR AMIR ALI. **11 C. W. N., 703.**

30. S. 13 (b) & 32 (3) & (5), 49 & 90—*Hindu Law—Inheritance—Primogeniture, rule of—Custom—Orissa, land tenure in—Regulation XI of 1793—Regulation X of 1800—Regulation XII of 1805, section 35—Bhunyan—Paharaj—Killa—Gerh—Hereditary office estate attached to—Statements of persons who are dead—Usage, Opinion as to—Ancient document, custody of—Regulation VII of 1882, Section 9.*

The rule of primogeniture may exist by family custom, although the estate may not be a *raj* or a *polliam*. 1 *Cal.*, 153 (*P. C.*) s. c., *L. R.*, 2 *I. A.*, 263 (*P. C.*) *followed.*

The law as prescribed in the Regulations expressly allows the rule of primogeniture to prevail in the district of Cuttack in cases in which by established usage succession to the entire estate devolves to a single heir, provided the rule is shown to have been in existence at the time of Regulation XII of 1805, and has not since been departed from. 1 *Cal.* 186, s. c., 19 *W. R. S. referred to.*

Sup: Govt. acts (VII of 1870) (*Contd*).

Words like *Bhunyan* and *Paharaj* used as titles of the owners of an estate in Orissa, and words like *Killa* and *Gerh* used as descriptive of the estate, were held, when read in connection with passages from standard works of reference on land tenure in Orissa, and taken in connection with the evidence adduced in the case, to furnish a proper basis for the inference that the estate being attached to and devolving with some public office descended only to the eldest son as the holder of the office. The statement in a genealogical table filed by a member of a family who is dead, regarding the descendants of another member of the family, before any question arose as to the latter, is relevant under section 32 (5) of the Evidence Act. SHYAMANAND DAS MOHAPATRA *v.* RAMA KANTA DAS MOHAPATRA. **32 C. 6.**

31. S. 13 & 35.—*Maintenance grant—Resumption—Presumption—Alienability—Evidence—Judgments in previous cases—Recital of pleadings.*

A maintenance grant is *prima facie* resumable on the death of the grantee, where it is a grant for the maintenance of the younger members of a family, and whether it is in the hands of the more immediate or in those of the more remote members of the family.

Whether a maintenance grant is heritable and alienablo is in all cases a question of the intention of tho parties.

On a review of the entire evidence in this case, it was—

Held, that the grants were hereditary but not alienable without the consent of the grantor or his roprosentatives.

It was the practice, in old times, for the Lower Courts in Bengal to set out the pleadings in their judgments and this practice was recognised by Circulars issued by the Sudder Dewany Adalut. Such judgments are, therefore, admissible in evidence under section 35 of the Evidouce Act as an admission by a party. They are also admissible under section 13 of the Act as instauces in which the right in question was claimed and disputed and disallowed. 9 *Cal.*, 586, *followed.* BHAYA DIRGUJ DEO *v.* PANDE FATEH BAHADOOR RAM. **3 C. L. J. 521.**

32. S. 13 and 43—*Custom—Alienation—Power to transfer ancestral property—Rawals of Mauza Badala, Nurpur Tahsil, Kangra District—Admissibility of previous judgments—Mortgage—Unequitable conditions—Onus, Undue influence.*

Held, that the plaiotiffs' family of *Rawals* seated at *Mauza* Badala in the Nurpur Tahsil of Kangra District, descendants of a Hindu Rajput who had embraced Islam, must be regarded as subject to Punjab Customary Law in matters of alienation as discussed in *P. R.* 107 of 1887 and that the *onus* of proving a custom authorizing alienation of ancestral land by a proprietor without proved necessity rests on the person so alleging. *Punjab Law Reporter 117 of 1901, P. R. 60 of 1895, 81 of 1895, 94 of 1898, 24 of 1900, referred to.*

Suc: Govt. acts (VII of 1870) (*Contd*).

A judgment finding that a particular person was not of sound mind based on a letter of a Medical man is not admissible either under Section 13 or Section 43 of the Evidence Act in a subsequent suit to prove that the person whose mental condition is in question was not of sound mind, where the previous suit was not between the same parties and no formal deposition on oath of the medical man was recorded.

Unequitable conditions affixed to a mortgage should not be enforced by Courts against the mortgagor or his successor in title. *20 Bom., 677, 21 Madras 111, 112, P. R. 131 of 1894, followed.*

Where the mortgagee who had obtained an ascendency over the mind of the mortgagor succeeded in gaining the mortgagor's consent to conditions to which a man of ordinary sense would not have readily consented the onus lies on the mortgagee to prove that he had made the mortgagor thoroughly understood the nature of the transaction and that money could not have been readily procured except from himself. SHER MUHAMMAD *v* FATTEH DIN.—**154 P. L. R, 1901=6 P. R. 1902.**

33. S. 13, 43—"*Particular instances in which the right was claimed*"—*Admissibility of judgment not inter partes in subsequent proceedings—C. P. C., S. 13.*

Per Russell, C.J.:—The rights and customs in S. 13 must be understood as comprehending all rights and customs recognized by law and therefore including a right of ownership. 10 B. 439 foll.; 2 B. L. R. 386, 651 and 5 B. L. R. 230 ref. to.

Per *Beaman*, J.:—S. 13 applies to cases in which the right or custom in question is regarded as capable of surviving repeated instances of its assertion and denial, *i. e*, continuing rights which may be interrupted without being necessarily destroyed. The section does not apply to the case of a right created by and inseparably bound up in a document and which does not admit of proof or disproof by particular instances of assertion and denial. The question in a case was whether a particular sale deed represented a genuine or a sham transaction. One of the parties produced a judgment not *inter partes* to show that the sale has been declared to represent a sham transaction.

Held:—Per *Rusell*, C. J.: –That the judgment in the prior suit would come within the purview of Cl. 2 of S. 13.

Per *Beaman*, J.:—A party who has been allowed to put in a previous judgment not *inter partes*, for the purposes of S. 13 of the Evidence Act, cannot be allowed to use its contents *qua* judgment virtually thereby converting it into a *res judicata*. That therefore conceding that the judgment in the prior suit was admissible to prove that there was a dispute about the genuineness of the sale deed, it could not be used for any ulterior purpose.—MUHAMMAD AMIR *v* HASAN MUHAMMAD.—**5 B. L. R. 65; 13 B. 143.**

Suc: Govt. acts (VII of 1870) (*Contd*).

34. S. 13, 43—*See S. 11, 13 and 43—9 C. W. N. 402—See No. 17—supra.*

34 (a). S. 13, 65 and 66 (2).—*Grants, construction of—Secondary evidence—Judgments not* inter partes, *admissibility of—Board's letter—Recognition—Notice to quit.*

Where a grant of land was made as a present for the purpose of planting a garden, and another was made "subject to faithful service," and the documents of grants did not contain any words expressly limiting the grants to the life of the grantee, nor making them descendible to the heirs of the grantee;

Held, they conveyed only life grants.

In a suit for *khas* possession on the ground that the defendants were trespassers on the death of their ancestor, the grantee, the plaintiff, relied on office copies of grants kept in the course of business of the grantor's *sherista*;

Held, that no notice to the defendants to produce the original was necessary to render secondary evidence admissible, as the defendants, from the nature of the case, must have known, that they would be required to produce the originals.

Where judgments not *inter partes* were filed to show that similar grants were resumed by the grantor or his heirs on the death of the grantee:

Held, they are admissible in evidence under the provisions of S. 13 of the Evidence Act.

Board's letter, dated the 26th November 1792, showing that jagirs are resumable on the death of the grantee, is inadmissible in evidence.

When the agent of the grantor, in ignorance of the death of the grantee, granted rent receipts to the heirs in the name of the grantee,

Held, the receipts did not recognise the heirs as tenants and successors of the grantee, and it was not necessary to give them notice to quit before bringing a suit against them. SYED MAHAMMAD KHAN *v.* MAHARAJA NAM NARAIN SINGH BAHADUR. **7 C. L. J. 90.**

35 S. 14.—*Fraud intention—Acquiescence.*

The plaintiff having obtained a money decree against defendant No. 2 sought to attach certain monies in the hands of Accountant-General as his judgment debtor. The monies had been assigned by defendant No. 1 to defendant No. 2, his wife who objected to the attachment.

Held, that for the purposes of determining the question, whether the deed was a sham transaction, the Court must take into consideration all the circumstances which surrounded the transaction and the conduct contemporaneous and subsequent of the parties.

It was found that, as there was no indebtedness at the time of the execution of the deed, all existing debts having been paid off before its execution and the consideration for the conveyance being natural love and affection, which the law regards as good, the deed was so far a *bona fide* transaction.

Sup: Govt. acts (VII of 1870) (*Contd.*)

No *mala fides* can be presumed merely from the possibility that the settlement might prejudice the claims of subsequent creditors—*I. L. R., XXIII Bom.*, 146. *at p.* 157; *referred to.*

It was contended for the plaintiff that *mala fides* must be presumed from (1) no notice of assignment having been given to the Accountant-General; (2) interest being realized by the defendant No. 2 subsequently to the assignment; (3) defendant No. 2's dealing with moneys in satisfaction of his own decrees.

Held, that *mala fides* could not be presumed from the above facts. Notice of assignment to the Accountant-General was not necessary; it must be presumed that, when the defendant No. 2 began to receive the moneys immediately after the execution of the deed, he received them for defendant No. 1, and made them over to her, and from her acquiescence in her husband's dealing with the moneys, *benami* nature of the transaction could not be presumed.

It is not the practice of the Courts in India to press a presumption by acquiescence against a *parda-nashin* female in a rival claim from the mere non-contestation for a limited time of an adverse title.

Where the circumstances attending the transactions are by themselves suggestive of *bona fides*, the evidence of intention afforded by subsequent conduct of the parties must be clear and cogent. It must not be of an equivocal character, but absolutely inconsistent with the *bona fides* of the transaction and leading to one and but one presumption only of fraud. EBRAHIM RAHIM BHOY *v.* FOOLBAI. **4 B. L. R. 130=26 B. 577.**

36. S. 18.—*Decree against dead person—Representative—Heir—Law. Wrong proposition of—Admission of.*—

A suit cannot be brought by or against a dead man, and if the person entitled to sue or liable to be sued is dead, the suit must be brought by or against the person who is entitled or liable at the date of the suit brought making it clear on the face of the plaint how the right or liability arises.

If a non-existant person is sued, as represented by an existing person, and a decree be obtained against him in that form the decree is regarded as obtained against no one owing to the non-existence of the defendant. A decree obtained against a person who was described as a representative of deceased, but did not hold that character can not bind the estate of the deceased.—*I. L. R., 9 Bom., 86, referred to.*

When a party against his interest admits as true a wrong proposition of law, he is entitled to maintain the right when he finds out his mistake. BALKRISHNA *v.* ORIENTAL LIFE ASSOCIATION COMPANY. **4 B. L. R. 340.**

37. S. 18 (2).—See S. 8, 18 (2), 21 &c. U. B. R. 1907. P. 13 No 7. *supra.*

38. S. 19, 20 & 80. *Heading of deposition is no part of evidence—and no admission.*—

Sup: Govt. acts (VII of 1870) (*Contd*).

The heading of a statement giving the description of the witness by whom the statement is made is no part of the deposition made by him on solemn affirmation.

Where the heading in a former deposition of the Defendants' mother was put in to prove his illegitimacy and the heading ran as follows: "I have lived with G. these 12 years I lived with him before his wife died two years before that event." Held that even if the document is admissible, it has no weight; and that it will be harsh to infer for the description any imputation of unchastity or that the witness confessed her immorality. When statements of witnesses are not improbable and not shaken on cross examination in the court taking them has accepted them, the Appellate Court should not reject them on mere suspicion that the witnesses are not independent. MOQBULAN *v.* AHMAD HUSAIN. **6 B. L. R. 233=8 C. W. N. 241=31 I. A. 38=26. A. 108. P. C.**

39. S. 21.—*Benami transaction—Burden of proof—Admission—Sale-deed containing admission of apparent title of vendee.*

Plaintiffs' father and the defendant were brothers. They separated and partitioned their ancestral estate. On the death of their father the defendant was natural protector of the plaintiffs. One of the plaintiffs alone, but describing himself also as the guardian and protector of his younger brother, who was minor, executed a deed purporting to sell to the defendant a coffee garden, describing it as having been enjoyed by their father and after his death belonging to his sons, the plaintiffs. The plaintiffs sued the defendant for the recovery of the coffee garden. The High Court, on the whole evidence decreed the plaintiffs' claim and relied upon the above document as containing an important admission of the title of the plaintiffs and their father.

Held, that the High Court was right in so using the document.

That in order to displace the apparent title of the plaintiffs, it was incumbent upon the defendant to show by satisfactory evidence that the funds out of which the garden was purchased were his own funds and that they had failed to do so. PULIYAMPATTI NARANIER *v.* KUPPIER. **9 C. W. N. 89.**

40. S. 21 & 163. *Admission by a person in his sale certificate made by himself.*

S. 21—Any statement, as to rent payable for a holding, made by a person in a sale certificate, which was obtained by him as purchaser of the holding, at a sale in execution of a decree against the former tenant, being in the nature of an admission, cannot be used as evidence on his behalf, as such a statement does not come within the exception to S. 21 of the Evidence Act and is not relevant under any other section. RAMANI PERSHAD NARAIN SINGH *v.* MAHANTH ADAIYA GOSSAIN. **I. L. R. 31 C. 380.**

Sup: Govt. acts (VII of 1870) *(Contd).*

40. (a) S. 21 *cls. (1) and (3) S 32 (5) and S. 157—Admission by plaintiff—When admissible in his favour—Statement in previous deposition.*

When the plaintiffs sought to establish their pedigree by proving *inter alia* that A and B were brothers.

Held, that a statement to that effect, made by one of the plaintiffs, in a deposition given long before the controversy in suit arose, was admissible in evidence. JADU NATH SARKAR *v.* MAHENDRA NATH RAI CHOWDHURY. **12 C. W. N. 266.**

41. S. 32 cl (2).—Report or certificate of a medical man not called as a witness as to mental state of an alleged lunatic is inadmissible in evidence. YAD ALI *v.* MST AMIRUNNESA **7. O. C.** *(See Lunatics Estates Act XXXV of 1858) No. 3.*

42. S. 32.—See S. 4, 32, & 90—6. B. L. R. 750 (P. C)=31 I. A. 217=26. A. 581=7. O. C. 290 No. 4 *supra.*

43. S. 32. (2).—*Account sales.*

In a suit to recover loss sustained on the sale by the plaintiffs of goods consigned to them by the defendant for sale by their London firm, account sales are good *prima-facie* evidence to prove the loss, unless and until displaced by substantive evidence put forward by the defendants.—BARLOW *v.* CHUNI LALL NEOGI, **I. L. R. 23 C.. 209.**

44. S. 32 (2) & 34.—*Account—Corroboration.*

The plaintiff relied on entries in the handwriting of her deceased husband kept in the ordinary course of his business.

Held, that entries in accounts relevant only under section 34 of the Evidence Act (I of 1872) are not alone sufficient to charge any person with liability: corroboration is required; but where accounts are relevant also under section 32 (2) they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible only under section 34, require corroboration. Entries in accounts may in the same suit be relevant under both sections, and where that is so, it is clear that inasmuch as they are relevant under section 32 (2), the necessity of corroboration prescribed by section 34 does not arise. Though accounts which are relevant under section 32 (2), do not, as a matter of law, require corroboration, the Judge is not bound to believe them without corroboration; that is a matter on which he must exercise his own judicial discretion as a Judge of fact. RAMPYARABAI *v* BALAJI SHRIDHAR. **I. L. R.. 28 B. 294=6 B. L. R., 50.**

45. S. 32 (3).—*Statement adverse to deceaseds' interest.*

A statement by a deceased landlord, that there was a tenant on the land is a statement against his proprietary interest and is admissible under Cl. 3 of section 32 of the Evidence Act. 22 *W. R.*, 231 *referred to.* ABDUL AZIZ MOLLA *v.* EBRAHIM MOLLA. **31 C. 965.**

Sup: Govt. acts (VII of 1870) *(Contd).*

46. S. 32 (3).—See Sections 13 (*b*), 32 C. 6 No. 28 *supra.*

47. S. 32 (4) & 21—*Muhammadan Law—Shia School—*Wakf *may be created by Will—Evidence—Legitimacy—Statements.*

According to Muhammadan Law of the *Shia* and *Sunni*, Schools a valid *wakf* may be created by Will. 14 *All.*, 429, *overruled;* 6 *S. D. A.*, 110; 8 *I. A.*, 117; 5 *M. I. A.* 199; 22 *I. A.*, 86 *and* 87, *referred to.*

Where a question arose whether the plaintiffs were legitimate descendants and heirs of the son of the testatrix and entitled to dispute the Will executed by her and to inherit the property left by her—

Held, that statements made by the testatrix in documents addressed to the *Wasika* office long before the present dispute arose, wherein she admitted them to be the heirs along with other legitimate heirs, whose legitimacy was not questioned, were admissible in evidence and entitled to great weight, and are conclusive on the issue of legitimacy.

Held, also, that a petition to the *Wasika* office by a descendant of the son of the testatrix, since deceased whose right as heir was not disputed to the effect that the plaintiffs were along with him heirs of the husband of the testatrix was admissible in evidence as containing a statement against the interest of the petitioner. BAKER ALI KHAN *v.* ANJUMAN ARA. **7 C. W. N. 465=5 B. L. R. 41=30 I. A. 94=25 A. 280 (P. C.)**

48. S. 32 (4) and 42.—*Trade mark—Importers' right.*

In a suit for injunction to restrain the defendants from importing or selling watches similar to those imported by the plaintiff on the ground that the plaintiff had under contract with the manufacturers sole right to sell them in India.

Held, that the point of primary importance for the plaintiff's case is that he should show that the value of the trade, which he carries on, is due to the reputation acquired by, and attaching to the trade-mark, as a guarantee of importation by him, and not merely as a guarantee of manufacture by somebody else, and that therefore the imitation of that trade-mark is an infringement of an exclusive right of his own, entitling him to ask for protection in this country. The claim was rejected on the ground that the agreement with the manufacturers did not give the plaintiff any interest in the manufacturer's trade-mark and the mere exclusive right to sell, within a limited area, would give no right to restrain a person importing and selling the article within that area. When the importer has adopted a trade-mark, as a guarantee of importation by *him* from a specified spot, he is entitled to protection against a person using that mark and although unable to show importation from such spot. An importer can only protect a trade-mark representing his own reputation and the advantages accruing therefrom, but not the trade-mark of another, a manufacturer or producer.

Sup: Govt. acts (VII of 1870) *(Cont'd)*

Held, that where in a suit in India the existence of a trade-mark is in question, a judgment in a foreign Court as against a stranger declaring the existence of the trade mark is not admissible in evidence either under S. 32 (4) or S. 42 of the Evidence Act which deal with public rights and not rights of a private individual as against the public.

The plaintiff was not saddled with the costs of the defendant on the ground that the plaintiff only committed a *bona fide* mistake as to a difficult point of law. CHARLES HEINIGER *v.* CONSTANT DROZ. **3 B. L. R. 1=25.B 433.**

49. S. 32 (4) & (5) and 35 & 57.—*Plea of custom of a family as well as of the tribe to which the family belongs*—Wajib-ul-arz, *value of, as record of custom*—Rawaj-i-aam, *extracts from—Hearsay evidence, as regards relationship—Presumption as to statement of a witness regarding facts occurring in his life-time and before he was born—Documents relating to* gaddi-nashini *estates in proof of custom excluding daughters from inheritance in estate not governed by that rule—Custom of exclusion of daughters from inheritance among Chohans—What constitutes valid custom.*

The plaintiff sued for possession of an estate, as the daughter of its last undisputed owner. The defendants contended that the plaintiff was excluded from inheritance by a custom prevailing in the family and tribe to which the parties belonged.

A party can plead that a custom obtains both in a family and in the tribe to which that family belongs; but he must prove that the custom is binding on the family, whether he confines his evidence and plea to the family or not. 7 *A. I. P. C. and* 20 *C. 649 P. C. referred to.*

A custom, to be valid, must be ancient, continuous, reasonable and definite, and all this must be established by clear and unambiguous evidence. 14 *M. I. A.* 570 *referred to.*

A wajib-ul-arz is generally more valuable as a record of opinion of persons presumably acquainted with the custom, than as an official record of the custom; but, if duly attested by settlement officials and signed by zemindars of the village to which it relates, it must be admitted in evidence under S. 35 of the Evidence Act. 7. 0. *C.* 134, 7. *I. A.* 63=5. *C.* 744 *and* 15. *C;* 20 *P. C. referred to.*

Neither cl. (4) nor cl. (5) of S. 32 of the Evidence Act justifies the admission of hearsay evidence upon the question whether a particular person survived another or upon the question whether a man was, at the time of his death, joint with, or separate from, other members of his family; nor can the grounds of the opinion of a deceased person, as to the existence of a custom, even if stated to a witness, be, as such, proved under that section. L. R. 13 Q. B. D. 818: 20 C. 758; 24 C. 265; 25 M. 183; select case No. 265; F. C. A. No. 46 of 1899; 19 A. 1. (P. C.) 23 A. 37 (P. C.); 23 A. 72

Sup: Govt. acts (VII of 1870) *(Contd).*

(P. C.); 1 Weightwick, 112 p. 169; 25. A. 143 (P. C.); and 31 I. A. 217, Refd. to.

When a witness states facts which occurred in his own life-time, in his own family, village or neighbourhood, after he had become of age it may be presumed that he is testifying to his own knowledge; but when he states instances of the application of the custom or particular facts which occurred before he was born and he does not give the source of his information, it cannot be presumed that he is repeating information acquired from his father or grandfather or some other person, who would be likely to have been aware of the facts.

On the contention that certain documents filed by the defendants were not admissible in evidence as they related to the succession to a *raj* or *gaddi*, while it was expressly admitted that the succession to the estate in suit was not governed by such a rule, it was *held* that those documents were admissible in proof of the custom set up by the defendants, although they related to estates which devolved upon a single heir. 7. I. A. 63=5. 744, 15. C. 20 P. C. and 20. C. 758. 24. C. 265. 25. M. 189. 19. A. I. P. C. 23. A. 37. P. C. 23. A. 72, P. C. 25. A. 143. P. C. and 31. I. A. 217. *referred to.*

In view of the evidence produced in the case, the Court *held* that, among *Jangra Songarha Chauhans*, daughters were excluded by brothers and male collaterals however remote from inheritance. MUSAMMAT PARBATI KUAR *v.* RANI CHANDRAPAL KUAR, **8. O. C. 94.**

50. S. 32 (a) cl (5), S. 21 (1) & (3).—*Statement of relatives as to age.*

Where the question in issue was the age of the deceased assured, in a suit by his heir against a Life Assurance Company held that the statement of the deceased himself, as to his age, contained in the proposal form in the declaration, is legally admissible in favour of the plaintiff under Section 32 (*a*), clause (5) and Section 21, clauses (1) and (3), but it can carry little weight when it is opposed to prior statements made by the deceased himself in respect of his age.

The report of the medical expert of the Company cannot be admitted in evidence without examining the expert himself as a witness.

Even expert's opinion in the matter of age cannot be safely accepted and acted upon when the difference between the contending parties as to the age is only about 3 years.

A statement as to the age of his brother, made by his sister, is admissible after her death under Section 32, clause (5) of the Evidence Act, Illustration (*e*). The date of birth being the commencement of a relationship by blood and so relating to the existence of each relationship (20 C 758 followed).

Sup: Govt. acts (VII of 1870) *(Contd.)*

Prescriptions in themselves do not prove that the person for whom they were given suffered from disease for which such prescriptions are really given. ORIENTAL GOVT LIFE ASSURANCE COMPANY *v.* NARSINHA CHARG. **11. M. L. J. 379=25. M. 183.**

51. S. 32 (5).—*Marriage Legitimacy—wakf by will.*

Held that among *Shia* sect of Mahomedans marriage includes *muta* marriage and therefore wherever the word marriage is used in Act I of 1872 S. 32, it must include *muta* marriage so far as it deals with case under the *Shia* Law. Held further that the law does not prevent creation of *Wakf* by using other expressions than "Wakaflo" and the intention for creating the *wakf* having been established the forms and expressions are immaterial. Held further that the deed creating the *wakf* was not a will but a *wakf-bel-wasiat* and therefore could not be valid and operative. Held also that when the testator declared appellants' mothers as her grand daughters it must (following 10 W. R. 469) be presumed that she meant legitimate daughters nothing to the contrary being shown. ANJMAN ARA BEGAM *v.* SADIK ALI KHAN. **2. O. C. 115.**

52. S. 32. (5).—*Pedigree table—Proof of relationship—*

A pedigree table was alleged to have been prepared by certain bards at the instance of a Raja. It was held to be inadmissible in proof of relationship as neither the bards nor the Raja had been produced as witnesses and it was not proved that they were dead or could not be found or had become incapable of giving evidence or could not be produced without unreasonable expense or delay. SURJAN SINGH *v.* SARDAR SINGH. **5. C. W. N. 49=23. A. 72. (P. C.).**

53. S. 32. (5.)—*Evidence—Pedigree, proof of— Evidence of witnesses who have heard names of ancestors recited—Evidence of relatives —Grounds for discrediting evidence— Mode of dealing with evidence—Witnesses, credibility of.*

Evidence of competent witnesses as to their having heard the names of the ancestors recited by members of the plaintiff's family on ceremonial and other occasions was held to be admissible evidence in support of the pedigree on which the plaintiff based his claim. Such evidence is not open to criticism merely on the ground that the witnesses are relatives. The relationship of a class of witnesses should be considered only with the ordinary caution with which testimony is sifted, where sympathy with one side is to be taken for granted, and should not be treated as making them interested or unreliable witnesses. The fact that one of such persons besides being a relative was assisting the plaintiff in the case, and that the other witnesses were connected with this person by blood or service, is not necessarily sufficient ground for discrediting their evidence. The rejection of certain specific statements of a witness is not necessarily a ground for disbelieving the whole of his evidence; nor is the fact that a Judge has not acted on certain portions of his evidence which may be due to caution on the part of the Judge or inaccuracy on the part of the witness.

Public assertion of the relationship of plaintiff's family made by plaintiffs grandfathers and father on several occasions in courts of Law without such assertions meeting with any denial on behalf of the defendant were held to be evidence of pedigree. DEBI PERSHAD CHOWDHRY *v.* RADHA CHOWDHRAIN. **31. I. A. 160=9 C. W. N. 161; P. C.=32. C. 84. (P. C.)**

54. S. 32. (5) & C. *See 32 C. 6 No. 28 Supra.*

55. S. 32. (5) & 90.—*Practice of Privy Council with respect to decisions as to credibility of witnesses by lower courts—Hearsay evidence —Ancient document—Discretion of Court in calling for formal proof of.*

The Judicial Committee will not criticize with any strictness of opinions as to the credibility of witnesses, which is eminently a question for the Courts in India. Where the Courts below had rejected the evidence of certain witnesses on the ground that it was hearsay only and had not conformed with S. 32 of the Evidence Act, and on the face of the evidence it was sometimes uncertain whether the witnesses were speaking from their own personal knowledge or from information derived from others, but the Courts had considered it from both points of view and held it inadmissible, the Judicial Committee saw no reason to differ from the estimate which the Courts had formed as to the credibility of the witnesses in the former case, nor, in the latter case, to question the manner in which the Courts had applied the provisions of S. 32. Notwitstanding a document was more than 30 years old and had been produced from proper custody, the Courts below, on the ground that there were circumstances in the case and evidence as to the document itself which threw great doubt on its genuineness, exercised their discretion under S. 90 of the Evidence Act by not admitting the document in evidence without formal proof, and rejected it when no such proof was given. The Judicial Committee considered that the discretion of the Court had been rightly exercised and declined to interfere with it.—SHAFIQ-UNNISSA *v.* SHABAN ALI KHAN.—**9 C. W. N. 105; P. C.=31 I. A. 217=26 A. 581 (P. C.)**

56 S. 32 (5)—*Evidence—Report of Panch in previous family disputes—Pleadings—New point raised for the first time on appeal before Privy Council* –

Matters in dispute between the heads of the two family lines represented by the parties to the present suit were referred to

Sup: Govt. acts (I of 1872) (*contd*).

Panch for enquiry. Their report contained a pedigree table of the family including relationship by adoption of the members. Both the disputants signed the report each saying that he agreed to what was stated in it. It does not appear whether any formal order was made on this report, and the record of the case did not include any order of reference or formal statement of the case to show what was the precise subject of decision. But the report was filed and preserved in the Collector's office. The question of adoption now in dispute could hardly have been the point in dispute before the Panch.

Held, that the report was admissible in evidence and the findings of the Panch embodied in the report were strong evidence in matters of family pedigree. The report was not rendered inadmissible by its being tampered with.

Where a point had not been raised in the pleadings the Privy Council did not allow it to be raised for the first time on appeal to the Council. AJAB SINGH *v.* NANABHAU. **25 B. 1 (P.C.).**

57. S. 32 (5), 49, 60.—*Custom—Hindu Law—Primogeniture—Inheritance—Burden of Proof—Admissibility of statements of deceased persons.*

The burden of proving that the custom in a particular family of primogeniture regulates the succession to their property, is upon him who claims to inherit in that right. The elder of two brothers having obtained possession of all the family estate, the younger suing for his half share under the general Hindu law, was met by the defence that there was in this family a custom of primogeniture. Upon the evidence the decision was that the custom alleged had been proved to exist. There was no documentary evidence prior to the conquest of the upper part of the Doab in 1803. The family was one of three families that descended in three branches from a common ancestor said to have died in 1695. In the two other families, as was admitted, primogeniture prevailed, a fact giving rise to much probability that it was the custom in this one also. For nearly eighty years possession had been consistent with the alleged custom and in the earlier part of that period inconsistent with any other basis. In that part of the oral evidence which related to the practice of *gaddinashini* in the family, there was an identification, understood to be meant by the witnesses, in speaking, of that practice, with primogeniture; in the same way that is referred to in the judgment in *Thakur Nitr Pal Singh* v. *Thakur Jai Pal Singh* (L. R., 23 I. A., 147; I. L. R., 19 All. 1). In the evidence as to tradition regarding the family, learned by witnesses from deceased persons, their statements came within sub-s. (5) of s. 32 of the Evidence Act 1872. And by the aid of s. 49, rendering relevant the opinions of persons having special means of knowledge as to family usages, oral statements of such opinions were admissible. But s. 60 requires that oral evidence referring to an opinion, or its grounds, should be the evidence of a person holding that opinion on the grounds referred to. A witness may state, as the ground of his opinion as to the existence of a family custom, information derived from deceased persons. But this must be the statement of independent opinion; and though derived from hearsay, must not be the mere repetition of hearsay. The weight of such evidence depends upon the chararacter of the witness and of the deceased. GARURADHAWAJA PRASAD *v.* SUPERUNDHWAJA PRASAD. **I. L. R., 23 A. 37.**

58 *Evidence Act 1872 S. 32 (6)—Pedigree-table.*

Held, that the pedigree-table said to have been prepared thirteen years before suit from the history given by bards and copied from certain papers in their possession was not relevant when the bards or the persons, who had the pedigree drawn up, were not called as witnesses and no reason was given for their absence. SURJAN SINGH *v.* SARDAR SINGH. **5 C. W. N. 49=23 A. 72 (P. C.)**

59 S. 32 (7)—*Admissibility of document—New trial—Preferable heir—*

It was contended by the appellant that certain documents which were resenter-alias-acta and did not fall under any of the clauses of S. 32 of the Evidence Act, were improperly admitted in evidence. They were held to be admissible against him as being clearly evidence against persons, through whom he claimed. With regard to the birth of a posthumous son, whose brith if proved, the respondent would succeed in preference to the appelant, a document in Persian characters was produced consisting of two different kinds of paper fastened together of which the lower portion (which the appellant alleged to be a forgery) was in different handwriting from that of the upper portion and was written with a different pen. It was also objected that the word in the upper portion translated "son" really meant only "child" or "offspring" without distinction of sex. *Held* that even if the appellant's contentions were correct, other expressions in the upper portion of the document pointed to the existence of a son, and the fact of its being expressly referred to in another document of slightly later date (the genuineness of which was not impeached) furnished contemporaneous proof by reference, and therefore the grave suspicion attaching to the document did not, under the circumstances, form sufficient ground for overruling the concurrent decisions of the Courts below. A new trial, asked for on the grounds that a mass of evidence had been improperly received, and that the earlier document above referred to was so clearly a forgery that injustice would be done, if the decisions appealed from were allowed to stand, and consequently there had been a gross miscarriage of justice, was refused on the above findings, the Judicial Committee being of opinion that there was no reason for departing from their usual practice of de-

Sup: Govt. acts (I of 1872) *(Contd).*

clining to interfere with concurrent decisions on fact. *Semble*, under the Mithila law an agante in the seventh degree is a preferable heir to a sister's son.—RANI SRIMATI *v.* KHAGENDRA NARAYAN SINGH. **31. I. A. 127. P. C.=31. C. 871. (P. C).**

60. S. 32.—*Statement in writing by person who could have been called as a witness but was not—Statement of deceased person—Report of Patwari—Limitation.*

Where a person, though alive at the time the plaintiff closed his case, was not called as a witness, statements in writing by such person, filed before his death in support of the plaintiff's case, were *held* by the Judicial Committee to be inadmissible in evidence, as statements of a deceased person. A genealogical table purporting to have been made by a person since dead, but which was shown to be merely an exhibit binding on him for the purposes of a former suit, was held to be inadmissible in evidence, having been made without the personal knowledge and belief which must be found or presumed in any admissible statement by a deceased person. In the report of a patwari as to the date of a death, the native date was given and after it what purported to be the corresponding English date. The dates being found not to correspond: *Held*, on a question of limitation, that the substantive statement was that given in the vernacular and that the rest was a miscalculation.—JAGATPAL SINGH *v.* JAGESHAR BAKHSH SING. **30. I. A. 27. P. C.=7. C. W. N. 209. P. C.= 25 A. 143. P. C.**

61. S. 32.—Statement of persons who can not be found or called as witnesses—9. B. L. R. 1047—See S. 11 and 32—No. (19) *Supra.*

62. S. 33. *Copy of living deponents' statement inadmissible except under special circumstances.*

Under S. 33, unless the deponent is dead or can not be found or is incapable of giving evidence or can not be produced without an unreasonable amount of delay or expense and unless the proceedings are between the same parties or their representatives and the adverse party had the opportunity to cross-examine the witness, no copy of a witnesse's deposition is admissible in evidence. CHAKURI SINGH *v.* SURAJ KUAR. **2 A. L. J. 91.**

63. S. 34—*Accounts regularly kept.*

For accounts to be regularly kept under S. 34 they need not have been written from day to day as the transaction took place. Though it may affect their credibility it can not render them inadmissible. ATMA RAM *v.* UMED RAM. **3 B. L. R. 213=25 B. 616.**

64. S. 34 and 114—*Entries in books regularly kept—Presumption—Instrument of debt in debtor's possession.*

Where the instrument of a debt and security for the debt are in the possession of the debtor, *primâ facie* there is a strong presumption that the debt has been discharged, and the burden of proof lies upon the creditor to rebut the presumption.

Entries in books regularly kept are admissible in evidence not only for the purpose of refreshing the memory of a witness but also as corroborative evidence of his statement. BHOY HONG KONG *v.* R. M. S. P. RAMNATHAN CHETTY. **4 B. L. R. 373, 6 W. N., C. 401=29 I. A. 43=29 C. 334 (P. C).**

65. S. 34—*Account books containing entries after transaction—Corroborated evidence.*

For account books to be regularly kept under S. 34 it is not necessary that in them entries may have been made from day to day or from hour to hour, as transactions have taken place. Entry in account books is admissible as corroborated evidence of oral testimony of payments. The opinion expressed in 4 B. 576 against the reception of an account book containing an entry not made at the time of the transaction was not approved. The time of making the entries may affect their value but if they have been regularly made in the course of business afterwards, it does not make them irrelevant. THE DEPUTY COMMISSIONER OF BARABANKI *v.* RAM PARSHAD. **4. C. W. N. 147,=2. O. C. 311. (P. C.)=27. C. 118. (P. C.)**

66. S. 34. *Accounts books—Copies.*

A person used to enter in a *chhota khata* all his receipts and money advances to his servants. After the expenses had been incurred by the *amlah* to whom the money was thus advanced he had to submit a *furd* embodying the expenses which were checked by him regularly. Monthly accounts were used to be prepared from this *khata.*

Held that the *chhota khata* books should be regarded as the original accounts, and in the absence thereof the *furds* and the monthly accounts were admissible in evidence for the purpose of proving what were the actual receipts.

These accounts having been regularly kept were admissible in evidence even though the *chhota khata* itself was not produced. 27 *A.* 118 *Referred to.* RAJA PEARY MOHAN MOOKERJEE *v.* NARENDRA NATH MOOKERJEE. **9. C. W. N. 421.=32. C. 582.**

67. S. 35.—*Effect of entry of pre-emption in a previous* wajib-ul-azr *and its omission from the latter one.*

Held, that the right of pre-emption, recorded in the *Wajib-ul-arz* of 1866, must be taken to be a record of customary right. A *Wajib-ul-arz*, prepared and admitted according to law, is *primâ facie* evidence of the existence of any custom of pre-emption which it records. *W. N., All.*, 1897, *p.* 3; 2 *All.*, 87; 8 *All.*, 434, *referred to.*

Held, also, that as there was no evidence whatever that the custom of 1866 had fallen into disuse, and the word '*nadarad*' in the *Wajib-ul-arz* of 1886-87, could not be taken as meaning that there was no custom, or that

Sup: Govt. acts (I of 1872) (*Contd*).

a custom, which had existed, had fallen into disuse, the custom must be presumed to continue to exist. Rules passed by Local Government, for the recording of rights in the District of Gorakhpur, directed that pre-emption should be noticed "when the proprietors expressly demand that it be noted and prove conclusively that the custom exists." *W. N., All.*, 1901, *p.* 29, *overruled* ; 16 *All.*, 40 *referred to.*

A record-of-rights is not admissible in evidence to show by an entry or by its silence that a particular custom does not exist in a village.

Section 35 of the Evidence Act only provides that any entry in an official public book, which is duly made by a public servant in the execution of his duty, is of itself a relevant fact; but it does not make the book evidence to show that a particular entry has not been made in it. 7 *C. L. R.*, 356; 10 *Cal.*, 1024; 15 *Cal.*, 20; *L. R.*, 7 *I. A.*, 63, *referred to.* ALI NASIR KHAN *v.* MANIK CHAND. **A. W. N. 1902 p. 207=25 A. 90 (F. B.)**

68. S. 35.—*Effect of entry in Collector's book on title.*

Held by Chandra Warkar and Jacob, J. J.—Where lands are entered in the Government records in the name of a particular person the entry is not sufficient to prove that person's ownership in those lands, such entries are only an evidence of that person's ownership of land taken with some other evidence.

Per Aston J. (dissenting)—Such entries in the name of a particular person are material though not conclusive evidence of his ownership of those lands. PANDURANG VASUDEO *v.* ANNANT LAKHMAN. **5 B. L. R. 956.**

68 a. *Father giving land to sons—Sons dead—Son's wife and children suing father for possession—Entry in revenue register by* thugyi *—Entry to the effect that father sent sons with letter declaring his wishes—Report to* thugyi *could not effect the gift—Children wrongly joined as plaintiffs—Duty of Subordinate Court*—Pyatbaing, *meaning of—S. 35, Evidence Act.*

The plaintiffs alleged that P. G., their husbands' father, gave his paddy land to his sons and transferred it to their names in the revenue register. On the death of their husbands they and their children brought a declaratory suit against P. G. and prayed for possession of the land. The evidence in the case consisted of an entry made by a *thugyi* or revenue Surveyor in the revenue register, the entry being that P. G. sent his sons with a letter declaring his wishes. The plaintiffs did not allege that the gift in question was effected by the report to the *thugyi*;

Held, that what the plaintiffs had to prove was gift made, and that the report to the *thugyi* could not effect the gift;

Held, also, that the entry could only be proved with the letter that accompanied it, but not otherwise.

Sup: Govt. acts (I of 1872) (*Contd*).

Held, further, that their children were wrongly joined as plaintiffs, as they had no rights to possession of inherited property during the lifetime of their mothers.

The duty of a Divisional Judge is to follow, not criticise, the rulings of the Chief Court, to which he is subordinate.

A *pyatbaing*, as its name implies, is the foil cut out of revenue register IX, and given to the person who reports any matter to the *thugyi*.

When a *thugyi* or revenue surveyor is examined, he may be asked to prove that he made entries in the ordinary course of his duty in revenue register IX, and those entries may be put in evidence under S. 35 of the Evidence Act. MAUNG PO GAUNG *v.* MA SHWE BWIN **14 B. L. R. 30.**

69. S. 35.—3 C. L. J. 521 See S. 13 *Supra No 31.*

70. S. 35 and 48—*Wajib ul-arz entry in custom. Evidence Act* (*I of* 1872), *Sections 35, 48—Evidence—wajib-ul-arz. Entries in—Custom. Proof of—Adoption of sister's son—Hindu Law.*

Entries in a *Wajib-ul-arz* properly made under Regulation VII of 1822 and authenticated by the signature of the officer who made them are admissible as evidence under section 35 of the evidence Act in order to prove a family custom of inheritance, or under section 48 as the record of opinions as to the existence of such custom by persons likely to know of its existence.

It cannot be laid down as a general proposition that a recital in a *Wajib-ul-arz* cannot operate as a Will in the case of a Hindu. The weight to be given to testamentary statements in a *Wajib-ul-arz* must depend in each case, on the circumstances in which the entries were originally made and the corroboration they receive from extrinsic evidence.

Dhanraj, a Marwari Brahman, declared by his statements in a *Wajib-ul-arz* that he had adopted Murli, his sister's son, as his son seven years ago and that the boy would be his heir and owner of his property after his death. He also declared that if a son was subsequently born to him half the property would be received by him and half by the adopted son. The entry also stated that a sharer shall be at liberty to adopt his sister's son or brother's son, or daughter's son whom-so-ever he may like, and after his death his adopted son will inherit the property.

Held, that the adoption of Murli having been found to be invalid gave no right to inherit and the gift therefore had no effect, for it was not the intention of Dhanraj to make Murli his heir irrespective of adoption. *L. R.*, 26 *I. A.*, 153, 19 *All.*, 16, *L. R.*, 19 *I. A.*, 101; *L. R.*, 3 *I. A.*, 253 *referred to.* MUSSAMMAT LALI *v.* MURLI DHAR. **3 C. L. J., 594=S. C., 3 A. L. J., 415=8 B. L. R., 402=10 W. N. C., 730=28 A. 488 (P. C.)**

Sup: Govt. acts (I of 1872) *(Contd)*

71. S. 35, 74, 80, and 90.—*Limitation Act. 1877, Section 19—Acknowledgment by minor.*

The documents on which reliance was placed by respondents to prove the minority of one K. D. were—

(*a*) the statement *K. D.* before the *Tahsildar*, dated 29th July 1842, in which he gave his age at 19;

(*b*) the statement of one *N. R.*, dated the 1st September 1842, before Mr. Ross, in which he stated his client's age was 19;

(*c*) the descriptive roll of *K. D.* in which his age was entered 18 years, and it was stated that hair was just appearing on his face;

(*d*) *K. D.*'s own statement, dated 5th September, before the Assistant Commissioner in which his age was put down as 18;

(*e*) the statement of the *Patwari* before the Settlement Deputy Collector, dated 9th September 1842 in which he said that in the measurements of 1246, *Fasli* (about 1830) the land was entered in the name of Manohar Das, *Waris* of *K. D.*; and

(*f*) a certified copy of an entry in the Municipal Death Register, dated the 13th February 1884, in which the age of *K. D.* was given as 60 years;

Held, that the documents referred to by the respondents were public documents within the meaning of Section 74 (1) *(iii)* of the Evidence Act, and documents (*b*) *(d)* and *(e)* and their contents were sufficiently proved by their production under Section 80 of the Act. Similarly, under section 90 the other documents were to be presumed genuine. Under Section 35 the descriptive roll, the entry in the Municipal Register of Deaths in 1884, and the *Patwari's* statement about the entry in the Revenue papers in 1246 *Fasli* were clearly relevant evidence.

An acknowledgment of liability by a minor is not efficacious within the meaning of section 19 of the Limitation Act—8 *Bom.*, 99, 16 *Mad.*, 227; 9 *P. R.*, 1897; 4 *M. & W.* 653, *referred to.* ANIS-UL-REHMAN KHAN *v.* BENI RAM. **P. R., 59 of 1901.**

72. S. 35.—*Entry in* Wajib-ul-arz—*Custom—Alluvion, diluvion—Rights of* adna maliks *in lands submerged in river*—Onus—*Summary Settlement—Punjab Land Revenue Act (XVII of 1887) Section 44.*

Plaintiffs were *Adna maliks* in the village whose lands after having been submerged in the river Chenab had recently come out and been taken possession of by the defendants, the *Ala maliks*. Plaintiffs sued for their recovery and were met by the plea that under the provisions of the *wajib-ul-arz* of 1879 their rights had been lost in consequence of the submersion. The *wajib-ul-arz* of 1866-67 contained no such provision and showed that there were then no *Adna maliks* created on the *adhlapi* tenure. Plaintiffs did not contend that the clause in the *wajib-ul-arz* of 1879 operated as an agreement.

Held, that the rule that the owner of land which is under water retains his right

Sup: Govt. acts (I of 1872) *(Contd.)*

to the site is a principle not peculiar to any system of municipal law but is one founded on universal law and justice. Judged by this standard plaintiffs' right was clear and, defendants who relied on the custom under which diluviation worked forfeiture were bound to establish it by cogent evidence. The evidence in support of the entry in the *wajib-ul-arz* of 1879 was quite insufficient to establish the custom set up by the defendants. The entry alone was not sufficient proof of the custom. The value of an entry which has never been held to be conclusive must depend upon the circumstances of each case.

Though the *wajib-ul-arz* of 1866-67 was a document of a summary Settlement aud had not the evidential value of a record of a regular Settlement under setcion 44 of the Punjab Land Revenue Act yet it was admissible in evidence under section 35 of the Evidence Act and was relevant to show that a custom such as was set up by defendants did not exist in the village when it was prepared. The time between the two Settlements was apparently too short to allow of the birth and growth into maturity of a binding custom. *V. B. L. R.* 521; 59 *P. R.* 1897 *(F B)* 96 *P. R.*, 1879, 152 *P. R.*, 1883, *XXIX Cal.*, 518, 98 *P. R.*, 1894, 125 *P. R.*, 1889, *referred to.* GHULAM MOHAY-UD-DIN *v.* FAIZ BAKHSH. **121 P. L. R. 1902 = 97 P. R. 1902.**

72 (a). S. 35.—*Death register—Entry in.*

Held, that the entry in the death register kept in *thana* showing the date of death is relevant and must be considered to have been made in the discharge of official duty under section 35, Evidence Act. JASWANT SINGH *v.* RAJA BALBAHADUR SINGH. *J. C.'s unpublished case, 19th November 1897.*

73. S. 36, 91, 115.—*Effect and value of entries of mortgages in settlement records—estoppel.*

Held, that entries of mortgages in settlement records are made in the course of official duty and are relevant under section 35 Evidence Act.

Held, also, that if the defendants allowed the plaintiff to register himself as the owner in the settlement Records, this did not estop them from contesting plaintiff's claim to the land. 2 *L. B. R.* 56 *and U. B. R.*, 1892-96 *P.* 379 *referred to.* MI SA U *v.* NGA PYAU. **U. B. R. 1905, P. 3.**

74. S. 33.—*Maps, thakbust—Entries in—Evidence—Presumption.*

The Takbust maps are prepared to delineate different estates.

An entry in a takbust map is relevant evidence under Section 36 of the Evidence Act on which a Court may act. 7 *C. W. N.* 193, *S. C.*, 30 *Cal.*, 291, 9 *Cal.*, *L. R.*, 305 *followed.* 3 *C. W. N.*, 99, 18 *Cal.*, 224, *referred to.*

From such an entry a Court may presume that the same state of things existed at the time of the permanent settlement. 16 *Cal.*, 108 *followed.* ABDUL HAMID

Sup: Govt. acts (I of 1872) *(Contd).*

MIAN *v.* KIRAN CHANDRA ROY. BAIKUNTHA NATH BISWAS *v.* KIRAN CHANDAR ROY. **7 C. W. N. 849.**—

75. S. 36.—*Thakbust maps—Evidence—Suit for declaration of title and recovery of possession*—Onus *of proof.*

Where in a suit for declaration of title to, and recovery of possession of, certain land brought by the plaintiffs on the ground that the lands had been re-formed on their original site within the village of the plaintiffs, the defendants claimed a portion of the lands as their *lakhiraj* in that *mouzah* and contended that the burden of proving that they were *mal* lands lay upon the plaintiffs and also objected that the *thak* map of the village, which showed no such *lakhiraj* lands, was no evidence in a matter of that kind—

Held, that the *thak* map was evidence in the case, in as much as at the time the *thak* map was made in the present case, it was necessary to show in such maps such *lakhiraj* lands as might be claimed, and that there was no ground for interference as to the objection about the putting of *onus.* RAJ KUMAR PAUL CHAUDHURI *v.* BASANTA KUMAR GUHA. **7 C. W. N. 612.**

76. S. 35.—*Thakbust maps not conclusive evidence.*

The Thakbust maps prepared by Revenue officers, though relevant, are not a conclusive piece of evidence to prove that the lands shown therein as comprised in a certain estate, are as a fact part of that estate. GOKUL CHANDRA *v.* HARA SUNDRI DASI. **9 C. W. N. 383.** *(See also No. 23 supra).*

77. S. 36—*Maps evidence. Permanent Settlement of* 1793—*Act IX of 1847—Accretions to land permanently settled—Burden of proof—Presumption—Bed of navigable river.*

Act IX of 1847 has no application to lands included in the Permanent Settlement of 1793, and the assessment of which lands was then fixed for ever. No new assessment of such lands can be lawfully made.

In every case the question, what lands were included in the Permanent Settlement, is a question of fact and not of law.

The *onus* of proving that any particular lands were included in the Permanent Settlement of 1793 is on those who affirm it.

It cannot be assumed that the land forming the bed of a public navigable river was included in the assessment then permanently fixed.

Maps and surveys made in India for Revenue purposes are official documents prepared by competent persons, and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive and may be shown to be wrong but in the absence of evidence to the contrary they may be properly judicially received in evidence as correct when made.

Sup: Govt. acts (I of 1872) *(Contd).*

Assuming lands not to be within the Permanent Settlement of 1793, the last survey, made under section 3 of the Act IX of 1847, is to be taken as the starting point for deciding, when the next survey is made, whether lands are within sections 5 and 6 of that Act. But when the question arises, whether lands shown on a particular *thok* or Survey map made since 1793 were or were not included in the lands charged with the assessment permanently fixed in 1793, the enquiry is at once enlarged, and it would not be right in point of law to act on the last *thak* or Survey map, and to treat it as decisive in the absence of evidence to the contrary. MAHARAJA JAGUDENDRA NATH *v.* THE SECRETARY OF STATE FOR INDIA. **5 B. L. R., 1=7 W. N., C. 193=30 C. 291 (P. C.).**

78. S. 36.—*Topographical Survey map—Value as evidence—Presumption of correctness—Duty of Court to settle boundary, when evidence insufficient—Second appeal.*

In this case the question was in which of two adjacent villages the land in dispute was included, the boundary line of the two villages being admitted that of the two pergunnahs.

Held, that a Topographical Survey map of 1869, in which the boundary line of the two pergunnahs was given, was admissible in evidence under S. 36 of the Evidence Act.

When pergunnah boundaries are found entered in such map, the presumption is that the entries were made according to the instructions received.

S. 36 of the Evidence Act does not require that the authority, under which a map is prepared, must be authority given by statute.

Granting that the survey maps were not prepared for revenue purposes, they are official documents prepared by competent persons, and with such publicity and notice to persons interested, as to be admissible and valuable evidence of the state of things, at the time they were made. They are not, however, conclusive and may be shown to be wrong, but till then they may be judicially received in evidence as correct when made (*7 C. W. N. 193=30 C. 291 referred to.*

In cases of boundary disputes, although no satisfactory evidence as to possession is obtainable, the Court ought to settle the boundary line on the evidence before it. (*21 C 504 followed.*)

Held, on second appeal, that, in the absence of better evidence, the lower Appellate Court ought to accept a Topographical Survey map as evidence of possession, as the time the map was made. GAJHOO DAMOR SINGH *v.* KOTWOR JAGATPAL SINGH, **11 C. W. N. 230.**

79. S. 38.—*Foreign Law—Judicial notice of Zanzibar Law, where Courts are established by Britain under a treaty.*

The plaintiff's lands were taken by Railway authorities and buildings were built

Sup: Govt acts (I of 1872) (*Contd*).

thereon by them, without any authority from Government or the lands being acquired under the Land Acquisition Act. The plaintiff sued the defendant for his lands and the buildings as accruing to the lands on which they were erected without his consent under the English Law.

Held, that the Sultan of Zanzibar has retained sovereignty within his territory and permitted the English Government to establish their courts within his territory to deal with particular cases and the Courts so established by Britain are Zanzibar Courts bound to take Judicial notice of Zanzibar Law (which is Muhammadan Law and under which the plaintiff does not become the owner of the buildings built by a stranger on his land but is entitled to have them removed). The courts cannot insist on evidence in proof of the Zanzibar Law as if it were foreign Law. It is the Lex Loci rei sitae, *i.e.*, the Local Law of the country in which the land is situate that governs this subject and not the law of the person who happens to buy or acquire land in a foreign country. By the mere purchase by an Englishman the land was not transferred to England so as to be governed by the English Law. SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* CHARLESWORTH PILLING. **26 B. 1 (P. C.)**.

80. S. 42.—See S. 13 Judgments Nos. (31) to (34) *supra*.

81. S. 43. Judgment convicting wife's paramour of adultery 24 P. L. R. 1903. *See No. 8 supra.*

82. S. 43. Judgment inter alias 9 C. W. N. 402. *See No. 17 supra.*

83. S. 43. In a suit for damages for malicious prosecution whether magistrate's judgment relevant. 9 B. L. R. 1134. *See No. 18 supra.*

84. S. 43. Admissibility of judgment not inter-partes as to custom. 9 B. L. R. 65=31 B. 143. *See No. 33 supra.*

85. S. 43. Previous judgment not inter-partes that a particular person was not of sound mind based on a medical man's letter is inadmissible in evidence 154 P. L. R. 1901 =6 P. R. 1902. *See No. 32 supra.*

86. S. 44—*Administrator's suit for rent —Tenant's plea—Letters of administration obtained by fraud untenable.*

Plaintiff, having obtained letters of administration as the adopted son of the deceased landlord sued the defendant tenant for rent. The defendant objected alleging that the letters were obtained by misrepresentation of plaintiff's adoption by the deceased.

Held, that assuming the letters of administration were an order within the meaning of S. 44 Evidence Act the plea of the defendant that the letters of administration were obtained upon a misrepresentation of the fact that the plaintiff was the adopted son of the landlord was not sufficient to entitle the defendant to go into evidence for

Sup: Govt. acts (I of 1872) (*Contd*).

the purpose of proving that the letters of administration were invalid in law.

That the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes and all the property of the deceased person vests in him as such.

That the plea that the plaintiff was not the adopted son and letters of administration were obtained by misrepresentation could not be successfully made so long as the letters were not revoked by a competent Court. 27 *Cal.*, 11; *6 C. W. N. Cal.*, 787, *distinguished.*

That the payment of rent by the defendant to the plaintiff would indemnify him against all claims made against him for the rent by any person whatever claiming as representative of the landlord. AMBICA CHURN DAS *v.* KALA CHANDRA DAS. **10 C. W. N. 422**.

87. S. 44.—*Decree obtained by fraud—Remedy.*

Although a court can not set aside a decree passed by another court on the ground of fraud, yet it can consider whether the decree was obtained by fraud or collusion, and if it so finds it may treat the decree as a nullity. KEDAR NATH MUKERJI *v.* PROSONNA KUMAR CHATTERJI. **5 C. W. N. 559**. *(See also S. 244 and 11 C. P. C.).*

88. S. 44 & 40, 41, & 42. *Res Judicata—Competence of party against whom a former judgment is set up as constituting res judicata to show that such judgment was obtained by fraud or collusion—Custom—Saraogis —Alleged custom of exclusion of daughters from inheritance to their fathers set up but not proved.*

When a subsisting judgment, order or decree, which is relevant under s. 40, 41 or 42 of the Evidence Act 1872, is set up by one party to a suit as a bar to the claim of the other party it is not necessary for the party against whom such judgment, order or decree is set up to bring a separate suit to have the same set aside, but it is open to such party in the same suit in which such judgment, order or decree is sought to be used against him, to show, if such be the case, that the judgment, order or decree relied upon by the other side was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. *Nistarini Dassi* v. *Nundo Lall Bose*, (*I. L. R., 26 Cal. 891*); *Rajib Panda* v. *Lakkan Sendh Mahapatra*, *(I. L. R., 27 Cal. 11)* and *Bansi Lal* v. *Ramji Lal*, (*I. L. R., 20* All. 370) referred to. No custom exists in the North-Western Provinces of India amongst the members of the Saraogi community by reason of which females are excluded from inheriting the property of their fathers.—BANSI LAL *v.* DHAPO, **A. W. N., 1902 P. 38= 24 A. 242**.

89. S. 44.—*Decree obtained by fraud—Court's power to treat it null.*

Where the owner of a considerable property, by defrauding a court caused a

Sup: Govt. acts (I of 1872) *(Contd.)*
decree to be passed against himself as defendnt in a collusive suit, upolding a ficticious *Wakfnama* which meant to tie up the property in perpetuity for the benefit of the direct descendants of the *wakf* to the exclusion of his collateral heirs, it was held in the heirs' suit for possession of the property (1) the fact that it was their predecessor in interest who perpetrated the fraud, did not debar them from showing that the decree was a fraudulent and collusive one and (2) that the Court, on fraud being proved, was justified to treat the decree as a nuillity, although the decree was passed by a different Court. The rule, that no person who is a party to a fraud, is allowed to plead the illegality of his act, has no application to persons claiming through them, when they are the losers by the fraud. *Nistarini Dassi* v. *Nundo Lall Bose (*I. L. R., 26 Cal. 891*)*, *Bandon* v. *Becher* (3 Cl. and Fil., 479), *Rajib Panda* v. *Lakhan Sendh Mahapatra* (I. L. R., 27 Cal. 11), *Ahmedbhoy* v. *Vulleebhoy Cassumbhoy*, (I. L. R. 6 Bom., 703), *Prudham* v. *Phillips (*2 Ambler, 763) and *Williams* v. *Lloyd* (5 Bing. N. C., 741), referred to.—BARKAT-UN-NISSA *v.* FAZL HAQ, **I. L. R., 26 A. 272 =A. W. N., 1904, p. 25.**

90. S. 44.—*Consent decree binding.*
A consent decree, unless it was obtained by fraud or collusion, is as much binding on the parties thereto as a decree in a contested suit. A party cannot escape from it simply by pleading that his consent thereto was given by his pleader in excess of his authority. A party setting up fraud or collusion will have to prove it. BAIKUNTHA NATH RAI *v.* MOHENDRA NATH ROY. **1 C. L. J. 65.**

91. S. 45.—*Expert evidence, caution against* -
In the expert witnesses there exists a tendency to support the view which is favorable to the party who employs them so that It is difficult to get from them an independent opinion which may help the Court. BOISOGOMOFF *v.* NAHAPIET JUTE CO. **6 C. W. N. 495=29 C. 32.** (*See to the same effect 1 C. L. J. 385, Panchu Mandal* v. *Emperor, Cr. case.*)

92. S. 35.—*Expert's evidence—Interpretation of texts—Hindu Law—Adoption—Succession—Divesting of estate—Co-ercion. Adoption by—Authority to adopt to two widows jointly—Ratification.*
The Nidadavole *Zamindari* is not impartible and descendible to a single heir only, but is partible according to the ordinary Hindu Law applicable to co-parcenary property. Such questions must be decided in each case according to the evidence given in it. (17 *I. A. 134 followed*).
An adoption made under coercion is not void under Hindu Law. It is only voidable and may be ratified. It is not void if it is in consideration of avoiding a threatened criminal prosecution for a felony which did not exist in fact.

Sup: Govt. acts (I of 1872) *(Contd).*
An adopted son is not by reason of the adoption divested of the estate which may have become vested in him prior to his adoption.
An authority to adopt is not invalid on the ground that it was a power granted jointly to two widows.
An authority to adopt to two widows jointly may be exercised after the death of one by the surviving widow.
The question of interpretation of Hindu Law not being a question of foreign law cannot be referred to experts for opinion. VENKATA NARASIMHA APPA ROW *v.* RANGAYYA APPA ROW. RANGAYYA APPA ROW *v.* VENKATA NARASIMHA APPA ROW. SRI RAJAH RANGAYYA APPA ROW BAHADUR *v.* PARTHASARADHI APPA ROW. PARTHASARADHI APPA ROW *v.* RANGAYYA APPA ROW BAHADUR. **16 M. L. J. 178=29 M. 437.**

93. S. 47.—*Handwriting—Evidence—Cross-examination.*
When a witness in his examination-in-chief makes a statement identifying the handwriting of a particular person he need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the source of his knowledge, if he be dissatisfied with the testimony as it stands.
It is within the power of the presiding Judge, and often may be desirable, to permit the opposing advocate to intervene and cross-examine so that the Court may at that stage be in a position to come to definite conclusion on adequate materials as to the proof of the handwriting. SHANKAR GANGADHAR *v.* RAMJI HURJIWAN. **6 B. L. R. 663=28 B. 58.**

94 S. 48, 49 and 60—*Family custom—Information given by deceased—Opinion.*
A witness's statement of his opinion regarding the existence of a family custom, and as the grounds there of information given by the deceased persons, is admissible, but this must be an independent opinion of the witness based on hearsay and not only repetition of a hearsay. As to the weight of such evidence, regard must be had of the position and character of the witness and of the persons on whose statements the opinion has been formed by the witness.—GARURUDHWAJA PERSHAD *v.* SAPARANDHWAJA. **5. C. W. N. 33.**

95 S. 48.—*Custom—Opinion of witnesses who give evidence—Opinion of Judge who does not take evidence.*
A general custom or general right must be proved by evidence. Under S. 48 of the Evidence Act, the opinion of persons who would be likely to know of its existence, if it existed, are relevant, but such opinions must be given by witnesses who give evidence. Where, therefore, there was no evidence given of any custom, and Lower Appellate Court dismissed an appeal because the Judge thought that the Judge of the original Court

Sup: Govt. acts (I of 1872) *(Contd).*

ought to know what the custom was and that his opinion might be accepted.

Held that it was admissible to act as the Appellate Court did upon the opiuion of the Judge of the Original Court as to the existence of the custom. MAUNG ON *v.* MAUNG SHOWE BWIN AND ANOTHER. **1 L. B. R. 1900-02, P. 80.**

96 S. 49—See Ss. 13 (b) 32 &c. No 32 C. 6. No 28 *supra.*

97 S. 49—See Ss. 48 and 49=1. L. B. R. 1900-02—No 95 *supra.*

98 S. 49 and 60—*Usage—Evidence—*

Opinions of persons having special means of knowledge founded on information received from deceased members of the family are admissible in evidence under S. 49 and 60 of the Act. 23. A. 37 followed. SARABJIT PARTAB BAHADUR SAHI *v.* INDERJIT PARTAB BAHADUR SAHI.—**2. A. L. J. 720.**

99. S. 50.—*Mahomedan Law—Marriage, evidence of, where disputed—Omission to mention* nika *wife in will made after marriage—Unchastity of widow as disentitling her to maintenance—Charge not specifically raised in pleadings or issues.*

The omission, in a will made after an alleged *nika* marriage, of all mention of the *nika* wife, is, so far as it goes, an item of evidence against the marriage having taken place; but its cogency must depend on whether the circumstances of the marriage made it natural that the wife should be an object of the husband's testamentary bounty and improbable that he should have left her to depend on her legal right to maintenance. In this case, it was *held* that the circumstances of the marriage made it not unlikely that the testator would have taken the latter course. A draft of the will, written by a person other than the testator, tendered as furnishing similar evidence to that afforded by the will, was held to be rightly rejected as evidence, not being a written statement by the testator. A charge of unchastity as disentitling a widow to maintenance must be specifically raised in the pleadings or issues. Where there was no averment of, nor issue as to such unchastity, it was *held* that the defendants could not found any such allegation on their general denial in the pleadings that the plaintiffs (the widow and her daughter) were entitled to maintenance, and on an issue "whether the plaintiffs are entitled in any event to maintenance or marriage expenses." HAJI SABOO SIDICK *v.* AYESHABAI. **5 B L. R. 475=7 C. W. N. 665 =30 I. A. 125=27 B. 485.**

100. S. 57.—See Sections 32 (4) and (5), 35 and 57 8 O. C. 94 No. 50 *supra.*

101. S. 57 (8) & (13).—*Limitation Act XV of 1877, S. 5, 6—Extension of period of Limitation—Rent Act (XXII of 1886) Ss. 108. Cl. (15), 132—Limitation provided by special enactment, Evidence of corresponding dates of different eras—Oudh Judicial Calendar.*

In a suit under S. 108 (15) Oudh Rent Act 1886, the District Judge in appeal held the claim in respect of 1330 Fasli barred inasmuch as that year, according to the Oudh Judicial Calendar, ended on 28th June 1896, and the suit was instituted on 26th June 1899. The 25th June 1899 was a Sunday.

Held, that the provisions of S. 5 of the Limitation Act did not apply to suits under the Oudh Rent Act, which is a Code complete in itself and contains rules of limitation complete in themselves.

Held, also, that under S. 57 Evidence Act a Court, in order to decide what particular date in the English Calendar corresponds with a certain date in the Fasli year, may resort to appropriate books or documents of reference such as an almanac compiled expressly to show corresponding dates in different eras. The Oudh Judicial Calendar is not compiled for such purpose. Maxim actus curioe neminem gravabit explained. RAGHUBAR DAYAL *v.* SHEO CHARAN. **4 O. C. 182=3 B. R. 113.**

102. S. 58.—*Non-registration.*

Where a document is by reference included in the plaint or written statement and its terms and execution admitted on the record by the pleadings, it is not necessary to prove it or put it in evidence and its non-registration is immaterial—*See* Buddhist Law—Inheritance.—MAUNG KYAW YAU & 7 OTHERS *v.* MAUNG PO WIN & ONE. **U. B. R 1904, P. 1 (Evidence).**

103. S. 58, 91.—*Evidentiary admissions and admissions by the pleadings distinguished.*

Held, that an admission by defendant (in his preliminary examination) of an agreement alleged in the plaint was not excluded by section 91, Evidence Act, and rendered proof of the agreement unnecessary. SADHU *v.* NGA SI GYI MI MI. **U. B. R. 1907. P 1. (Evidence).**

104. S. 60.—See S. 49 & 60—2. A. L. J. 720 No 98 *supra.* & 23 A 37 No 58 *supra.*

105. S. 63.—*Forest Lands—Forest and waste lands—Rebuttable presumption of Government ownership—Conclusive presumption under Hindu and Muhammadan Law—Warg land—Rights of wargdar over waste lands adjacent to his cultivated land—Kumaki and Netticut rights—Acts of user and occupation consistent with proprietary right of Government.*

There is a general presumption that forest and immemorial waste land in South Canara, not exclusively occupied by any person or body of persons, is the property of the Government. In the case of large tracts of immemorial forest on the ghats and elsewhere in South Canara, there is a presumption of fact that they are Government forests, though such a presumption is rebuttable, by proof of private ownership in regard to any particular part of the forest. In the case of forests of secondary growth, the presumption will usually be that they belong to some private owner, but this may be rebutted by showing that any portion forms part of a warg that was

Sup: Govt. acts (I of 1872) (*contd.*)
abandoned or forfeited or escheated to government, or by showing that it was not part of a warg but was cultivated as Kumri. In order to rebut the presumption of Government ownership in forest and immemorial waste land, it is necessary that there should be proof of the exercise both in the past and in the present, of acts of undoubted ownership, such for instance as, the granting of leases to tenants for cultivation, and the cutting of valuable timber trees for sale, aud not such acts as the Government permits in forest and waste land for the benefit of the adjacent cultivation. "Kumaki" and "Netticut" privileges, which are conceded to all wargdars for the better enjoyment of their warg lands adjacent to Government forest do not, by any means, prove exclusive proprietary right as against Government. "Nettleut" privileges are enjoyed by such wargdars as have their wargs situated in valleys lying between the slopes or ridges of hills. Each ridge or Netticut forms a natural boundary within which the cultivator grazes his cattle. Kumaki lands are lands which are allowed to be used in assisting cultivation and they are intended to afford to the ryots the means of procuring leaves for manure and to furnish fodder for their cattle. History of the Revenue System obtaining in the District of South Canara reviewed. *Subbaraya* v. *Krishnappa*, (I. L. R., 12 Mad. 422), approved. *Bhaskarappa* v. *The Collector of North Canara*, (I. L. R., 3 Bom., 452), approved and followed. SECRETARY OF STATE FOR INDIA *v.* KRISHNAYYA. **I. L. R., 28 M. 257; 15 M. L. J. 147.**

106 S. 63—*Civil Procedure Code (Act XIV of 1882), Section 32—Parties Misjoinder of—Appeal—Question of fact—Appellate Court, duty of—Evidence—Admission of secondary evidence by first Court—Objection on appeal—Limitation Act (XV of 1877). Schedule II, Articles 118, 119—Adoption—Limitation.*

When the daughter and adopted son of the deceased owner of the property sued the defendant for recovery of a house on the allegation that the defendant had taken possession of it under a Mamlatdar's decree fraudulently obtained during the adopted son's absence and it was contended for the defendant that the suit was bad for misjoinder of parties.

Held, that as the plaint showed that the daughter did not set up her right to recover the property as heiress but claimed it with the adopted son on the ground that the latter was the son of the deceased owner and that she lived with him and was dispossessed with him by the defendant, the objection was not valid.

Where a question mainly depends upon the credibility of conflicting witnesses the Appellate Court must accept the conclusion arrived at by the original Court unless there be cogent reasons against it. The question whether secondary evidence was in any given case rightly admitted is one which is proper to be decided by the Judge of first instance

Sup: Govt. acts (I of 1872) (*Contd*).
and is treated as depending very much on his discretion. His conclusion should not be overruled except in a very clear case of miscarriage.

The interference mentioned in article 119 of the second schedule of the Limitation Act as a condition of the application of that article so as to bar the plaintiff's right altogether is obviously an interference which must amount to an absolute denial of the status of adoption held by a plaintiff and an unconditional exclusion of him from the enjoyment of his rights in virtue of that status. The article can have no application to a case where the facts suggest that the interference, such as it was, was intended to have no greater effect than that of postponing the right of the adopted son to succeed as heir to the property of his adoptive father.

Article 119 is to be applied only where the question is not as to the *factum* but the validity of an adoption, but article 118 is applicable to a suit where the plaintiff claims a declaration that an alleged adoption was invalid or never in fact took place. NINGAWA *v.* RAMAPPA. **5 B. L. R., 708.**

106 (a) *Application for Letters of Administration with copy of will, proved abroad, annexed—Original will deposited and registered in Scotland—Copy produced being copy certified under the hand and seal of Notary Public to be true copy of original granted by Assistant Keeper of Register of Deeds—No certificate of having been compared with original—Not shown to be admissible in England—Copy not admissible under S. 63, Evidence Act.*

Where, in an application, under S. 180 and 212 of the Succession Act, for Letters of Administration with copy of the will, proved abroad, annexed, the original will, described as a trust disposition and settlement having been deposited and registered in Scotland, a copy certified under the hand and seal of a Notary Public to be a true copy of the original granted by the Assistant Keeper of the Register of Deeds, neither purporting to be a copy made from the will itself nor bearing any certificate that it had been compared with the original, nor shown to be a copy admissible in England to prove the original was produced.

Held that the copy produced was not a properly authenticated copy of the will and inadmissible as secondary evidence, under S. 63 of the Evidence Act, and that the applicant should produce a copy certified, by the Keeper or Assistant Keeper of the Register, to be a true copy of the original will. IN THE MATTER OF THE ESTATE OF ADAM ROBERTSON WHYTE, **14 Bur. L. R. 33.**

107. S. 63, 65, 66.—*Evidence Act (I of 1872). S 61, 65, 66—Secondary evidence, admissiblity of—Objection to, reception of evidence.*

No objection should be allowed to be taken in the Appellate Court as to the admissibility of a copy of a document which was admitted in evidence in the Court below without any objection. *Kameshwar Pershad* v. *Amanuttulla*, (I. L. R. 26 Cal. 53) dissented

Sup: Govt. acts (I of 1872) (*contd*).
from.—KISHORI LAL GOSWAMI *v.* RAKHAL DAS BANERJEE, **I. L. R., 31 C, 155.**

108. S. 63, 65, 90, 114.—*Copy of document—No evidence that original could not be produced—Secondary evidence—Presumption.*

In a suit to recover possession of land the defendant relied principally on a document which was filed in the Munsif's Court in support of his title. According to the evidence, this document had been prepared with reference to a document of an earlier date. This earlier document was not produced, though it was admittedly in existence, nor was it shown that it could not have been produced. The Munsif decreed in plaintiff's favour. On appeal, a copy of the earlier document was produced and filed.

Held that although the exhibit was admissible as secondary evidence, it was only secondary evidence of the contents of a document. There was no evidence that the document, of the contents of which the exhibit was evidence, was in fact executed in 1862 between the parties mentioned, and inasmuch as the exhibit was a copy and not the original, the presumption which, under S. 90 of the Evidence Act, may be made where a document over thirty years old is produced, ought not to be made. *Khetter Chunder* v. *Khetter Paul Sreeterutno*, (I. L. R., 5 Cal. 886), refered to. APPATHURA PATTAR *v.* GOPALA PANIKKAR, **I. L. R., 25 M. 674.**

109. S. 65.—*Evidence—Copies of documents.*

When a copy of a document has been produced and admitted in evidence without objection in a Court of First Instance, the objection that it is only a copy and not the original cannot be raised in the Appellate Court. *Akbur Ali* v. *Bhyea Lal Jha*, (1880) I. L. R. 6 Cal., 366; *Chimnaji Govind Godbole* v. *Dinkar Dhondey Godbole*, (1886) I. L. R., II Bom., 320; cited. THET SHE v. MAUNG BA, **3 L. B. R. 49.**

110. S. 65.—*Admissibility of opinion—Exclusive use of trade mark.*

Held that the evidence of persons stating that in their opinion by the use of a particular trade mark by persons other than the original proprietors of that trade mark would deceive or not the under purchasers is inadmissible. NOOROO DEEN SAHAB *v.* CHARLES SNOWDEN **15. M. L. J. 45.** (*see trade mark*).

111. S 65.—*Registration Act (III of 1877) Section 17 (n)—Receipt for payment of mortgage-money.*

A receipt for part payment of mortgage-money which does not purport to extinguish the mortgage is not compulsorily registerable.

Though a receipt which purports to extinguish the mortgage is inadmissible in evidence for want of registration, the fact of payment may be proved *aliunde*. *W. N. All.*, 1887, p. 188, *followed*. AMIR *v.* DIALA MAL. **39. P. R. 1904.**

Sup: Govt. acts (I of 1872) (*Contd*).

112. S. 65.—*Certified copy from the Registration office if admissible—Secondary evidence—Public document.*

A certified copy obtained from the Registration office is not a copy of the original document and is not therefore admissible under section 65 (c) or *(f)*. But the copy contained in the books of the registration office is itself a public document and a certified copy of that copy being a copy of a public document is therefore admissible as secondary evidence, provided that the case can be brought under clause (*a*) or (*c*) of section 65. *12 C. P. L. R., 117 dissented from. 10 C. P. L. R., 59 distinguished.* RADHA KISHAN MARWARI *v.* MT. SONA BAI AND OTHERS. **17 C. P. L. R., 1904, P. 161.**

112 (a). S. 65.—See Sections 13, 65, 66 (2). 7 C. L. J. 90, No. 34 (*a*) *supra*.

113. S. 65, 91 & 22.—*Cause of action—Suit on a promissory note—Note inadmissible in evidence—Plaintiff not allowed to set up a case outside the note.*

When money is lent on terms contained in a promissory note given at the time of the loan, the lender suing to recover the money so lent must prove those terms by the promissory note. If, for any reason, such as the absence of a proper stamp, the promissory note is not admissible in evidence, the plaintiff is not entitled to set up a case independent of the note. *Sheikh Akber* v. *Sheikh Khan*, (I. L. R. 7 Cal., 256) and *Radhakant Shaha* v. *Abhoychurn Mitter* (I. L. R., 8 Cal., 721) followed. *Pramatha Nath Sandal* v. *Dwarka Nath Dey*, (I. L. R., 23 Cal., 851). dissented from. *Hira Lal* v. *Data Din*, (I. L. R., 4 All., 135) referred to. PARSOTAM NARAIN *v.* TALEY SINGH. **A. W. N., 1903, P. 217 = 26 A. 178.**

113 (a). S. 65 (e), 74, 79 & 80.—*Admission of party—Certified copy of statement in a previous suit—Admissible.*

Certified copy of a statement, made by a party to the suit in a previous proceeding, is admissible as evidence of an admission contained in it, under sections 65 (*e*), 74, 79 and 80 of the Evidence Act. NATHA *v.* HURMAT. **31 P. R. 1903.**

114 S. 65 (e) and (f) and 74 (2)—*Public document—Certified copy of registered document if admissible—Registration Act S. 57.*

Plaintiff sued on certain mortgage deed. Defendant denied execution and alleged that it was all forgery. None of the above deeds were produced and it was contended that the plaintiff could succeed by producing certified copies of the deeds without first proving their loss.

Held that by registration a private document does not become a public document under S. 74 cl. (2).

Held also that the last clause of S. 57 of the Registration Act was not intended to override the provisions of the Evidence Act. (7. O. C. 327 overruled. 22. W. R. 303 refered to). RAJGOBORDHAN SINGH *v.* MT. NASIBAN. **7. O. C. 365.**

115 S. 65 (e)—*Statement as to contents of Public Records—*

Sup: Govt. acts (I of 1872) (*Contd.*)

In order to ascertain the history of certain properties in suit, the Judge took the evidence of the record-keeper and clerks in charge of the records and registers, regarding the general result of their examination of these documents, and it did not appear that the documents could be conveniently examined in Court.

Held, that under such circumstances S. 65, cl. (e) of the Evidence Act, does not require that certified copies of the records should be produced, under cl. (g) S. 65 the Judge acted rightly in this case. RANI SUNDER KOER *v.* CHANDRESHWAR PROSAD NARAYAN SING. **11 C. W. N. 501=34 C. 293.**

115 (a) S. 68 (2)—See S. 13, 65 and 66 (2) —7 C. L. J. 90—No 34 (a) *Supra.*

116 S. 68.—*Section 68—Attesting witness—Mortgage-deed.*

A writer of a deed is an attesting witness within the meaning of Section 68 of the Evidence Act, if he was present and saw the execution of the deed. Though he was described in the deed as its writer and not an attesting witness. 20 *All.*, 532, *referred to.*—RAJNARAIN GHOSH *v.* ABDUR RAHIM. **5 W. N., C, p. 454.**

117. S. 68.—*Attestation.*

Where a mortgage-bond, which was, on the face of it, attested by more than two witnesses, but was proved by only one of them and its execution was not denied.

Held, that having regard to Section 68 of the Evidence Act, the document may be taken as properly proved. NAND KISHORE LAL *v.* RANEE RAM TIWARY. **6 W. N., C., 395=29 C. 355.**

118. S. 68.—*Mortgage deed—Attesting witness not called if admissible as a money bond.*

Where an attesting witness is necessary to the validity of an instrument, a person who was such witness must be called if alive, capable of giving evidence and subject to the process of the Court, whatever the purpose for which the instrument is produced may be S. 68 applies only where an instrument required by law to be attested is attested and not where the instrument itself does not bear the necessary attestation. It is impossible to sever a particular covenant in the document from the document without considering its execution as a whole. Where a mortgage deed, required by law to be attested by two witnesses was put in evidence but no attesting witness, though alive and capable of giving evidence, was called.

Held, that the deed was inadmissible in evidence for the purpose of proving the personal covenant to pay the money. VEERAPPA KAVUNDAN *v* RAMASAMI KAVUNDAN. **2 M. L. T., 175=17 M. L. J. 213=30 M. 251.**

119. S. 68, 69 & 115.—*Attestation.*

Held, that where a will was executed before Act I of 1869 (Oudh Estates Act) came into force S. 19 of that Act was not applicable to it. The Mohammadan Law does not require that a will, if reduced to writing, shall be attested. Sections 68 and 69 Evidence Act were therefore not applicable to the will and the plaintiffs admission in the suit filed by the testator before her death was sufficient proof of the will.

Held, further that to a codicil executed after the enforcement of Act I of 1869, S. 19 of that Act applied. That S. made S. 50 of the Succession Act and S. 68 of the Evidence Act applicable to the codicil.

Held, therefore, that there was no evidence to the effect that the testator also executed the codicil. NAJBAN BIBI *v.* RAZA HUSAIN. **4 O. C. 408.**

120. S. 70 & 114.—*Transfer of Property Act (IV of 1882), Section 59—Evidence Act (I of 1872), Sections 70, 114—Mortgage-deed. Execution of—*

The mortgage-deed in question showed that it was duly signed by two witnesses, able to read and write, one of whom was the writer of the deed. The defendant admitted its execution and registration. The writer of the deed falsely denied its execution by the defendant in his presence. The other witness deposed that the executant signed in his presence, but he was not able to remember whether the executant signed also in the presence of the writer. The writer's signature, as attesting witness, preceded that of the other witness.

Held, that it might fairly be presumed that both the witnesses signed after the execution of the document by the defendant, and that presumption was sufficient to support the finding of the lower court that the deed was validly executed. 1 *R. Eccl. R.*, *p. 5, referred to.* JOGENDRA NATH MUKHOPADHYA *v.* NITAI CHURN BUNDOPADHYA. **7 C. W. N. 384.**

121. S. 74.—Certified copy of a previous statement 31 P. R., 1903. *See No. 113 (a) supra.*

122. S. 74.—Certified copy of a registered document. *See Sections 65 (e) and 74* 7 *O. C.*, *365, No. 114 supra.*

123. S. 74.—*Public documents—Census registers.*

Held, that Census registers are not public documents within the meaning of section 74 of the Evidence Act. EMPEROR *v.* BHAVANRAO VITHALRAO. **6 B. L. R. 535.**

124. S. 74.—*Public document—Certified copy of—*

The statement of a witness in a record is part of the record of the Acts of un-official tribunal under S. 74 and can be proved by a certified copy. SAKINA KHANUM *v.* LADDAN SAHIBA. **2 C. L. J. 213.**

125 S. 74 (2)—*Public document—Inventory deposited by Talukdar in D. C's. office.*

Held, that an inventory deposited in the office of the Deputy Commissioner by a Talukdar or grantee under S. 7 Act I of 1869 does not by being so deposited become a public document. S. 74 (2) of the Evidence Act does not apply to such documents; it refers to public records kept in British India of private documents. AZMATUN NISA BEGAM *v.* SHAHARA BEGAM. **1 O. C. 36.**

Sup: Govt. acts (I of 1872) (*Contd*).

126 S. 74 and 77—*Public document—certified copies of khasras—*

Held, that by S. 8 Act XIII of 1882 and S. 17 Act IX of 1889 "all official records and papers kept by such officer (i-e. the *Patwari)* shall be deemed to be public records and the property of Government" and therefore the *khasras* for certain years produced in evidence were public documents, and under S. 77 Evidence Act, they could be proved by producing their certified copies.

Held, also, that though before the enforcement of Act XIII of 1882 the *Patwaries* were the servants of the village proprietors yet as they used to do public duties the *khasras* prepared by them in discharge of such duties were either "public documents" or "public records kept in British India of private documents" under S. 74, Evidence Act, and therefore copies of the *khasras* were admissible in evidence under S. 77, Evidence Act. DALJIT SINGH *v.* THE HONORABLE MAHARAJA PARTAB NARAIN SINGH. **3. O. C. 204.**

127. S. 77.—See Sections 74 and 77, 3 O. C. 204 No. 126 *supra*.

128. S. 77.—*Certified copy of a compromise.*

Held, that the copy of a compromise filed in Court with an order of Court thereon is under S. 77 admissible in evidence and need not be proved. MANGAL SEN *v.* HIRA SINGH. **1 A. P. J. 369.**

129. S. 80.—See Sections 19, 20 and 80. 26 A. 108 P. C., No. 38 *supra*.

130. S. 85 & 114.—*Presumption of identity—Power-of-attorney executed before, and authenticated by a Notary Public—Necessity for affidavit of identity.*

Where an application is made, for letters of administration with a copy of the Will of the deceased annexed, by an agent of the executor under the Will, under a power-of-attorney duly executed by the executor before, and authenticated by the Notary Public and attested by witnesses, there is no necessity, for an affidavit of identity, S. 85 of the Act being mandatory and S. 114 raising a presumption in favour of the identity of the executant of the power-of-attorney. MYLNE, *In the goods of.* **9 C. W. N. 986=33 C. 625.**

131 S. 87—*Reference books—*

The following books were admitted in evidence as historical works and books of reference; Atkin's "Historical Account of the N. W. P.", Manual of "Titles N. W. P." and "Basti District Settlement report,"—PATESWARI PARTAP NARAIN SINGH *v.* RUDRA NARAIN SINGH. **1. A. L. J. 543.**

132 S. 90—*Ancient document, presumption as to—Genuineness of signature in issue—Presumption not excluded, but has to be rebutted.*

It is in the discretion of a Court whether it will raise the presumption in favour of a document for which S. 90 of the Evidence Act provides, but the discretion is not to be exercised arbitrarily: it must be governed by principles, which are consonant with law and justice. And while on the one hand

Sup: Govt. acts (I of 872) (*Contd*).

great care is requisite in applying the presumption, on the other hand it is clear that very great injustice may be perpetrated, if an ancient document coming from proper custody is refuted by a Court capriciously or for inadequate reasons. When the genuineness of a document purporting to be an ancient document is put in issue, it appears to have been sometimes thought that any presumption in its favour is thereby excluded, but this would deprive the party producing it of the benefit of the presumption precisely in the circumstances, in which he most stands in need of its aid. The presumption merely takes the place of the evidence which would, where a modern document is concerned, be necessary for the purpose of proving due execution, and it must be met and rebutted in the same way as direct evidence of execution in the case of a modern document. *Mussamat Phool Bibee* v. *Goor Suran Doss* (18 W. R. 485) *Boikunt Nath Kundu* v. *Lukhun Majki*, (9 C. L. R. 425) *Hari Chindtaman Dikshit* v. *Moro Lakshman*, (I. L. R., 11 Bom, 89) *Trailokia Nath Nundi* v. *Shurno Chungoni*, (I. L. R., 11 Cal. 530) referred to.—GOVINDA HAZRA *v.* PROTAP NARAIN MUKHOPADHYA,—**I. L. R., 29 C. 740.**

133. S. 90—*Document more than 30 years old.*

A Court is not bound to make a presumption mentioned in S. 90 but it has an absolute judicial discretion, that being satisfied as to the execution of a document to such an extent that it will allow the presumption to take the place of specific evidence as to the signatures which the document purports to bear upon it. HANUMAN SHUKUL *v* RAMCHARITTAR LAL,—**A. W. N. 1902. P. 28**

134 S. 90—*See S.* 4 & 90=31. *I. A.* 217=26 *A*. 581=7 *O. C.* 290 *No. 4 Supra.*

135 S. 90—*See S.* 32 (5) & 90—9 *C. W. N.* 105=31 *I. A.* 217=26. *A* 581 *No. 26 Supra.*

136. S. 90.—*Proper Custody.*

Although a manager appointed by the Court, of the property of an insane person, ought to restore a document in his possesion to the proprietor when he is removed from the management, his failure to do so does not make the custody of the document improper within the meaning of S. 90 Evidence Act. SHYAMA CHARAN NUNDY *v* ABHIRAM GOSWAMI, **3 C. L. J. 306=10 C. W. N. 738 =33 C. 511.**

137. S. 90—*Registration Act (III of 1877). S. 17, 50—Evidence Act (I of 1872), S. 90—Documents thirty years old—Proper custody—Presumption—Consructive notice—Possession.—*

A registered document contained a recital of unregistered incumbrances, and a question having arisen as to whether the recital of the unregistered incumbrances amounted to notice: *Held* that registration is at most constructive notice and the doctrine of constructive notice cannot be so extended as to cover unregistered documents under which the holders of registered documents derive title. The defendants further relied on their

Sup: Govt. acts (I of 1872) *(Contd).*

being in actual possession. Possession amounts to notice of such title as the person in possession may have, and any other person who takes a martgage or other charge upon, or purchases, immoveable property without ascertaining the nature of the claim of the person in possession, does so at his own risk. The general consensus of opinion of all the High Courts in India is that possession is at least a very cogent evidence of notice which a purchaser cannot with safety disregard, and that section 50 of the Registration Act (III of 1877) does not do away with the effect of notice in favour of the registration to which *cæteris paribus* it gives preference.

Per Batty J.—S. 90 of the Evidence Act (I of 1872) admits a presumption of the genuineness of documents purporting to be thirty years old, if produced from proper custody proved to have had a legitimate origin or an origin the legitimacy of which the circumstances of the case render probable. It is not necessary that the documents shall be found in the best and most proper place of deposit. The section insists only on a satisfactory account of the origin of the custody and not on the history of its continuance.

Per Aston, J.—S. 90 of the Evidence Act requires that a document must be produced from the proper custody. SHARFUDIN *v.* GOBIND,—**I. L. R., 27 B. 452.**

138. S. 90 —*See Sections 4 and 90—110 P. L. R., 190. - 82 P. R.. 1902, No. 5 supra.*

139. S. 90.—*Presumption as to documents over 30 years old—Procedure.*

When a document, which is over 30 years old, has been tendered, under S. 90 of the Act, it is for the Court to determine, (which is a matter for judicial discretion) whether it will make the presumption mentioned in the section, or will call upon the party to offer proof of the document, stating its reasons in the latter event, and, in the former, whether the presumption has been rebutted or not. SRINATH PATRA *v.* KULODA PROSAD BANERJI. **2 C. L. J. 592.**

139 (a). S. 90.—*Presumption weakened—Lessor and lessee—Adverse possession—Lessee holding over—Limitation Act, Art 139.*

The Court may presume the genuineness of a document more than 30 years old, produced from proper custody, but the presumption may be weakened by circumstances tending to raise doubts as to its authenticity.

A failure to pay rent to the lessor during the period of the lease does not alone operate to create in favour of the lessee a title by adverse possession. 4 *C.* 314, 7 *B.* 40 *referred to.*

If a lessee holds over after the exiry of the lease and no arrangement is made for a new tenancy time begins to run under Art. 139, Sch. II of the Limitation Act, (1877), against the lessor from the date of the expiry of the lease. 22 B. 893, 24 B. 504 followed. 8 M. 424 Diss. MADAN MOHAN GOSSAIN *v.*

Sup: Govt. acts (I of 1872) *(Contd).*

KUMAR RAMESHWAR MALIA. **7 C. L. J., 615.**

139 (b). S. 90 & 102.—*Presumption as to genuineness of document 70 years old—Burden of proof.*

A Taluqdar sued one M. for a declaration that M. had no proprietary or under proprietary rights in a certain village. M. produced a document 70 years old giving under proprietary rights in perpetuity to the ancestor of M. executed by an ancestor of the Taluqdar.

Held, that the document should be presumed to be genuine under S. 90, Evidence Act, and that under S. 102 of the Act, the burden of proof lay on the Taluqdar plaintiff to prove that M. had no under proprietary rights. THE DEPUTY COMMISSIONER, RAI BARELI *v.* MAHESH BAKHSH. **6 O. C. 142.**

140. S. 91—*See S. 65 and 91—A. W. N. 1903. P. 217=26. A. 178 No. 113 supra.*

141. S. 91.—*Bengal Tenancy Act (VIII of 1885), Section 88—Division of holding—Consent in writing*—Dakhila *or receipt, if amounts to consent.*

The consent in writing by the landlord to the division of a tenure has the effect of substituting a new contract for the old. It should therefore be complete in itself and embody distinctly the terms of the new contract. Should it fail to do so, the principle laid down in Section 91 of the Evidence Act would apply and extraneous evidence to prove the terms of the contract would be inadmissible. 25 *Cal.*, 531 *distinguished.*

Held, upon the construction that the *Dakhila* or receipt did not amount to a consent in writing by the landlords within the meaning of section 88 of the Bengal Tenancy Act.

Held, also that the fact of some of the joint occupiers of a joint tenure paying portions of the rent due from all, corresponding with the shares for which the joint occupiers are liable, cannot prevent the landlord from suing them all or making all answerable for the joint debt. 21 *W. R.* 256, 22 *W. R.* 205 *and* 22 *W. R.* 231 *relied on.* JNANENDRA MOHAN CHOWDHURY *v.* GOPAL DAS CHOWDHURY. **8 C. W. N. 923=31 C. 1026.**

142. S. 91.—*Grant—Registration Act (III of 1877), Sections 17, 49—Authority to adopt in writing and not contained in a will—Document not a testamentary disposition of property and not registered—Invalidity—Admissibility of evidence of authority to adopt.*

In a suit for a declaration that first defendant was not the adopted son of plaintiff's deceased brother, the first defendant and his mother relied on an authority to adopt which was contained in a document which they contended was a will of the deceased. This document, which had never been registered, and which was the only evidence of the alleged adoption, authorised the wife to adopt, and further authorised her to put into

Sup: Govt. acts (I of 1872) *(Contd)*

the possession of the adopted son all the properties which the deceased got under a certain decree, and all his immoveable proties, etc.

Held, that the document was not a testamentary disposition of propery, within the meaning of S. 3 of Act V of 1881. It was an authority to adopt and nothing else, and the direction therein to put the adopted son into possession of the property could not be construed as a devise of the property. It was simply a statement of the consequences that should legally follow on the adoption. *Mussumat Bhubum Moyee Debia* v *Ram Kishore Acharj Chowdhry* (10 M. I. A. 279 at p. 312), referred to. The authority to adopt being in writing, and not being contained in a will, its registration was compulsory. SOMASUNDARA MUDALI *v.* DURAISAMI MUDALIAR. **I. L. R. 27 M. 30 ; M. L. J., 1903 P. 283.**

143 S. 91.—*Negotiable Instruments—Negotiable Instruments Act (XXVI of 1881)—Promissory note—Suit by payee—Defence by maker—Payee not true owner of note—Parol evidence to support plea—Admissibility.*

In a suit to recover the amount due on a promissory note by the payee named in the note, the defendant pleaded that the consideration for the note was not advanced by the plaintiff, but by a third party on whose account the note was taken; and that as the amount had already been repaid to the party entitled, the suit was fraudulent and unsustainable :

Held, per Subramania Ayyar, J., that the plea was sustainable. Parol evidence is admissible in a suit on a promissory note to show that the plaintiff is not the true owner of the note, if such proof would enable the defendant to establish a defence valid, as against the true owner.

Per Davies, J., (dissenting) that the defendant was precluded from pleading the "*jus tertii*" of a person who is not even a party to the record. SUBBA NARAYANA VATHIYAR *v.* RAMASWAMI AIYAR. **I. L. R., 28 M. 244.**

144 S. 91—*Contract in writing—Admissibility of oral evidence as to terms.*

Where there is a proposal in writing for a contract to be entered into at a later date, it is doubtful if oral evidence of terms, not to be found in the written proposal, is admissible. MAUNG SHWE OH *v.* MAUNG TUN GYAW, **9 C. W. N. 147 (P.C.)=31. I. A. 188=32. C. 96.**

145 S. 91—*Will—Evidence—Executor, proof of title of—Probate—Administration, grant of —Jurisdiction of Court to modify—Succession Act (X of 1865), ss. 3, 179, 187, 260—Sale for arrears of rent—Incumbrances, annulment of —Notice—Disclaimer—Bengal Tenancy Act (VIII of 1885), s. 167.*

Under S. 179, 187 and 260 of the Succession Act, where probate of a will has been granted, the executor, in order to bring a suit as such, is bound to prove his title, to do which, in case of dispute, he must file, not

Sup: Govt. acts (I of 1872) *(Contd).*

merely a copy of the grant of administration, but also the copy of the will attached to it, the two together forming the probate as defined by S. 3. But a Court, not being the Court of Probate, cannot go behind the grant and interpret and modify its terms by the provisions of the will. In a suit for possession after annulment of an under-tenure under S. 167 of the Bengal Tenancy Act, absence of due service of notice on a person, who in the suit disclaimed all interest therein, cannot prejudice the plaintiff. But, if the application for the issue of the notice against some of the persons jointly interested in the incumbrance was not made within time, the whole suit must fail.—DELANERY *v.* ROHAMAT ALI, **I. L. R., 32 C. 710.**

146. S. 91. *C. P. C. S. 375—Compromise need not be reduced to writing—Oral evidence of its terms under S. 91, Evidence Act—Specific Relief Act, S. 9.*

S. 375 of the Code does not require that the agreement or compromise itself shall be reduced to writing, but only that the terms of it shall be recorded in the suit. The agreement or compromise itself, that is made out of Court, may be in writting or oral. If the Court did not record the terms of it, S. 91 is no bar to a suit being brought on the terms of the compromise. Moreover, S. 375 only allows the decree to be final, so far as relates to the subject-matter of the suit. So, when an agreement or compromise is made in a suit under S. 9, Specific Relief Act, the Court's decree under S. 375 does not bar any person from suing to establish his title to property and recover possession thereof. BI YA *v.* ON GAING, **3. L. B. R. 243.**

147 S. 91.—*Cl. (b) and proviso (3) of S. 29—Whether evidence as to improvements admissible—Removal of stringent conditions in former lease -Improvement by landlord, if could justify enhancement of rent.*

Suit for a declaration that the *Kabuliat* executed by the plaintiff was void, as the rent had been thereby enhanced by more than two annas in the Rupee and that it was executed under coercion and undue influence. Defendants justified the enhancement by setting up the fact of improvement made by them by the excavation of the canal such as was contemplated in proviso (2) of S. 29 of the Act. They, further, pleaded that there were stringent conditions in the former lease and since the above enhancement of rent was agreed upon by the plaintiff in consideration of avoiding those stringent conditions from the *Kabuliat* in question, the enhancement was not improper.

On appeal, the District Judge held that the question of improvement could not be gone into, evidence regarding the same being inadmissible under S. 91 of the evidence Act.

Sup: Govt. acts (I of 1872) *(Contd.)*

Held, on second appeal, that the lower appellate Court ought to have gone into the questions, where there was any 'improvement', within the meaning of the Act, effected by the landlords, and whether the plaintiff had agreed to the enhanced rent in consideration of such improvement, since the fact that the writing between the parties contained no reference to any such improvement could not render inadmissible, evidence sought to be let in on the point. The consideration for a contract being different from the 'terms of such contract' in proof of which alone S. 91 of the Evidence Act lays it down that 'no evidence shall be given,' that section cannot prevent the defendants from giving extraneous evidence as to the consideration.

Held, also, that the mere fact, that certain stringent conditions, which had found a place in the previous lease were omitted from the present *Kabuliat*, was not such a circumstance as could justify any enhancement of rent, much less an enhancement, as in the present case at the rate of more than two annas in the Rupee 8. C. 3 33 and 28. C. 90 distinguished, and that the *Kabuliat* in question was, therefore, void for having contravened the provisions of cl. (b) of S. 29 of the Bengal Tenancy Act. PROBAT CHANDRA GANGAPADHYA *v.* CHIRAG ALI, **33 C. 607 =4 C. L. J. 320 =10 C. W. N. 62.**

148. S. 91.—*See S. 58 & 91—U. B. R. 1907. P. 1 (Evidence) No. 103 Supra.*

149. S. 91—*Admissions as to agreements requiring registration—Civil Procedure Code (Act XIV of 1882), Section 257 A—Execution of money-decree—Application embodying agreement hypothecating immovable property and granting time filed by parties in execution-proceedings—Objection in a subsequent suit as to non-registration of the application.*

In execution of a money-decree an agreement was arrived at between the parties, which was embodied in an application filed in Court, under which the equity of redemption of the two houses, which had been attached, were hypothecated for the sum due on account of the decree including costs, and four months' time was given for payment. The plaintiffs applied for execution after the expiry of the term, but it was held that the agreement was a complete satisfaction of the decree which was not therefore capable of execution. The plaintiffs brought the present suit for recovery of the amount due, basing their claim on the agreement, and it was contended by the defendant that the agreement was void under section 257 A of the Civil Procedure Code, the application embodying the agreement was not admissible in evidence for want of registration, and the suit was barred by section 244 of the Civil Procedure Code.

Held, that the proper reading of the application was, that it contained merely a statement of the fact that an oral agreement, such as was mentioned in the application, had been made previously, the application was not inadmissible in evidence, and the suit was not in any way barred.

The want of registration of an agreement requiring registration does not invalidate it, and section 91 of the Evidence Act does not prevent admissions made by the executant of such a deed to be admitted into evidence in proof of the agreement.—PRABH DYAL *v* GURMUKH,—**98 P. R. 1902 =18 P. L. R., 1903.**

150. S. 91—*Oral evidence—Secondary evidence.*

Where in a pre-emption suit the question was whether a local area consisting of nine villages constituted a *Mahal*. *Held*, that such area did not constitute a *Mahal* under S. 9 Act. XVIII of 1876 (Oudh Laws Act) unless such villages were held under an engagement for the payment of land Revenue assessed on such local area.

In order to prove that they were so held it is necessary to prove that there was an agreement to pay such land revenue and such an agreement was required to be in writing by rule 38 under S. 15 and 220 of the Oudh Land Revenue Act for the assessment of the revenue demand.

Held, therefore, under S. 91, Evidence Act, no oral evidence could be given of such an agreement, unless it had been reduced to writing and the case was one in which secondary evidence was not admissible. SAMSAM ALI *v* RAM PARSHAD.—**4. O. C. 365.**

151. S. 91—*A stranger's rough note for his own use—Document.*

Where rough notes in writing of an agreement by the husband to provide for the wife in case of future separation were made by the priest merely for his own convenience and were not signed by the parties: It was held that they did not constitute a document under S. 91 Evidence Act in which the terms of contract can be said to have been continued. MEHER ALI *v* SANKER KHANOO BAI.—**7. B L. R.—692 on P. 710.**

152. S. 91.—*Oral agreement to execute a lease for 7 years, if admissible—T. P. A. S. 105 and 107.*

A landlord sued his tenant for rent at a certain rate of rent per year at which he had paid before. The plaintiff had stated in the record that she agreed to give the defendant a lease for 7 years at that rate and the defendant had given her a *kabuliat* to that effect but no lease was written.

Held, that a *kabuliat* is not a lease, although, for the purposes of the Stamp Act, a lease includes a *kabuliat*, and that under Sections 105 and 107, T. P. A. an agreement to execute a lease of immoveable property, for any term exceeding one year was inadmissible in evidence and that its term could not be proved by oral evidence under S. 91 of the Evidence Act.

Sup: Govt. acts (I of 1872) (*Contd*).

Held, further, that she could prove that she gave the defendant a lease for one year at a certain rent, and the defendant took possession according to the agreement. On this proof and the proof of holding over after the expiry of the first year the defendant was bound to pay rent, at the same rate, for the period he remained in possession. Even if this was not proved she was entitled to a decree as compensation for use and occupation of her land by the defendant. *5 O. C. 222, 7 O. C. 166, 9 M. 142, and 9 C., 908 referred to.* MT. RAJKUAR *v.* NABI BAKHSH. **9 O. C. 296.**

153. S. 91.—*Mortgage deed, containing no separate admission of debt or promise to repay it, not divisible and cannot be admitted in evidence.*

Plaintiff-appellant sued the defendant for Rs. 170, as legal representative of her deceased husband Po Ni. She relied on a document unstamped and unregistered, D. 1261 B. E., which purported to be an instrument of mortgage of certain land. The Court of first instance admitted the document in evidence on payment of stamp duty and penalty and holding the execution of the same proved, gave plaintiff-appellant a decree. The Lower Appellate Court reversed this decision on the ground that the evidence was insufficient to prove execution. The mortgage deed contained no separate admission of the debt or promise to repay it.

Held, that as the mortgage deed contained no separate admission of the debt or promise to repay it, it was not divisible and could not be admitted in evidence at all. *S. J. L. B., p. 195, referred to.* MAUNG PI *v.* MA KIN U. **U. B. R. 1901, P. 79.**

154. S. 91—*Promissory note—resorting to original consideration.*

Held, that where money is lent on terms contained in a promissory note given at the time of loan, the Plaintiff is debarred by S. 91 Evidence Act from resorting to the original consideration. 1 East 55, II U. B. R. 1897-01 P. 390 referred to. II U. B. R. 1897-01 P. 391, 3 A. 717. 4 A. 135, 9 A. 351 Superseded. 26 A. 178 12 B 443 followed. 24 B. 307 3 C. 314, 7 C. 256, 8 C. 721 dissented from. 23 C. 851, 5 M. 166, 7 M. 112, 10 M. 94, 23 M. 527, 21 W. R. 1, 24 W. R. 88, dissented from.—NGA WAIK *v* NGA CHET—**U. B. R. 1907 P. 5.**

155. S. 91—*(Evidence Act)—Suit to enforce registration—Invalid registration—Time limit—Mortgage deed—Admissibility in evidence—Bar to oral evidence—Personal undertaking—Agreement to repay loan—Indian Registration Act, (1877) S. 17, 23, 34, 49, 73, 77—Transfer of Property Act, (1882), s. 86.*

In December 1901 A borrowed money of B and executed a mortgage deed of certain land in B's favour.

In January 1902 B instituted a suit praying *inter alia* for an order to the Sub-Registrar to register the deed. In June 1903 he obtained a decree directing that the deed should, on application, be registered whether A admitted execution and receipt of consideration or not.

The deed was registered in accordance with this decree in July 1903.

The present suit was brought by B for sale of the mortgaged property and was based on the mortgage deed in question.

Held,—that the former suit not having been brought under the conditions required for the filing of a suit under section 77 of the Indian Registration Act, the decree therein had no value as exempting the document registered under it from the necessity for compliance with all other provisions of the Act. The Court had power to decide as to the validity of the registration, and as the document was not registered in accordance with the provisions of sections 23 and 24 of the Act, it could not, under section 49, be received in evidence as affecting the mortgaged property. At the same time section 91 of the Evidence Act precluded B from proving the existence of the mortgage by any other evidence.

Held further,—that as the deed contained a distinct agreement to re-pay the money borrowed, it was admissible as the basis of a personal money decree for the amount.

Bhagwan Singh v *Khuda Bakhsh* 1881) I. L. R. 3 All., 397; *Edun* v *Mohamed Siddik*, (1882) I. L. R. 9 Cal., 150: *Pathcrpermal Chetty* v *Mooniandy Serrai*, 11 Bur. L. R., 166; *Chatter Mal* v *Thakuri*, (1898) I. L. R. 20 All., 512; followed.

Ram Ghulam v *Chotey Lal*, (1878) I. L. R. 2 All., 46; *Abdulla Khan* v *Jamki*, (1894) I. L. R. 16 All., 303; *Sahmukhun Lall Panday* v *Sah Kundan Lall*, (1875) L. R. 2 I. A., 210; *Sreemutty Matonginy Dossee* v *Ramnarain Sadkhan*, 2 C. L. R., 428; referred to. MAUNG KYAW & MA SAN HMWE *v.* SIKHAMBARAM CHETTY—**4 L. B. R. 1907 P. 88.**

155. (a) S. 91.—*Promissory note, loss of—Proof of contents.*

Where a plaintiff bases his cause of action of a promissory note, which he alleges had been lost, he cannot prove the contents, unless he succeeds in proving the loss of the document, apart from the note in which the contract was recorded. 28, A. 298. D. SIRAJ HUSAIN *v.* BULAKI RAM, **5. A. L. J. 162.=A. W. N. 1908. P. 91.**

155. (b). S. 91.—*Promissory note lost—Proof of contents.*

A based his claim on a promissory note which he alleged had been lost. Held he could not prove the contents unless he proved the loss of the document. 28 *A.* 298 dissented from. SIRAJ HUSSAN *v.* BULAKI RAM. **5. A. L. J. 162**

155. (c) S. 91 and 92. *Question as to who were the parties to a contract—Oral evidence.*

The question as to who were the contracting parties is not a question as to the 'terms of the contract', within the meaning of S. 91 and 92 and a plaintiff can give (oral) evidence of circumstances which went

Sup: Govt. acts (I of 1872) *(Contd.)*

to show that a defendant signed a bond on his own behalf and as the agent of his partner, another defendant 7 Taunt, 295, and L. R. 6 C. P. C. Ex Ch. 486. F. Also, 2 H. L. C. 579, Rep VENKATASUBBIA v. GOVENDRAJULLU. **18 M. L. T. 1.**

155. (d) S. 92. - *Oral evidence that a mortgage was intended to be a sale.*

Held, that oral evidence is not admissible between the parties to a deed which purports to be a mortgage, or their representatives in interest, to prove that it was intended to be a sale *22 A. 149 Referred to.* ZAKI-UD-DIN KHAN v. AKRAM-UD-DIN KHAN, **11. O. C. 95.**

155. (e) S. 91 & 92 - *31 C 614 P. C. See No 182 infra.*

156. S. 91, 95, 97. *Deed having false description—Evidence as to the plot really sold.*

The general rule of S. 91 of the Evidence Act is subject to the exceptions contained in Ss. 95 and 97. Where in a sale deed the lands are described by wrong survey numbers, but can otherwise be identified clearly the maxim *demonstration falsa non nocet* applies. Evidence is also admissible to show the plot intended to be sold by that deed KARUPPA GOUNDAN v. PERIATHAMBI GOUNDAN. **2. M. L. F. 336 = 30 M 397.**

156. (a) S. 91 and 92. *Question as to who were the parties to a contract, whether one of the terms of the contract - Oral evidence, admissibility of, thereon.*

A question as to who the contracting parties are is not a question as to the 'terms of the contract', within the meaning of S. 91 and 92 of the Evdidence Act; and it is open to a plaintiff to give (oral) evidence of circumstances which went to show that a defendant signed a bond on his own behalf and as the agent of his partner, another defendant. *7. Taunt 295. and L. R. 6. C. P. C. Ex. Ch. 486 F. also 2. H. L. C. 579. R.* VENKATASUBBIAH CHETTY v. GOVINDARAJULU NAIDU. **18 M. L. J. 1 = 3. M. L. T. 259 = 31. M. 45.**

157. S. 92. *"Contradicting, varying, adding to or subtracting from" - Admissibility of oral evidence when question not as between parties to the instrument or their privies.*

Plaintiffs sued defendant for a piece of land, alleging that it had been given to her by a relation. The defence was that the property had been purchased by the defendant M. A document was filed, which purported to be a sale of the land to plaintiff, but defendant contended that the document had been executed in plaintiff's name *benami* for him: *Held* that oral evidence was admissible in support of the contention that there had been a gift of the land to plaintiff, the question not arising as between the parties to an instrument or their privies, so as to bring it within the purview of S. 92 of the Evidence Act. Though plaintiff and defendant claimed through one and the same person, yet they could not be treated as parties contracting with each other, nor would oral evidence be evidence to vary the terms of any written agreement between them. *Rahiman v. Elahi Baksh* (I. L. R., 28 Cal. 70), commented upon. PATHAMMAL v. SYED KALAI RAVUTHAR, **I. L R., 27 M 329.**

158. S. 29. *Oral evidence to vary or add to a document.*

In a suit based on a pronote, oral evidence is not admissible to prove that one of the defendants signed the pro-note only as surety for the other defendant and that his liability as surety was to last only for a month. HAREK CHAND BABU v. BISHUN CHANDRA MUKERJEE, **8 C. W. N. 101.**

159. S. 92. *Registration Act (III of 1877), s. 7—Registration of mortgage—Interest in land —Right to redeem immoveable property mortgaged—Transfer of Property Act (IV of 1882), s. 59.*

Two documents were produced in evidence, one of which was in terms an absolute sale. This document had been registered. The other document (which was not dated) had apparently been written contemporaneously with the first, but it had not been registered. This document purported to show that the transaction between the parties was a mortgage: *Held* that the second document could not be received as evidence of a mortgage transaction not below Rs. 100, and that the registration of the first document, which was on the face of it an absolute and unconditional sale, could not be regarded or operate as the registration of a mortgage. Though there is nothing to prevent the whole of a mortgage transaction being reduced in any form to writing on different papers, whether attached together or detached, yet the requirments as to registration cannot be said to have been complied with if some of such papers are registered while others are left unregistered. A document which gives a person a right to redeem a mortgage on immoveable property on payment of money creates an interest in immoveable property and its registration is compulsory under S. 7 of the Registration Act. MUTHA VENKATACHELAPATI v. PYANDA VENKATACHELAPATI, **I. L. R. 27 M. 348.**

160. S. 92. *Hindu Law—Partition—Requisites for Partition—Deep defining and allotting shares—Effect on deed of subsequent conduct of the parties—Effect of deed as regards minor members of the joint family—Re-union of member after once separating himself.*

An *ikrarnama* executed by the members of a joint family, some of whom were minors, stated in unambiguous terms that defined shares in the whole joint property had been allotted to the several

Sup: Govt. acts (I of 1872) (*Contd*).
co-parceners, and also gave liberty to any of the parties to it "either to live together as a member of the joint family as before or to separate his own business": *Held* that the effect of the deed was to cause a separation in estate and interest between all the co-parceners. The clause giving the parties the option of being joint or separate was not inconsistent with a separation in estate. It conferred on the parties no larger liberty of choice than they would have had without it. They might elect either to have a partition of their shares by metes and bounds, or to continue to live together and enjoy their property in common as before. Whether they did one or the other would affect the mode of enjoyment, but not the tenure of the property or their interest in it, which was, on the principle of the case of *Appovier* v. *Rama Subba Aiyan*, (11 M. I. A. 75), determined by the allotment to them of defined shares by the *ikrarnama*. The legal effect of the *ikrarnama* could not be controlled or altered by evidence of the subsequent conduct of the parties; but such conduct in this case was not inconsistent with an intention to subject the whole property to a division of interest, although it was not immediately to be perfected by an actual partition.

Held, also that the *ikrarnama* was binding on the minors. It followed from the admitted right of any co-parcener to claim partition that a valid agreement for partition could be made during the minority of one or more of the co-parceners. If it was unfair or prejudicial to their interests the minors could, by proper proceedings, on attaining majority set it aside so far as it concerned themselves. BALKISHEN DAS *v.* RAM NARAIN SAHU. **7 C. W. N. 578 = 5 B. L. R., 461 = 30 I. A., 139 = 30 C. 738 at 772 P. C.**

161. S 92.—*Evidence act (I of 1872) S. 92 Construction of document—Oral agreement.*

The plaintiff sued to recover money which he had been compelled to pay in virtue of a mortgage executed by his two half-sisters and himself. His claim was based on the plea that, though appearing in the bond as a co-obligor, he was in reality merely a surety. *Held*, that evidence was admissible to show that the plaintiff executed the mortgage-bond as a surety only. The plaintiff failed to prove that he was other than a principal, whereupon it was *held* that he was not entitled to recover anything from the defendants by way of contribution, the case upon which he came into Court being totally different from a suit for contribution. *Mul Chand* v. *Madho Ram*, (I. L. R., 10 All. 421) followed. SHAMSH-UL-JAHAN BEGAM *v.* AHMAD WALI KHAN. **I. L. R., 25 A. 337.**

162. S. 92.—*Oral evidence—Evidence act (I of 1872) S. 92—Evidence to show that a 'deed of sale' was meant to be a 'deed of gift'—Admissibility of oral evidence to vary a written contract.*

Under the provisions of S. 92 of the Evidence Act (I. of 1872) no oral evidence

Sup: Govt. acts (I of 1872) (*Contd*)
is admissible to show that a "deed of sale" was really meant to be a "deed of gift" and not a "deed of sale." *Shewab Singh* v. *Asgur Ali*, (6 W. R., 267); *Wali Mahomed* v. *Kumur Ali*. 7 W. R., 428), and *Lala Himmat Sahai* v. *Llewhellen* (I. L. R., 11 Cal., 486) distinguished—RAHIMAN *v.* ELAHI BAKSH, **I. L. R., 28 C. 70.**

S. 92—*Oral Evidence—Evidence Act (I. of 1872) S. 92—Conduct of parties—Oral evidence when admissible to prove that a conveyance is a mortgage by way of conditional sale—Admissibility of parol evidence to vary a written contract.*

Under the provisions of s. 92 of the Evidence Act (I. of 1872) oral evidence of the acts and conduct of parties, such as evidence of the repayment of the money, the return of the deed and the exercise of the acts of possession by the vendor, is admissible to show that a certain conveyance was really a mortgage by way of conditional sale. *Preonath Shaha* v. *Madhu Sudan Bhuiya* (I. L. R., 25 Cal., 603) referred to. The case of *Balkishen Das* v. *Legge* (L. R., 27 I. A., 58; I. L. R., 22 All., 149) did not in any way affect the rule laid down in the case of *Preonath Shaha* v. *Madhu Sudan Bhuiya* (I. L. R., 25 Cal., 603).—KHANKAR ABDUR RAHMAN *v.* ALI HAFEZ, **I. L. R., 28 C. 256.**

163 S. 92—*Oral Evidence—Evidence Act (I. of 1872), s. 92—Acts and conduct of parties—Oral evidence when admissible to prove that a conveyance is really a mortgage by way of conditional sale—Admissibility of parol evidence to vary a written contract—The Indian Law Reports Act (XVIII. of 1875), s. 3.*

Oral evidence of the acts and conduct of parties, such as evidence of promise by the vendee, to restore the property on repayment in two or three years, is admissible to show that a certain conveyancy was really a mortgage by way of conditional sale. *Balkishen Das and others* v. *Legge* (L. R., 27 I. A., 58; I. L. R., 22 All., 149), explained. *Preo Nath Shaha* v. *Madhu Sudan Bhuiya* (I. L. R., 25 Cal., 603) referred to.

Semble, per *Maclean*, C. J.—S. 3 of the Indian Law Reports (Act XVIII. of 1875) does not prevent a High Court from looking at an unreported judgment of other Judges of the same Court—MAHOMED ALI *v.* NAZAR ALI, **5. C. W. N. 326 = 28. C. 289.**

164. S. 92. *Evidence to vary written instrument—Execution of sale-deed—Subsequent redemption suit on footing that the sale was in fact a mortgage—Evidence of subsequent conduct to show collateral agreement—Inadmissibility.*

On 23rd September 1876, defendant wrote to plaintiff, inviting plaintiff to execute a sale-deed of certain land in favour of defendant and promising that if plaintiff did so, defendant would discharge plaintiff's debts out of the income to be derived from the land, and would, after the debts had been discharged, or before, if so requested, restore the land to plaintiff, upon payment

Sup: Govt. acts (I of 1872) (*Contd.*)
by plaintiff of a sum of money that had been advanced to him by defendant. This document was not registered. On 29th September 1876, plaintiff executed a deed of sale of the land in defendant's favour, which was unconditional in its terms, and which was duly registered. Plaintiff subsequently brought a redemption suit against defendant on the deed of 29th September, and he contended that though that deed was, in its terms, an absolute conveyance, he was entitled to adduce evidence of the subsequent conduct of himself and defendant, to show that the transaction was, in fact, not a sale but a mortgage: *Held* that the evidence was not admissible. *Balkishen Das* v. *Legge*, (L. R., 27 I. A., 58; I. L. R., 22 All. 149), followed. *Khankar Abdur Rahman* v. *Ali Hafez*, (I. L. R., 28 Cal. 256), and *Mahomed Ali Hossein* v. *Nazar Ali*, (I. L. R., 28 Cal. 289), dissented from.

Plaintiff further contended that the contract was not contained in the deed of sale alone, but must be gathered from both of the documents referred to above: *Held* that the document of 23rd September being unregistered was inadmissible in evidence as it purported to create or limit an interest in the immoveable property conveyed under the deed of sale. *Pranal Annee* v. *Lakshmi Annee*, (L. R., 26 I. A., 101; I. L. R., 22 Mad. 508), followed. ACHUTARAMARAJU *v.* SUBARAJU, **11. M. L. J. 370 = 25. M. 7.**

165. S. 92. *Construction of document—Evidence inadmissible to show that a document purporting to be a sale-deed is in reality a deed of gift.*

Held that extrinsic evidence is not admissible for the purpose of showing that a document, which purports to be, and on the face of it is, a deed of sale, is in reality a deed of gift. *Sah Lall Chand* v. *Indarjit*, (I. L. R., 22 All. 371), and *Balkishen Das* v. *Legge* (I. L. R., 22 All. 149) referred to. FAIZ-UN-NISSA *v.* HANIF-UN-NISSA, **A. W. N. 1905. p. 129. = 2. A. L. J. 363 = 27. A. 612.**

166. S. 92 *Easement—Easement Act (V of 1882), S. 13, cls. (c), (f) Easement of necessity—No easement on the ground of convenience when there is other means of access—Evidence Act (I of 1872), s. 92—Oral contemporaneous agreement cannot be set up to add to a written contract.*

Held that if A has a means of access to his property without going over B's land, A cannot claim a right of way over B's land on the ground that it is the most convenient means of access. The law under s. 13, cl. (c) of the Easements Act is the same as the law in England *Wutzler* v. *Sharpe* (I. L. R., 15 All. 270 at p. 28), followed. *Esubai* v. *Damodar Ishvardas*, I. L. R., 16 Bom. 552 at p. 559), not followed. *The Municipality of the City of Poona* v. *Vaman Rajaram Gholap*, (I. L. R., 19 Bom. 797), not followed. To sustain a claim under section 13, clause (f) of the Easements Act, the easement claimed must be apparent and continuous. A contract

Sup: Govt. acts (I of 1872) (*Contd*).
in writing cannot be added to by a contemporaneous oral agreement. KRISHNAMARAZU v. MARAJU, **15 M. L. J. 255 = 23. M. 495**

167. S. 92. *Written document—Absolute conveyance—Mortgage—Contemporaneous oral agreement or statement of intention—Inference from circumstances.*

The plaintiff sued to recover possession of land contending that the document under which the defendants held the land, though in form an absolute conveyance, was intended to operate merely as a mortgage. The plaintiff's contention was based on the grounds that the consideration was a previously existing debt and not money paid at the time; that the plaintiff's father, notwithstanding the execution of the deed, remained in possession until his death, and that after his death his widow remained in possession for three years; that there was no transfer of the land into the *khata* of the transferee and that the consideration was grossly inadequate. The first Court held the transaction to be an out-and-out sale and dismissed the suit. On appeal by the plaintiff: *Held* confirming the decree, that the meaning of the contention of the plaintiff was that the document was accompanied by a contemporaneous oral agreement or statement of intention which must be inferred from the said several circumstances relied on, but that in questions of this kind, Courts in India must be guided by s. 92 of the Evidence Act (I. of 1872), and cannot have recourse to those equitable principles which enable the Court of Chancery to give relief in those cases of which *Alderson* v. *White* (2 De G. & J. 98) or *Lincoln* v. *Wright* (4 De G. & J. 16) furnish examples. 22 A 149 followed. This, however, would not have precluded the plaintiff from relying on the provisos to the section, had any of them been applicable. DATTOO *v.* RAMCHANDRA, **I. L. R., 30 B. 110; 7 B. L. R. 669.**

168. S. 92. *Redemption suit—Sale out and out—Construction—Evidence of intention—Admissibility*

Plaintiffs, who were agriculturists, brought a suit to redeem and the defendant contended that the transaction in suit was a sale out and out and not a mortgage. The lower Courts held that the transaction was a mortgage and allowed redemption. *Held*, on second appeal by the defendant, that evidence of intention cannot be given for the purpose merely of construing a document which purported to be a sale, out and out and not a mortgage; s. 92 of the Indian Evidence Act (I. of 1872), subject to the proviso therein contained, forbids evidence to be given of any oral agreement or statement for the purpose of contradicting, varying, adding to or subtracting from the terms of any contract, grant or other disposition of property, the terms of which have been reduced to writing as mentioned in that section. While there are

Sup: Govt. acts (I of 1872) *(Contd).*

restrictions on the admissibility of oral evidence, s. 92 in its first proviso recognizes that facts may be proved by oral evidence which would invalidate a document or entitle any person to any decree or order relating thereto. And where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is in a Court of Equity considered as having been obtained fraudulently. ABAJI v. LAXMAN. **I. L. R., 30 B. 426; 8 B. L. R. 553.**

169. S. 92—*Construction—Mortgage or Sale—Real agreement between parties whether embodied in document or not.*

The plaintiff sued to redeem his land alleging that they were mortgaged with the defendants under a nominal sale-deed. The lower Court treating the contract as embodied in the deed as one of sale rejected the suit:—

Held, that the real question involved in the suit was not whether the document was one of sale or mortgage, but whether the real agreement between the parties was embodied in the document. ANSA TUKA v KENCHAPPA SATAPPA,—**8 B. L. R. 669**

170. S. 92.—*Evidence regarding oral assurances by granters if admissible.*

Oral evidence regarding oral assurances given by the granters at the time of making the grant to show the perpetual nature of a grant is not admissible. 22. A, 149 L. R, 27 I. A. 58, followed. NARASINGH DAYAL SAHU v RAM NARAIN SINGH.—**30. C. 884.**

171. S 92.—*Evidence showing that the executant of a pro-note signed as surety.*

Held, that in the plaintiff's suit on a pro-note executed by the defendants filed against them oral evidence was not admissible to show that one of them signed the pro-note only as surety and that his liability was only to the extent of standing as a surety for one month. 3 *Cal.*, 174 distinguished S. 92, Evidence Act, and not English law is applicable to such cases 4 C. W. N. 155=27 I. A. 58 followed, HAREK CHAND BABU v BISHAN CHANDRA BANERJEE. —**8. C. W. N. 101.**

172. S. 92—In a suit between mortgagees and mortgagors it is not open to some of the executants of the mortgage deed who signed as principal debtors and mortgagors, to adduce oral evidence to prove that they were only sureties (25 A 337, 10 A 421, 8 C. W. N. 101 followed.) NGA SAING v NGA LU AUNG. **U. B. R. 1906 P. 13.**

173. S. 92—*Oral evidence to contradict the terms of a kabuliyat—Oral evidence as to conduct of parties—Waiver of terms—Landlord and tenant—Rate of rent.*

When the *kabuliyat* states the amount of rent that is payable to the landlord, oral evidence is not admissible for the purpose of contradicting that statement, but evidence is admissible to show that as between the landlord and the tenant the document

Sup: Govt. acts (I of 1872) *(contd).*

was never intended to be acted upon or enforced, or evidence to show that there has been, as between the parties to the document, a waiver of some of its terms.

To show that the intention of the parties was that the *kabuliyat* from the first was not intended to be acted upon, or that there had been a waiver by the parties evidence is admissible to prove that since the time the *kabuliyat* was entered into, the tenant has always paid rent at a lower rate than that stated in the lease. BENI MADHUB GORANI v LALMOTI DASSI.—**6. C. W. N. 242.**

174. S 92—*Oral evidence to vary a written contract.*

A mortgage-decree was sold free from incumbrance and a portion of the purchase money was deposited with the purchaser, who gave a receipt embodying the real contract between the parties with regard to the deposit, *held*, evidence could not be given of a separate agreement empowering the purchaser to pay off an attaching creditor of the decree. But evidence might be given to prove the object for which the deposit was made, or to explain the meaning of a sentence in the receipt.—KHETSIDAS AGARWALA v SHIB NARAYAN MURDA,—**9 C. W. N. 178.**

175. S. 92—*Oral evidence relating to documents—Sale—Mortgage.*

Held, that, notwithstanding the provisions of S. 92 of the Evidence Act, the defendants were entitled to show that a document purporting to be a deed of sale executed by them was intended to be a mortgage and not a sale. 72 P. R. 1901=114 P. L. R. 1901 followed, RAM SARUP v ALLAH RAKHA,—**107. P. L. R. 1905.**

176. S. 92—*Written instrument—Sale-deed or mortgage—Re-presentation that a sale-deed would not be enforced as a sale-deed—Construction of document.*

Where at the time of executing a document, a representation is made that the document though in form a sale-deed will not be enforced as against the executant as a sale-deed, and where on the faith of that representation the executant executes the document, the sale-deed cannot be upheld as a sale-deed as against him. NAVALBAI FULCHAND v SIVUBAI GENU KORPE.—**8 B. L. R. 761.**

177. S. 92—*Document—Construction, Transaction evidenced by the deed—Nature of the transaction which the parties contemplated—Evidence.*

Where the contention in a case is that there was no agreement enforceable by law to sell the property but that there was a mortgage agreement, it should be specifically determined whether real transaction between the parties, as shown by the evidence, is a mortgage or a sale.

Per Heaton, J.—"The theory that an apparent sale is a mortgage is not based on the conception of a sale accompanied by modifying oral agreement or understanding.

Sup: Govt. acts (I of 1872) *(Contd).*

It rests on the suppositions that the intention of the parties is simply and solely that the property shall be security for the debt: and that no sale in any form is jointly contemplated. The fact that the document takes the form of a sale-deed, is explained by the assumption (1) of a fraud by the creditor; or (2) of a convention which the creditor insists shall be observed, and which the debtor dare not repudiate; or (3) of circumstances peculiar to an individual transaction. It may be that the debtor prepares for himself a case specially difficult of proof but that is not a reason for refusing to allow him to attempt to prove it. KRISHNA BAI *v* RAMA BALA.—**8 B. L. R. 764.**

178. S. 92. *Oral evidence varying the terms of a deed--Intention of parties cannot be such evidence--Sale—Exchange—Limitation Act (XV of 1877), Art. 97—Money paid upon an existing consideration which afterwards fails.*

On the 17th April, 1892, the defendants passed a sale deed of certain lands at Gadag to plaintiff for Rs. 500. On the same day, the plaintiff sold some lands at Toppinkatti to the defendant's sister for Rs. 500. No money passed under any of these transactions, the one being a consideration for the other. In 1898, the plaintiffs were dispossessed by a person deriving title from a purchaser, at a court sale on the 6th June, 1885, of Gadag lands in execution of a decree against the defendants, who had somehow remained in possession. The plaintiff, thereupon, filed a suit against the defendants to recover the possession of the lands at Topinkatti, or in the alternative for compensation for the loss sustained by him by reason of his dispossession:—

Held (1) that the two deeds professed to be deeds of conveyance; and the mere fact that they were mutual deeds of conveyance would not make the transaction an exchange Whatever might have been the intention of the parties, having regard to S. 92 of the Evidence Act, it was impossible to treat the transaction of 1892 as one for exchange.

(2) That the plaintiff was entitled to recover money paid upon an existing consideration which afterwards failed: Art. 97 of the Limitation Act, 1877 18. M. 173 followed. HANMANT NARSINHA *v.* GOVIND PANDURANG KAMAT, **8. B. L. R. 283.**

179. S. 92. *Registration—Document collateral to a permanent lease of immoveable property—Registration Act (III of 1877), s. 17—Transfer of Property Act (IV of 1882), s. 107—Assignment of property to trustee—Trust deed.*

An agreement to pay Rs. 500 a month to a lessor in consideration of receiving from him a permanent lease of portions of his zamindari, which agreement was come to before, but reduced to writing after, the execution of the lease, was *held* to be not affected by s. 92 of the Evidence Act, nor to require registration either under the Registration Act, s. 17, or the Transfer of Property Act, s. 107, where it was not inconsistent with the lease, its provisions formed no part of the holding under the lease, the payment bargained for was no charge on the property, and it was not rent or recoverable as rent, but a mere personal obligation collateral to the lease:

Held also, that the lessor's rights under the agreement did not pass under a settlement subsequently executed by him for the benefit of his son, by which he assigned to a trustee his zamindari with its incidents, and also "all the outstanding debts, arrears of rent, mesne profits, claims, demands and sums of money of whatsoever description, now due owing or payable to the settlor on any account whatsoever, and all rights to prosecute any suit or other proceeding existing in favour of the settlor at the date of those presents * * * * except and always reserving to the settlor or outstanding debts, arrears of rent and other claims and demands payable and to become payable to the settlor, and all rights to prosecute any suit or other proceedings now existing, etc." The use in an Indian document of the words "now due owing or payable" in defining the claims transferred coupled with the words that follow restricting the transfer of rights of suit in respect of such claims to those existing at the date of the deed, showed that rights of the nature of those in the agreement, accruing as they did after the date of the trust deed, were not intended to pass under it; and this view was strengthended by the employment of the phrase "demands payable and to become payable" in the exception and reservation which followed. Where, therefore, the lessor had, after execution of the trust deed, assigned his rights under the agreement:

Held that the assignee could maintain a suit upon it to recover the amount due. SUBRAMANIAN CHETTIAR *v.* ARUNACHALAM CHETTAIR, **6 C. W. N. 865 = 25. M. 603 = 29. I. A. 138 (P. C.)**

180 S. 92—A registered mortgage takes effect against any oral agreement relating to the hypothecated property, and no oral agreement purporting to modify the terms of the mortgage by reducing the amount recoverable thereunder, by taking away the right of sale, and by providing for the payment of the reduced debt by a sale, of other property, can be proved, by virtue of the provisions of S. 92 of the Act MAHARAJ SING *v.* RAJA BALWANT SINGH. **3 A. L. J. 274 = A. W. N (1906), 117 = 28 A. 508.**

181 S. 92—*Bond—Oral evidence —*

Where the terms of a bond are clear and unambiguous oral evidence can not be taken that it was an assignment of future rent.—HRIDOY NATH PODDAR *v.* JOYRAM MAHTO. **4 C. L. J. 402.**

182 S. 92 & 91—*Contract—Bought and sold notes—Misrepresentation—Fraud, effect of*

Sup: Govt. acts (I of 1872) *(Contd).)*

—Right of plaintiff to fall back on original contract—Damages for breach of contract.

The plaintiff made a contract by telegram with the defendants for the purchase of a full cargo of kerosine oil, which the defendants had themselves contracted to buy from a firm of merchants in Calcutta. That firm declined to have their contract with the defendants transferred into the plaintiff's name and it was therefore arranged between the plaintiff and the defendants that 'bought and sold notes' should be exchanged. In carrying out this arrangement, the defendants misrepresented the amount of the cargo, and the words "100,000 cases" were inserted in the bought and sold notes when the cargo really consisted of 125,000 cases of oil. Both the Courts below found that this misrepresentation was fraudulently made. The High Courts in its Original Jurisdiction held that the bought and sold notes, were invalidated by the fraud and gave the plaintiff a decree for damages on his contract as proved by the oral evidence. The High Court in appeal treated the case as founded on the bought and sold notes, and held that no other evidence of the contract could be given, and dismissed the suit.

Held that the bought and sold notes having been falsified, the plaintiff was entitled to disregard them and fall back on his original contract.—DURGA PROSAD SUREKA *v*.. BHAJAN LALL LOHEA. **8 C. W. N., 489=6 B. L. R., 498=M. L. J., 1904; p. 196; P. C.=31 I. A. 122=31 C. 614.**

183 S. 92 Pro (1)—*Contract Act (IX of 1872) s. 24—Unlawful consideration—Adultery.*

No Court ought to enforce a contract which, though on the face of it, is valid in form and matter, is shown by evidence to be based, wholly or in part, on unlawful consideration. It matters not whether the defendant pleaded illegality or not. If the evidence adduced by the plaintiff proves the illegality, the Court will not assist him. Adultery is an offence in India, therefore when adultery, past or future, is the consideration or an indivisible part of the consideration for an agreement entered into in India, this would make the contract an immoral and illegal agreement and the contract would be void. *Man Kuar* v. *Jasa la Kuar* (I. L. R., 1 All. 478) and *Dhiraj Kuar* v. *Bikramijit Singh* (I. L. R., 3 All. 787) referred to.—ALICE MARY HILL *v*. WILLIAM CLARKE. **A. W. N., 1904. p. 238.**

184 *Section 92.*

A plaintiff is entitled to show under section 92, Evidence Act, 1872, that a deed was passed without consideration, and when evidence is adduced on his behalf, the defendant is equally entitled to show that there was valuable consideration for the deed though not identical with that stated in the deed itself. 11 *Cal.*, 486 *and* 3 *Bom.*, 159, *referred to.* KAILASH CHANDRA NEOGI *v.* HARISH CHANDRA BISWAS. **5 W. N. C. 158.**

185 S. 92—*Easement Act.*

Where on partition different sites fell in to the lot of the parties and the plaintiff began to build upon his site and the defendant obstructed him alleging that he had an easement of necessity over the site, and also set up an agreement at the time of partition in support of his alleged right of way:

Held, as the agreement of partition contained in the partition deed, made no provision for the right of way claimed, an oral evidence of the agreement was inadmissible under S. 92 Evidence Act. SABHAPATY MUDALI *v.* KUPPU SAMY MUDALI. **—15 L. J. 225.**

186. S. 92—*Suit for accounts Razinama filed—Fresh suit on oral promise that accounts would be settled on filing a compromise—Oral evidence to contradict compromise.*

T sued J. for accounts; the parties in the course of the suit executed a *Razinama* to the effect; the plaintiff had understood all the accounts and held settled them and that they had no further dispute. The compromise was filed in Court and the plaintiff admitted the terms of compromise. The defendant attested the *Razinama* and the Court dismissed the suit.

The plaintiff subsequently filed another suit alleging that the defendant had promised in the previous suit to explain the accounts to him and to pay whatever was found due provided the plaintiff first filed a *Razinama*. This was done but the defendant has not rendered the accounts. Hence the present suit. Held the plaintiff could adduce the proof of oral promise alleged by him and it was not excluded by the provisions of S. 92. P. THAKUR DAS *v.* R. B. DR. JASWANT RAI.—**41 P. L. R. 1904=1. P. R. 1904.**

187. *Section 92.*

Oral evidence as to the acts and conduct of the parties is admissible to show whether a certain deed is, as it purports to be, an out and out sale or a mortgage, but it is not admissible to show that a deed of sale was really meant to be a deed of mortgage and not a deed of sale. *22 All., 149, 5 W. N. Cal., 326, 5 W. R. 68, followed 12 All., 357, 14 All., 159, 4 Bom., 594, 10 Cal., 764, 9 Cal., 525, 13 Mad., 474, 16 Mad., 80, 19 All., 434, 25 Cal., 693, 2 W. N., Cal., 552, 7 Bom., 73, 6 Cal., 328, 17, Cal., 173 and 176, referred to.* ABDUL GHAFUR KHAN *v.* ABDUL KADER. **P. R. 72 of 1901.**

188. S 92. *Property exchanged—Cash payment recited in sale-deed—Whether evidence of actual transaction admissible.*

Held that evidence is admissible to show that consideration, mentioned in a deed as having been paid, never passed, and also to show that the consideration specified

Sup: Govt. acts (I of 1872) *(Contd.)*

in the deed was satisfied in a different way from that mentioned in the document itself 18 A 168. 22 A 370 P. C. *referred to.*

Where, therefore, a deed recited that a payment of Rs. 1,000 was made in cash, *held* that it could be shown that the payment was not made in cash, but in some other way, i. e., by exchange of property. MUHAMMAD YUSUF *v.* MUHAMMAD MUSA, **4. A. L. J. 441 = A. W. N. 107. P. 181.**

189. S. 92. *Evidence to vary or contradict terms of document—Evidence of acts and conduct of parties—Indian Statute Law & principles. of equity.*

The Indian Law is generally a codified one. The Codes are exhaustive, not only as to the rule to be followed, but also as to the extent of discretion vested in the Courts. There is no analogy between the *status* of this codified law and the common law of England; and Courts in India are not justified in relaxing the Statute Law in the same way, as Courts of Equity in England deal with rules of common law.

S. 92 excludes evidence of every kind adduced to prove an oral agreement, including the circumstantial evidence derived from the acts and conduct of the parties to the instrument to prove what it has forbidden. When an oral mortgage is put forward, whether it be to wholly supplant or merely to supplement the terms of a written sale, clearly there is a *contradiction* of, or an *addition* to, the written evidence of the transaction and S. 92 forbids such proof. The word "contradict" in that section must be given its ordinary meaning; and, therefore, the distinction drawn by Messrs. Amir Ali and Woodroffe, *viz.*, that we cannot vary, add to, or substract from, the written evidence of the terms of a transaction, but we may wholly contradict it, by proof of an entirely different contemporaneous oral agreement, is not sound. 22 A. 149 and 30 C. 738, referred to. 4 B. 594, 16 M. 80, 25 C. 603, 28 C. 256, 28 C. 289, *Diss*; 25 M. 7, *F.* GUJAR MAL RAM LAL *v.* SITA RAM URJAN. **3 N. L. R. 19.**

190 S. 92 *Benami Transaction—Undue influence—Gift—Pardanashin lady—Suit to set aside deeds as having been executed by person of unsound mind—Alleged influence of daughter over her mother—Gift with imaginary consideration inserted in deed.*

In a suit by a son to set aside certain transactions entered into by his mother, a Mahomedan lady, in favour of her daugher, the defendant, by which the daughter acquired possession of most of her mother's property, the plaint alleged that his mother was, at the time the transactions took place, of unsound mind and "entirely under the dominion and control" of her daughter. Both Courts in India found that the mother was not of unsound mind; but the first Court treated her as a *pardanashin* lady, and as "entirely under the control and domination of the defendant, who had unscrupulously used her power over her mother to get her mother's property into her own hands," and made a decree that the transactions should be avoided on the ground of undue influence. The Court of appeal reversed the finding with respect to undue influence and dismissed the suit.

Held that, assuming the question of undue influence could be set up at all (for it was not raised in the pleadings except with regard to unsoundness of mind, which had been negatived, nor was any issue raised upon it), no case of undue influence had been established by the evidence. The mere relation of daughter to mother in itself suggested nothing in the way of special influence or control; and the evidence was insufficient to establish any general case of domination on the part of the daughter, and subjection of the mother, such as to lead to a presumption against any transaction between the two; and with regard to the actual transactions there was no evidence whatever of undue influence brought to bear upon them.

Held also that in the evidence and circumstances of the case, the transactions in dispute were absolute gifts, and not *benami* transactions, which might have been set aside.—ISMAIL MUSSAJEE MOOKERDAM *v.* HAFIZ BOO, **10 C. W. N. 570 = 3 A. L. J. 353 = 16 M. L. J. 166 = 3 C. L. J. 484 = 8 B., L. R. 379; P. C. = 33 C. 773.**

191. S. 92 *Whether an apparent sale deed is a mortgage—Evidence of oral.*

Held that when a party sets up a contemporaneous oral agreement, showing that an apparent deed of sale was really a mortgage, unless it appears from the conduct of the parties and from collateral circumstances that the transaction was intended to be and was treated by them as a mortgage mere verbal evidence of the contemporaneous oral agreement is insufficient.

Held also that under the same circumstances such evidence is not admissible as against an innocent purchaser without notice of the existence of the mortgage, who merely bought from a person who was in possession of the title deeds and was the ostensible owner of the property. 5 W. R. 68, 4 B. 594, 16 M. 80, 9 C. 898 referred to. MAUNG LU GYE & MA KYE HMON *v.* MAUMG HLA PYU & MA SHWE BWIN **U. B. R. 1902 P. 1 (evidence)**

192. S. 92 *Mortgage or sale—Evidence of oral agreement varying terms of deed of sale—Evidence Act, s. 92.*

Plaintiff, who had executed a deed of sale of land to defendant, afterwards brought a suit for a declaration that the transaction was a mortgage and not an outright sale, and for an order that the land should be re-conveyed on plaintiff's paying the mortgage money. Plaintiff brought evidence of an oral agreement between the parties at the

Sup: Govt. acts (I of 1872) *(Contd)*
time of the execution of the deed of sale, that plaintiff should have the right to redeem the land; and also evidence of the conduct of the parties as showing that such was the agreement between them.

Held, that such evidence was not admissible, being excluded by the terms of section 92 of the Indian Evidence Act, 1872. Balkishen Das v. Legge, (Privy Council) (1899) I. L. R., 22 All., 149; Banapa v. Sunderdas, Jogjivandas, (1876) I. L. R., 1 Bom. 333; Achutaramaraju v. Subbaraju, (1901) I. L. R. 25 Mad., 7; followed. Ramesh Chandra Pal v. Nga Soung, (1902) 2 L. B. R., 1, over-ruled. Paksu Lakshman v. Govinda Kanji, (1880) I. L. R., 4. Bom., 594; Preonath Shaha v. Madhu Sudan Bhuiya, (1898) I. L. R., 25 Cal., 603; Khankar v. Ali Hafez, (1900) I. L. R., 28 Cal., 256; Mahomed Ali Hossein v. Nazar Ali, (1901) I. L. R., 21 Cal., 289; dissented from. Lincoln v. Wright, (1859) 4 Deg. & J., 16; Alderson v. White, (1858) 2 Deg. & J., 97; Gunga Narain Gupta v. Tiluckram Chowdhry. (1888) I. L. R., 15 Cal., 533; Beni Madhab Dass v. Sadasook Kotary, (1905) I. L. R., 32 Cal., 437; referred to. MAUNG BIN v. MA HLAING **3. L. B. R. 1905 P. 100.**

192 (a) S. 92—*Oral evidence a mortgage or a sale—Representatives in interest of parties to the suit.*

Held, that oral evidence is not admissible between the parties to a deed which purports to be a mortgage, or their representatives in interest, to prove that it was intended to be a sale. 22 A 149 Referred to. ZAKI-UD-DIN KHAN v AKRAM-UD-DIN KHAN. **11 O. C. 95.**

193 S. 92—*Execution of Decree - Agreement in satisfaction of Decree—Civil Procedure Code (Act XIV of 1882), s. 257 A—Khata—Decision on a point not raised by the defendant.*

It is not open to a Judge to decide a case in defendant's favour on a point not raised by him with the result that if the decision be upheld it will cast upon the defendant a far higher liability than if he had made the order which the plaintiff had asked for. In an execution proceeding, the parties arrived at an agreement in satisfaction of the decree. The agreement was in the form of a *khata*. Subsequently the plaintiff brought a suit on the *khata* and claimed interest on the amount in suit. A question having arisen in the suit as to whether the *khata* sued on was enforceable;

Held, allowing the claim for the principal amount only, that if there was an agreement to pay interest, then either it was a part of the agreement embodied in the *khata*, or was a separable agreement. If it was a part of the agreement to be embodied in the *khata*, then under S. 92 of the Evidence Act (I of 1872), evidence of it was not admissible. If it was a separate agreement, then it would not vitiate the agreement embodied in the *khata*, which, apart from the separate oral agreement, could not be open to objection under S. 257 A of the Civil Procedure Code (Act XIV of 1882). RAICHAND v. NARAN,—**I. L. R. 28 B. 310; 6 B L. R., 62.**

194. S. 92. Prov. (1). *Contract Act (IX of 1872) s. 24—Unlawful consideration—Adultery.*

No Court ought to enforce a contract which, though on the face of it, is valid in form and matter, is shown by evidence to be based, wholly or in part, on unlawful consideration. It matters not whether the defendant pleaded illegality or not. If the evidence adduced by the plaintiff proves the illegality, the Court will not assist him. Adultery is an offence in India, therefore when adultery, past or future, is the consideration or an indivisible part of the consideration for an agreement entered into in India, this would make the contract an immoral and illegal agreement and the contract would be void. *Man Kuar* v. *Jasada Kuar* (I. L. R., 1 All. 478) and *Dhiraj Kuar* v. *Bikramjit Singh (*I. L. R., 3 All. 787) referred to. ALICE MARY HILL *v.* WILLIAM CLARKE. **I. L. R. 27 A. 266.**

S. 25. *See Contract Act.*

195 S. 92. prov: (1) and illustration (e)—*Contract—Mistake in agreement—rectification of—Specific Relief Act, 1877, s. 31.*

Evidence to prove a mistake in the t r ns of an agreement may be brought in a suit upon that agreement as well as in a suit to rectify the mistake under section 31 of the Specific Relief Act, 1877.

Balkishen Das v. *Legge*, (1899) I. L. R. 22 All., 149; *Maung Bin* v. *Ma Hlaing*, (1905) 11 Bur. L. R., 281; referred to. *Mahendra Nath Makherjee* v. *Jogendra Nath Roy Chaudhury*, (1897) 2 C. W. N., 260, followed. NARAYANSAWMY *v.* RODRIGNEZ. **3 L. B. R., 1906 P. 227.**

196 S. 92—*Proviso (i)—Oral evidence—Wagering contract—Written agreement—Agreement, validity of—Contract, real nature of.*

Upon the true construction of S. 92 of the Evidence Act (I of 1872), and specially having regard to proviso (*i*) of that section, the decision in the case of *Juggernath Sew Bux* v *Ram Dyal* (I. L. R., 9 Cal. 791) cannot be regarded as law. In order to enable a Court to arrive at a decision whether or not an agreement is void on the ground that it is by way of wager, the party, who sets up that it is, should be allowed to go into evidence to prove that it is so. *Kong Yee Lone & Co.* v *Lawjee Nanjee* (I. L. R., 29 Cal. 461; L. R. 281, I. A. 239) referred to. *Per Woodroffe J.* If the validity of a written agreement is impeached, it is no defence to point to the apparent rectitude of the document and to claim protection from enquiry under the rule embodied in S. 92 of the Evidence Act, which exists against the contradiction and variance of the terms only of those instruments, the validity of which is not in question. The instances mentioned in proviso (*i*) of that section are illustrative and not exhaustive. BENI MADHUD DASS *v.* SADASOOK KOTARY.—**9. C. W. N 305 = 1 C. L. J. 155 = 32 C. 437.**

Sup: Govt. acts (I of 1872) *(Contd).*

197 S. 92. prov. (1) and (6) *—Evidence —Oral evidence as to contents of documents—Fraud—Want or failure of consideration—Mortgage—Sale deed.*

Ordinarily oral evidence is not admissible for the purpose of ascertaining the intention of the parties in interpreting language used in a written document which is clear and unambiguous. Unless the Court is able to assume some oral agreement it would be impossible to regard the contemporaneous or subsequent conduct of the party, as in itself evidence to establish the intention of the parties at the time of the execution of the document. Such extraneous intrinsic evidence would necessarily be of value only as a ground for inferring an oral agreement whereof evidence is excluded by section 92 of the Indian Evidence Act 1872.

The fraud, which under proviso 1 of section 92, may be proved must be fraud which would invalidate the document and therefore subsequent fraud in respect of the document not such as to invalidate it, could not be a ground for admitting extraneous oral evidence under proviso 1 of section 92. The real effect of admitting such evidence would not be to prove fraud in the execution of the document, but the existence of different intention than that which appears on the document itself. In other words, it would be an attempt to prove a different contract from that expressed in the document without proving any fraud in the preparation of the document which would invalidate it.

The "want or failure of consideration" contemplated by the proviso 1 to section 92 is a complete want or failure of consideration.

Proviso 6 to section 92 does not cover facts which are intended to show that the language of the document means the exact opposite of what it purports to mean. There is no necessity for the explanation of the language used in relation to existing facts. The only object or use of such evidence, if admitted, would be to show that the language was intended to mean something which is utterly incapable of being expressed by that language. KESHAVRAO BHAGVANT *v.* RAYA PANDU. **8. B. L. R. 287.**

198. S. 92, proviso 2. *Negotiable Instruments Act, S. 80—Oral evidence of contemporaneous agreement to pay interest—Pronote silent.*

Where a promissory note is silent as to the payment of interest, oral evidence is not admissible in proof of a contemporaneous oral agreement to pay a certain rate of interest; but interest at 6 p. c. should be awarded under S. 80 of the Negotiable Instruments Act. FATHUMA BIBI *v.* HANUMAN THA ROW. **17. M. L. J. 296.**

199. S. 92. prov: (2). *1. Contract—Damages suit for—Breach of contract—License to work in forest—Construction of contract—*

Sup: Govt. acts (I of 1872) *(Contd).*

Verbal agreement, contemporaneous—Evidence Act (I of 1872), s. 91 and 92, proviso (2).

One of two defendants in consideration of advances made to him by the plaintiff for the purpose of paying the cost of obtaining the lease of a forest in the name of his son, the other defendant, made an agreement with the plaintiff that " when my son returns I will make him to arrange for you in some way or other (or by any means) to go on working the forest within the years for which written permit has been obtained. " The son was not a party to the agreement.

Held, in a suit for damages for breach of contract in not giving the working of the forest to the plaintiffs, that on its true construction, the agreement contemplated the making of a contract for working the forest only on the return of the son and left all terms to be then arranged; and the plaintiff was entitled only to recover the advances with interest. An alleged contemporaneous verbal agreement as to the rates the plaintiff was to pay for working the forest was *held* not to be proved; and *quære* whether if proved, evidence of it would have been admissible with reference to s. 91 of the Evidence Act.—MAUNG SHWE OH *v.* MAUNG TUN GYAW, **I. L. R., 32 C. 96; 9 C. W. N. 147; P. C.**

200 S 92 *Proviso (2)—Interest—Act XXVI of 1881 (Negotiable Instruments). S. 80—*Hundi, *suit on—Collateral agreement as to interest—Rate of interest—The Usury Laws Repeal Act (XXVIII of 1855).*

Hundis the basis of the suit, were silent as to interest. But it was proved that in accordance with the custom of the district the parties had entered into a collateral agreement, embodied in written documents, that the *hundis* should bear interest at 30 per cent. per annum.

Held, that S. 80 of the Negotiable Instruments Act, being an enabling section, was no bar to the interest at the above rate. GOSWAMI SRI GHANSHIAM LALJI *v.* RAM NARAIN. **11 C. W. N. 105 (P. C.)=4 A. L. J. 23=9 B. L. R. 1=1 M. L. T. 427=17 M. L. J. 35=5 C. L. J. 7=29 A. 33.**

201 S. 92 *Proviso (3)—Oral evidence Haq—Jethausi—Custom.*

In a claim of Haq Jethausi in a partition suit the matter was referred to the Tahsildar for report. But before the making of a report the parties presented a compromise whereby the plaintiff was to receive certain land as Jethausi. The compromise was thereafter recognized or acted upon on three occasions.

Held that the petition of compromise could not be said to contend the terms of a contract between the parties such as is referred to in S. 92 Evidence Act, but if it were such a contract oral evidence as to the alleged conditions precedent would be admissible under proviso (3) of that Section. THA-

Sup: Govt. acts (I of 1872) *(Contd)*

KAR JANG BAHADAR SINGH *v.* THAKAR JAGDEO BAKHSH. **10. C. 301.**

202. S. 92 *Proviso 4—Oral evidence to vary the terms of a registered deed—Contract Act (IX of 1872) Section 63—Discharge of liability.*

An oral agreement cannot be admitted into evidence to show that the lessor agreed to accept from the lessee a reduced rate of rent than stated in the registered lease.

But the lessee may prove that the lessor gave a discharge for the rent payable under a registered lease. KARAMPALLI UNNI KURUP *v.* THEKKU VITTIL MUTHORAKUT **26 M. 195.**

203. S. 92. *Prov. (4)—Partnership by registered deed—Oral dissolution.*

Held, that when a partnership has been constituted by a registered deed S. 92 proviso (4) Evidence Act does not bar it from being dissolved by an oral agreement. 14 B. 472 referred to. ABDUL RAHMAN *v.* ASGHAR ALI AND OTHERS. **U. B. R. 1902 P. 5.**

204 S. 92 *Prov. (4)—Subsequent oral agreement varying rent in a kabuliat.*

S. 92 (4) Evidence Act excludes the production of evidence of a subsequent oral agreement varying the rate of rent payable under the terms of a *kabuliat*, 22 M. 261 followed. RADHARAWAN CHOWDHRY *v.* BHAWANI PRASAD BHOWIK. **6. C. W. N. 62.**

205. S. 92. Prov (4) *Oral transfer of liability to pay money under written contract.*

Held, that liability to pay money under a written contract may be transferred to another person by word of mouth with the consent of the creditor and the person taking upon himself the liability for the original debtor, the old contract being entirely rescinded or put an end to. Section 92 of the Evidence Act has no application to such a case. H. H. THE MAHARAJA OF FARIDKOT *v.* MESSRS. BALL HOBSON & CO. **69. P. L. R., 1903.=40. P. R. 1903.**

206. S. 92, proviso 4. *Agreement in writing registered—Oral evidence of discharge — Admissibility.*

An usufructuary mortgage deed was executed in favour of S. who took possession of the mortgaged land. The deed was registered. S died, and his adopted son brought the present suit to recover a portion of the land so mortgaged, alleging that, during his minority, the first defendant had taken wrongful possession of the property. The first defendant was the heir of the mortgagor. His defence was that the equity of redemption had become vested in himself and another as the heirs of the deceased mortgagor; that he, as a person thus entitled to a moiety of the estate, had entered into an oral agreement with plaintiff's adoptive mother and guardian for the redemption of his share only, and that, in pursuance of that agreement, he had paid her a moiety of the mortgage amount, and redeemed the lands in question as falling to his share: *Held* that he was not precluded by s. 92

Sup: Govt. acts (I of 1872) *(Contd.)*

(proviso 4) of the Evidence Act from proving this oral agreement.—GOSETI SUBBAROW *v.* VARIGONDA NARASIMHAM, **I. L. R., 27 M. 368.=14. M. L. J. 218.**

207. S. 92, proviso 4 *Agreement for maintenance—Subsequent modification—Oral evidence—Enjoyment of lands for past maintenance.*

A woman sued for arrears of maintenance due to her under a registered deed executed by the defendant in her favour. The defendant pleaded a subsequent oral agreement (settlement) between the parties by which he had placed her in enjoyment of certain lands in lieu of her claim under the deed.

Held that the settlement pleaded was an agreement to rescind or modify the original agreement within the meaning of S. 92 proviso 4 & was thus inadmissible in evidence, and that plaintiff was entitled to future maintenance at the originally stipulated rate.

Held also, that it was open to the defendant to plead discharge of the obligation to pay past maintenance by reason of plaintiff's enjoyment of the lands in pursuance of the agreement to so discharge his liability even though the agreement itself could not be proved otherwise. KUTTIKA BAPANAMMA *v.* KATTIKA KISTNAMMA. **17 M. L. J. 30; 30 M. 231.**

208. S. 92 Pro. (5) *Evidence of oral agreement varying terms of document.*

A advanced certain money to B and C on a bond. On the face of the bond, B and C were jointly and severally liable for the amount. Subsequently A sued C for the amount, foregoing in his plaint his claim on B on the ground that the latter could not be found. The Judge of the Court of First Instance admitted oral evidence to prove that, by the custom of the trade, B was the principal debtor and C merely the surety, and, holding that the abandonment of the claim against B had the effect of releasing C, dismissed the suit.

Held, that the learned Judge had erred in admitting oral evidence of a condition which was repugnant to and inconsistent with the express terms of the bond. *Hari Chand Babu and others* v. *Bishun Chandra Banerjee and another*, (1903) 8 C. W. N. 101 referred to LU GALE AND ONE *v.* MAUNG MO. **2. L. B. R. 1904 P. 268.**

209 S. 92 pro: (6) & 98—*Mortgage of a Taluka as* hastobudi—*Subsequent mortgage of* sarbarakari *rights—The nature of security for plaintiff's loan—Evidence—Transfer of Property Act, S. 8—*

A sued B., C. and D. on a mortgage-bond executed by B. in favour of A. The loan had been secured by the mortgage of a *taluka* belonging to B. Subsequent to A's mortgage, the *sarbarakari* rights of B in two *garhs* of the *taluka* were mortgaged to C. & D. The question for decision was whether the *sarbarakari* rights of A. in the two *garhs* were also mortgaged to A *Held:—*

Sup: Govt. acts (I of 1872) *(Contd).*

Per PARGITER J.—Evidence was admissible under Ss. 92 (6) and 98 of the Evidence Act, because it showed how the plaint document was related to existing facts and because the nature of the landed tenures was a special matter which could not be stated off-hand but required to be elucidated by a reference to the particular facts. The villages composing the *garhs* were definitely ascertained and recorded as *sarbarakari*, only after the date of the mortgage to the plaintiff. In the negotiations, that preceded the plaintiff's mortgage, a list of all the villages comprised in the *Taluk* was given by the manager of defendant No. 1 and in that, it was definitely stated that all the villages were *hastobudi*. As defendant No. 1 could not dispute that he mortgaged the villages in the two *garhs* as *hastobudi*, defendants Nos. 2 & 3, who derived their title from him, could not be in a better position. The result was that defendants Nos. 2 & 3 became pusine mortgagees of the *sarbarakari* rights in the two *garhs*.

Per WOODROFFE, J.—No. books or papers were produced to show that the Zemindari and *sarbarakari* rights in the villages were kept existing separately by defendant No. 1. From the terms of the mortgage to the plaintiff, it was clear that defendant No. 1, intended to mortgage all the rights which he then possessed. In the list, it was expressly stated that the villages comprising the *garhs* were *hustobudi* and not *sarbarakari* villages. Under S. 8 of the Transfer of Property Act, a transfer of property passes to the transferee, all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof unless a different intention is expressed or necessarily implied. In this case, both the superior and the subordinate rights were vested in one and the same person as Zemindar and the words in the plaint-bond being general, in the absence of reservation of either, all the rights in the mortgagor stood as security for the loan. After the appeal was argued, the appellant died and hence the High Court entered its judgment *nunc pro tunc* and dated the judgment as on the date on which it was reserved and not on that it was pronounced. RAJA GOUR CHANDRA GAJAPATHI NARAYAN DEB *v.* RAJA MAKUNDA DEB. **9 C. W. N. 710.**

210. S. 92, 93. *Suit for recovery of haq-i-chaharum—Sale alleged to be disguised as a usufructuary mortgage—Admissibility of evidence.*

The plaintiff sued to recover one-fourth of the price of a house alleged to have been sold by the first defendant to the second defendants, the claim being based upon a local custom. The transaction between the defendant was ostensibly not a sale but a usufructuary mortgage.

Held that the plaintiff, not being a party to the transaction, was entitled to give evidence to show that what purported to

Sup: Govt. acts (I of 1872) *(Contd).*

be a usufructuary mortgage was not in reality such, but was in fact a sale. *Rahiman* v. *Elahi Bakhsh* (I. L. R., 28 Cal. 70), dissented from; *Jagat Mohini Dasi* v. *Rakhal Das Bisazi* (2 C. L. J. 333), and *Pathammal* v. *Syed Katai Ravuthar* (I. L. R., 27 Mad. 329), followed. BAGESHRI DAYAL *v.* PANCHO, **I. L. R., 28 A. 473 3 A. L. J. 314 = A. W. N. 1906. P. 89.**

211. S. 92 & 99. *Pre-emption—Mortgage or sale—Evidence to contradict the terms of a document.*

A pre-emptor is not precluded by S. 92 of the Evidence Act from showing that an ostensible mortgage was in reality a sale.

Held, that transactions where the form of a mortgage appears to have been adopted with the object of evading a pre-emption claim, must be looked with great suspicion. KHODDAD KHAN *v.* NASAR KHAN. **127. P. L. R. 1902.**

212. S. 92. 99.—*Oral evidence, admissibility of—Deed of gift, true nature of—Parties—Strangers.*

S. 92, excluding oral evidence, applies only to parties to the instrument which is sought to be contradicted or varied, and to their representatives in interest, S. 99 enables strangers to an instrument to prove the real nature of the transaction by parol evidence.

When, therefore, A purported to make a gift of land to his daughter, B, it was open to a creditor of X, the husband of B, to prove by oral evidence that the transaction was, in reality, a sale to X and that the property was, consequently, liable to be attached and sold in execution of a decree obtained against him. 27 I. A. 93=22 A. 370, followed. 6 C. W. N. 60. Distd. from 28 C. 70, not followed. JAGAT MOHINI DASI *v.* RAKHAL DAS. **2. C. L. T. 333.**

213. S. 92 and 99. *Oral evidence contradicting terms of document*

The plaintiff sued the defendant, her father, for possession of certain property on the allegation that the property had been gifted to her by her mother's paternal aunt, though a deed of sale, instead of a deed of gift, was executed in her favor. The defence was that the property was purchased by the defendant and the deed of sale was executed *benami* in favor of the plaintiff. The suit was decreed but on appeal the decree was set aside on the ground that oral evidence was not admissible to prove that the deed was intended to operate as a gift.

Held that the decision of the lower appellate Court was wrong, oral evidence was not barred under section 92 of the Evidence Act, for the question did not arise as between the parties to the suit. 28 *Cal*, 70 *referred to.* PATHAMMAL *v.* SYED KALAI RAVUTHAR. **27 M. 329.**

213 (a) S. 93 *Contract ambiguous on its face—Evidence to show intention of parties Civ. Pro. Code, S. 622.*

Sup: Govt. acts (I of 1872) (*Contd*).

A brought a suit for damages for breach of a contract. D. J. held that the contract was ambiguous on the face of it. But, he held, that evidence was admissible to show the intention of the parties, and he acted upon such ev idence. *Held*, this was in contravention of S. 93 of the Evidence Act, and illegal within the meaning of S. 622 of the Civ. Pro. Code. JOMAN *v.* AH YU, **14, B. L. R. 58.**

214. S. 94—*Admissibility of oral evidence to explain documents.*

The mere fact that words of inheritance do not occur in a lease does not make it the less a permanent lease, if from the language of the document, taken as a whole, the object of the lease and other surrounding circumstances such as the conduct of the parties it appears that their intention was that it should operate as a lease in perpetuity, *L. R. 1900, A. C. 260, followed.*

Where the question is whether a lease to a person named in it is perpetual *i. e.*, whether it is to him and his heirs, evidence as to the surrounding circumstances is admissible because it explains what standing alone is capable of explanation whether a grant to A is a grant to him alone or to him and his heirs. BABU SAMBHUSHET TELI *v.* SITARAM HARI PRABHU. **3 B. L. R., 768.**

215 S. 94. *Plaint—Amendment of—Mistake—Limitation—Power of Receiver to sue—Limitation Act (XV of 1877), s. 19—Acknowledgment of liability.*

By an order of the Court, the plaintiff was appointed Receiver in a certain suit with authority to sue for and recover an attached debt. Through some mistake in the office of the attorneys of the plaintiff in that suit, the money sought to be attached was wrongly described in the tabular statement as money due under the agreement of the 25th October 1895, where as it should have been the agreement of the 26th August 1895, and the Court, acting on this representation, made the order, which applied to the alleged agreement of the 26th October 1895. On application to amend the order and the plaint, or in the alternative to read the existing order as if it were in reality applicable to the right agreement:

Held that no order for amending the plaint or the order could be made; the amendment of the order would operate only as a new order, taking effect from the date on which it is made, and could not therefore operate as the basis or authority for the present suit. The plaintiff's authority to maintain this suit depends solely upon the order appointing him Receiver; if it has been made under any mistake, it cannot, by any course of construction, be regarded as applying to anything other than the subject-matter specified by the order itself, the intention of the parties being immaterial. In order

Sup: Govt. acts (I of 1872) (*Contd*).

to satisfy the requirements of s. 19 of the Limitation Act though a promise to pay need not be made out, it is necessary when the right claimed is a debt that an unequivocal and unqualified admission of the debt or a part of it or of the subsisting relationship of debtor and creditor should be established. There is a distinction in this respect between the law of limitation applicable in England and that in force in this country. *Fink* v. *Baldeo Dass*, (I. L. R., 26 Cal. 715), distinguished; *Venakat* v. *Parthasaradhi*, (I. L. R. 16 Mad. 220), approved of. BENODE BEHARY MOOKERJEE *v.* RAJ NARAIN MITTER. **I. L. R., 30 C. 699, 7 C. W. N. 651.**

216. S. 95. See S. 91, 95 & 97—30 M 397—2. M. L. T. 336—No 156 *supra.*

217. S. 97. See S. 91; 95 & 97—30 M. 397=2. M. L. J. 336—No *supra.*

218. S. 98. See S. 92 & 98—9 C. W. N. 710—No 209 *supra.*

219. S. 99. See S. 92 & 99 See Nos 210 to 213 *supra.*

220. S. 101. *Onus of proof.*

The plaintiff sued the defendant alleging that he had lent the defendant a necklace on 9th July, 1897, and that the defendant refused to return the necklace. The defendant denied the loan. He stated that on 31st July 1897, the plaintiff pledged the necklace with him for Rs 50. On issue fixed, the onus of proving the loan was laid on the plaintiff and the onus of proving the pledge on the defendant. Plaintiff gave no evidence. Defendant swore to the truth of his case. The court decreed the plaintiff's claim.

Held, that the onus was rightly laid, there being a total denial of the material fact alleged by the plaintiff, he was bound under S. 101 of the Evidence Act to prove the existence of the fact. He failed to do so.

Held, also possession is presumptive proof of ownership. MAHADIN *v.* RAGHUBAR SINGH. **2 O. C. 59.**

S. 102 See S. 90 6 O. C. 142 *No. supra.*

221 S. 102—*Burden of proof—Receipt of consideration admitted in bond but denied by executant.*

When the execution of a bond is admitted and the bond contains an admission that consideration has passed, it is for the executant to get rid of the admission which he has admitted in the bond. It is not enough for him to prove that prior to the institution of the suit, he denied receipt of consideration even though the denial was made before the registering officer. MAHABIR PERSHAD RAI *v.* BISHAN DAYAL. **A. W. N., 1904. p. 163=1 A. L. T. 423=27 A. 71.**

222 S. 102—*Market-value. Burden of proof.*

Where in a pre-emption suit there was a dispute between the parties whether the price stated in the sale deed was fixed in good faith, and the parties produced no evidence of the market-value.

Sup: Govt. acts (I of 1872) (*Contd.*)

Held, the burden of proving the market value lay upon the plaintiff.

The plaintiff could only obtain a pre-emption decree upon payment of the sum, if any, admitted by the defendants to be the market-value or failing that the sum mentioned in the deed, but he could not, in any case, be compelled to pay more than the sum mentioned in the sale-deed. HUBDAR SINGH *v.* NANKOO, **6 O. C. 327.**

223. S. 102 & 110.—*Suit by a Taluqdar for declaration of proprietary title and tenant's ejectment—Defence setting up adverse title—Presumption of ownership.*

In this suit the plaintiff Taluqdar admitted that the defendants were in possession since the year 1857. In the year 1886, the Taluqdar served them with a notice of ejectment under Oudh Rent Act of 1868. On defendant's suit contesting the notice, the notice was cancelled. The plaintiff in January 1888 brought this suit against the defendants for his declaration of his proprietary right to the village and to eject the defendant whose tenancy was alleged to have commenced in 1866 with a lease for 1 year. The defendants denied tenancy and asserted their right as under-proprietors of the entire village, or at least of the *sir*-lands, groves, houses, trees, and wells, and that the suit was barred by limitation.

Held, that under section 102 Evidence Act the plaintiff would fail if no evidence was adduced by either sides, notwithstanding that the village is a part of the Taluqa and that rent has been paid. As defendants have been in possession for more than 12 years and under S. 110, Evidence Act, possession is *prima facie* proof of ownership and the defendants have set up adverse possession the plaintiff must give some evidence that defendants' possession was not adverse and that his title as a Taluqdar was subsisting when the suit was lodged by him.

Held, further, as the plaintiff stated in his plaint that the relationship of landlord and tenant between the parties commenced in 1866, the plaintiff could not be allowed to depart from that statement. *11 M. I. A., 24 and 6 M. I. A., 410 followed.* BHAGWAN BAKSH *v.* KAMTA PERSHAD. **6 O. C. 119.**

224. S. 103.—*Suit for possession of ancestral property sold during plaintiff's minority.*

Plaintiff brought a suit to recover one-half of certain ancestral joint property sold during his minority by his elder brother 15 years before suit and that he came to know full facts one year before the suit. The first Court relying on his statement made in a previous case by which his age at the institution of this suit appear to be 23 years dismissed his suit as time barred, as having not been brought within three years of his attaining majority under S. 7 Limitation Act.

Held, that the suit fell under Art. 127, Limitation Act and the *onus* was on the defendant to prove that the plaintiff knew of his exclusion from joint family property more than 12 years before suit. LAL GAURI KANT *v.* SHANKAR BAKSH SINGH. **2 O. C. 348.**

225. S. 106.—*Attachment of property in wife's name—Onus of proof.*

A decree-holder attached properties standing in the name of the judgment-debtor's wife and certain other persons for many years. The latter put in an objection, and, on its rejection, instituted a suit. The question to be decided was whether the property, which stood in her name and also in another's name, was held benami for her husband.

Held, that, under S. 106 the *onus* lay on the plaintiffs to show that the purchase money was supplied by the wife, and that the properties had been in enjoyment of the plaintiffs, as these things were peculiarly within the knowledge of the plaintiffs; who had failed to discharge the *onus*. It should be held that the purchase-money was supplied by the husband and that the properties had all along been in his enjoyment. *6 W. R.*, 312 and *8 C.* 545 *referred to.* SANJIVAROYA PILLAI *v.* BALAMBIKA AMMAL. **17 M. L. J. 339.**

226. S. 107 & 108.—*Burden of proof—Presumption as to death—Presumption as to date of death.*

A, a Mahomedan, died in 1881, and his estate was divided amongst his heirs by an arbitrator. B, the eldest son of A, had disappeared in 1870 and had not since been heard of; and in accordance with a rule of Mohamedan Law, a share of the estate was set aside for him as a missing heir.

C, the son of B, claimed this share, to which he would have been entitled, under Mahomedan Law, if B had been alive at the time of A's death, but not otherwise.

Held, that the special rules regarding burden of proof in sections 107 and 108 of the Indian Evidence Act could only be applied with reference to the date of the suit, and not to the question whether B was alive or dead on a specified prior date; and that the burden of proving that B was alive in 1881 lay upon C, who affirmed it. *Mazhar Ali* v. *Budh Singh*, (1884) I. L. R., 7 All., 297; *Rango Balaji* v. *Mudiyeppa*, (1898) I. L. R., 23 Bom., 296; followed. MOOLLA CASSIM BIN MOOLLA AHMED *v.* MOOLLA ABDUL RAHIM. **4 L. B. R., 1907, P. 77.**

227. S. 108.—*Presumption of death—Onus.*

Section 108 does not require that the Court should hold the person dead at the expiration of the seven years therein indicated, but merely provides that the burden of proving that he is alive at the time of the suit is shifted on to the person who affirms it. NARAYAN BHAGWANT *v.* SRINIWAS TRIMBAK. **8 B. L. R., 226.**

228. (a) S. 108.—*When death presumed—Person not heard of for seven years.*

Section 108 contemplates whether a man is alive or dead when the question is raised, and not wheher he was alive or dead at some previous date.

Sup: Govt. acts (I of 1872) *(Contd.)*

It is on the person, who alleges that the person was dead at antecedent time, to prove that fact by evidence. FANI BHUSAN BANERJEE *v.* SURJA KANTA ROY CHOWDHURY. **5 C. L. J. 649=11 C. W. N., 883 =35 C. 25.**

228. (b) S. 108. *Persumption as to death —Onus.*

S. 108 provides for the question whether a man is alive or dead, when the question is raised, and not whether he was alive or dead at some antecedent date; the law raises no presumption as to the time of his death, and the presumption that may, in certain circumstances, be raised, is a presumption that the man is dead when the question is raised, and not a persumption that he was dead at some antecedent date that fact must be proved by special evidence. FANI BHUSAN BANERJEE *v.* SURJA KANTA ROY CHOWDHURY. **5 C. L. J. 649=11 C. W. N. 883=35 C. 25.**

229. S. 108.—*Succession—Grand-children by predeceased son—Presumption of death of missing person—Onus.*

Under the Mohomedan Law, grand-children are entirely excluded from the inheritance by their uncles and aunts.

A, the son of H, was missing for 14 years before the death of H. Now C, the son of A, sued to share in the estate of H; it was *held* that under S. 108 C had to prove that his father, A, had survived his grandfather, H.

Held that this onus was not discharged by proof that, in an arbitration-award made 4 years after H's death a share had been set apart for A., because this was consistent with the principle of Mahomedan Law that a share ought to be reserved for a missing heir. MOOLLA CASSIM *v.* MOOLLA ABDUL RAHIM, **2 C. L. J. 236 (P. C.)=15 M. L. J. 317=7 B. L. R. 892 =2 A. L. J. 798=10 C. W. N. 33 33 C. 173.**

230. S, 108. See S. 107 & 108 4 L. B. R 1907 P 77 *supra No.*

231. S. 110. *Possession—Declaration of title—Suit by person in possession for declaration of title—Burden of proof—Effect of plaintiff's possession—Presumption of title.*

The plaintiffs brought this suit in 1898 for a declaration that certain land in the village of S belonged to them, and that they might be confirmed in possession. They alleged that they purchased the land in July 1888, from the *patel* of the village, and had been in possession, ever since, and that their vendor had previously been in possession. They now sued because their possession had been threatened by the orders of Government officials. It was admitted that the plaintiffs had been in actual possession since 1888. The District Judge held that the burden of proof of title to the land lay upon the plaintiffs. He was of opinion that they had failed to prove it, and he dismissed the suit.

Held, per Jenkins, C. J., and Ranade, J, (Whitworth, J., dissenting),—that the plaintiff's being in possession (not shown to have wrongfully originated) such possession was good against the whole world except a person who could show better title: that the burden of proving such title lay therefore upon the defendant; that he had failed to prove it; and that therefore the plaintiffs were entitled to the declaration sued for. *Per Whitworth, J.:*—That the evidence did not show such possession in the plaintiffs as under s. 110 of the Evidence Act (1. of 1872) shifted the burden of proof upon the defendant; that prior to the alleged sale to the plaintiffs in 1888, the defendant had been in the position of an absentee owner of the land in question represented partly by the village officers and partly also by the village community, and that he might he said to be in possession: that the sale to the plaintiffs in 1888 by the *patel* of the village, who should have protected the defendant's interests, was a wrongful act; that the plaintiffs were therefore not relieved from the burden of proving their title, and that they have not proved it. *Per Ranade, J.:*—When a person in possession of land has been dispossessed and sues to recover it, the fact of his previous possession will not entitle him to a decree unless he sues under s. 9 of the Specific Relief Act (I. of 1877) within six months of the date of dispossession. If he sues after the six months have expired, he must prove a *Prima facie* title. In such a case he is entitled to a decree unless a superior title is proved on the other side. It is in reference to such cases that it has been held that possession is evidence of title, and that the plaintiff, who proves such possession and subsequent disturbance, shifts the burden of proof on the defendant when the *prima facie* title is made out. When no such *prima facie* title is made out by the plaintiff who asks for a declaratory decree, he cannot obtain that decree on the mere ground that he was in possession and the defendant had no title. Mere wrongful possession is insufficient to shift the burden of proof. HANMANTRAV *v.* SECRETARY OF STATE, **I. L R. 25, B. 237.**

232. S. 110.—*Benami Transaction—Burden of proof—Admission—Presumption of title from possession—Sale deed admitting title of vendee.*

Plaintiffs' father and the defendant, who were brothers, had separated and partitioned their ancestral estate. After the death of the father of the plaintiffs, they naturally came under the protection of their uncle, the defendant. One of the plaintiffs, describing himself as the guardian of his minor brother, executed a sale deed in favour of the defendant, by which he purported to sell to the

Sup: Govt. acts (I of 1872) *(Contd)*

latter a coffee garden which was described in the deed as having been enjoyed by his father during the life time and as belonging to him and his brother after his death. The plaintiffs brought this suit to recover the coffee garden from the defendant. The High Court relying on the sale deed as containing an admission of the plaintiffs' title to the property, decreed the plaintiffs' claim. It was no body's case that it was a real sale. *Held*, by the Judicial committee, that the High Court was right in so using the document. *Held*, also that in order to displace the apparent title of the plaintiffs and to establish a beneficial title in himself, it was incumbent on the defendant to show by satisfactory evidence that the funds out of which the garden was purchased and developed, were his own funds. PULLIAMPATTI NARNIER *v.* KUPPIER. **9 C. W. N. 89; P. C.**

233. S. 110. *See S. 102 and 110—6 O. C. 119 No. 223 supra.*

234. S. 110—*Defendant in possession sets up gift outright—Plaintiff alleges permissive use, burden of proof.*

Held that where the Defendant is in possession of land, and there has been no wrongful dispossession of the Plaintiff, and the Plaintiff asserts that he gave the defendant permissive occupation, and the Defendant asserts that he obtained the land by gift outright, the burden of proof lies on the plaintiff to show that he gave permissive accupation and that he has a subsisting title. 2 U. B. R. 1892—96 P. 371 and 2 U. B. R. 1897—01. P. 421 referred to.

Held that as Defendant is in possession under S. 110 Evidence Act he could retain that possession unless the Plaintiff proved his subsisting title to have the land. MAUNG TUN *v.* MAUNG PA U.—**U. B. R. 1903 P. 7.**

235. S. 110 *Possession—Wrongful dispossession—Specific Relief Act S. 9—Suit based on title.*

Held that in S. 110 Evidence Act possession means actual and present possession, and that in suits (other than suits under Section 9, Specific Relief Act in which wrongful dispossession is alleged) the burden of proof lies upon the plaintiff to prove title as well as the wrongful dispossession.

Held further that in such suits evidence of previous long possession is evidence of title. 8 W. R. 386, 12 W. R. 472, 20 W. R. 458, 7. I. A. 73, 5, C. L. R. 278, 8. B. 371, 25, B. 287, 25. M. 179. 20 C. 834, 12. A. 46. 2 U. B. R. 1897—1901, P. 421. MI EIN KIN *v.* NGA LI—**U. B. R. 1905 P. 7.**

236. S. 111—*Good faith—Trust Act, S 96.*—Section 11 of the Evidence Act applies to the question of good faith arising under S. 96 of the Trusts Act. HASANALI *v.*—ESMAIL JI **9 B. L. R. 606.**

237 S. 111—*Position of active confidence—Mortgagor and mortgagee—Burden of proof—Proof of consideration for mortgage bond.*

On the facts of this case which was a suit on two mortgage bonds.

Sup: Govt. acts (I of 1872) *(Contd)*

Held (affirming the decision of the High Court) that the plaintiff was not in a position of "active confidence" towards the defendants within the meaning of section 111 of the Evidence Act (1 of 1872), and that the consideration for the bonds was fully proved. THAKAR DAS *v.* JAIRAJ SINGH. **9 C. W. 569=31. I. A. 46=26. A. 130.**

238 S. 111—Pardanashin *lady—Execution of bond by—Undue influence—Consideration—Burden of Proof—Issue—Omission to frame—Irregularity.*

The plaintiff sued the defendant, his maternal uncle's daughter, a parda-nashin lady, residing at Delhi, on a registered bond for Rs. 10,000, executed by her. The defendant had been brought up at the house of the plaintiff and married from there. The bond was registered at the plaintiff's house at Hathras in the absence of the defendant's husband and recited that the money borrowed had been spent in constructing a house. The defendant admitted execution of the bond and pleaded that the bond was without consideration and fictitious having been executed for fear of her husband who was addicted to extravagance and waste and that some money had been advanced by the plaintiff to her in lieu of wich a garden had been sold to him. The plaintiff's replication was that he had paid cash both for the garden and the bond. The origiual Court dismissed the suit and held that payment of consideration for the bond was not proved. On appeal, it was contended that the execution and registration of the bond having been admitted the burden of proving want of consideration lay on the defendant and that the original Court should have framed a specific issue as to the passing of consideration for the sale of the garden.

Held, that though the *onus* of proving want of free consent and of consideration for the bond lay on the defendant, yet under the circumstances of the particular case it was shifted on the plaintiff, who was in a position to completely dominate her will and she was powerless to resist him. In such a case strictest proof of good faith and fair dealing was necessary and the plaintiff had failed to adduce it.

Held, also, that the issue as to the payment of the purchase-money for the garden was subsidiary and the plaintiff was not prejudiced in any way by the omission.—13 *M. I. A.*, 573 (*P. C.*), 12 *B. L. R.*, 304 (*P. C.*), 21 *All*, 71 *(P. C.) referred to.* HOTI LAL *v.* MUSSAMMAT RAM PIARI, **77 P. R., 1903.=9. P. R. 1904.**

239. S. 111 & 3—*Fraud—Undue influence—Coercion.*

S, the plaintiff, obtained from A, a Taluqdar Raja, a perpetual lease of some villages for a certain rent. The Raja died 14 years after the lease and was succeeded by his son P, the defendant. S. sued for cancellation of a new lease obtained by P. on the obligation that P, who was an Honorary Magistrate, got one

Sup: Govt. acts (I of 1872) (*Contd.*)

R. to bring a Criminal case against S. in the Court of P., the defendant, and that S. was kept in a lockup and forced to accept a new lease. *Held* the facts stated in the plaint shew real authority on the part of P. over S. and that P. used his authority to obtain an advantage over S., which P. but for that authority could not have obtained.

Held, that it was proved that undue influence was exercised by P. over S.

Held, also that it was for the defendant to prove that under the circumstances of the case the transaction was true one. RAJA PARTAB BAHADAR *v.* SHEORAJ AHIR. **1 O. C. 63.**

240. S. 112.—*Child—Presumption as to paternity of child born after death of husband—Non-access, proof of—Burden of proof—Illness of husband rendering act of begetting a child improbable.*

To rebut the legal presumption under S. 112 of the evidence Act (I of 1872), it is for those, who dispute the paternity of the child to prove non-access of the husband to his wife during the period when, with respect to the date of its birth, it must, in the ordinary course of nature, have been begotten. Where a wife came to her husband's house a few days before he died and remained there up to the time of his death, and it was shown that a child, alleged to be that of her husband was the child of the wife, and that it was born within the time necessary to give rise to the presumption under S. 112, the Judicial Committee, in the absence of any evidence to show that the husband could not have had connection with his wife during the time she was residing with him, *held* (reversing the decision of the High Court) that the presumption as to the paternity of the child given by S. 112 must prevail. The fact that the husband was, during the period within which the child must have been begotten, suffering from a serious illness which terminated fatally shortly afterwards was held, under the circumstances, not sufficient to rebut the presumption. NARENDRA NATH PAHARI *v.* RAM GOBIND PAHARI. **6. C. W. N. 146=4 B. L. R. 423=29 I. A. 17. P. C.=29 C. 111 (P. C.)**

241. S. 112.—*Marriage, Continuance of—Presumption—Legitimacy—Divorce—Burden of proof.*

It is a well recognized rule of law that when a particular relationship is shown to exist, such as marriage, then its continuance must *prima facie* be presumed.

In the present suit the legitimacy of the plaintiff was in question.

Held, that according to the provisions of Section 112 of the Evidence Act, the burden of showing that the divorce of the mother of the plaintiff took place at a time which disentitled the plaintiff from relying on section 112 lay on the defendants, and it was not the plaintiff's duty to show when the divorce took place. If the defendants were unable to show that the divorce took place

Sup: Govt. acts (I of 1872) (*Contd.*).

at a time which excluded the plaintiff from the operation of section 112 of the Evidence Act, then the conclusive proof in favour of the plaintiff arose and could only be displaced by its being shown that the parties to the marriage had no access to each other at any time when the plaintiff could have been begotten by his mother's husband. BHIMA *v.* DHULAPPA. **7 B. L. R. 95.**

242. S. 112. *Presumption as to paternity of child born after death of husband—Onus.*

Where a child was born after the death of the husband, under such circumstances as to give rise to the presumption under s. 112 of the Evidence Act (I of 1872). *Held*, in a suit by the appellants to dispute the paternity of the child, that the burden of proof lay on them, and that on the evidence the presumption was not rebutted. TIRLOK NATH SHUKUL *v.* LACHMIN KUNWARI. **7 C. W. N. 617; P. C. =5. B. L. R. 474=30 I. A. 152 (P. C.)=25 A. 403.**

243. S. 112. *Hindu Law—Joint Family—Presumption as to paternity applicable only to offspring of married couple.*

In a suit by an illegitimate son of a deceased Chetti against the adopted son and brother of his late father for a share in his father's estate, or, in the alternative, for maintenance: *Held* that the claim for a share must fail as it was not shown that the deceased had left any separate or self-acqired property. The family of the deceased (consisting of his father and two sons, of whom one was the deceased) was not shown to have had any ancestral, but it had acquired property by trade in which the father and the two sons were jointly engaged. There being no indication of an intention to the contrary, it must be presumed that the property thus acquired was held by the members of the family as joint property with the incident of the right of survivorship. Inasmuch as the Plaintiff's father had predeceased his father and brother, plaintiff could claim no share as against his grandfather and uncle; and, as he was illegitimate, he could not represent his father in the undivided family. *Ramalinga Muppan* v. *Pavadai Goundan*, (I. L. R., 25 Mad. 519), referred to. The fact that in the present case there was a son in existence besides the illegitimate son, made no difference, in principle, between this case and the cases already decided. *Held also* that plaintiff was entitled to maintenance. An illegitimate member of a family, who is not entitled to inherit, can be allowed only a compassionate rate of maintenance and cannot claim maintenance on the same principles and on the same scale as disqualified heirs and females who have become members of the family by marriage. But regard should be had to the interest which the deceased father of the illegitimate son had in the joint family property and the position of his mother's family. Arrears of maintenance awarded for

Sup: Govt. acts (I of 1872) *(Contd).*

a period of nine years prior to the suit. The presumption as to paternity in section 112 of the Indian Evidence Act only arises in connection with the offspring of a married couple. A person claiming as an illegitimate son must establish his alleged paternity in the same manner as any other disputed question of relationship is established.—GOVALASAMI CHETTI *v.* ARUNACHELLAM CHETTI, **27 M. 32.**

244. S. 112. *Legitimacy—Presumption—Maintenance—Illegitimate children.*

Held, that the presumption, that children born of a married woman during the lifetime of her husband are the legitimate offspring of that woman and her husband, is rebuttable and that it was rebutted by the plaintiffs in this case.

Illegitimate children are entitled to be maintained till they come of age from the estate of their natural father. BAHADUR SINGH *v.* VIRU. **28. P. R. 1906.**

245. S. 112. *Legitimacy—Child born during marriage—Presumption.*

Held that under s. 112 of the Act there is a conclusive presumption that a child born during the continuance of a valid marriage between the parents of the child is a legitimate issue of those parents, it matters not how soon the birth may accur after the marriage. In this case the plaintiff suggested that the marriage took place about 7½ months before the birth. The Chief Court referred to Amir Ali's Law of Evidence P. 617, where it is stated "that under S. 112 of the Evidence Act which is based on English law a child born during wedlock is presumed to be the legitimate issue of such parents. No matter how soon the birth be after marriage. When a man marries a woman whom he knows to be with child, he may be considered as akoowledging by a most solemn act that the child is his. The present Section considers a child legitimate who is born of parents married before the time of his birth, though they were unmarried when he was begotten (or his conception took place)" UMRA *v.* MOHAMAD HAYAT. **79. P. R. 1907.**

246—S. 114.—*See S. 70 and 114—7 C. W. N. 384 No. 120 Supra.*

247—S. 114.—*Presumption from the word "refused" on a letter containing notice to quit whether it was duly presented to the addressee—Whether judgment was pronounced on the date it bears.*

The date borne by a decision is not conclusive evidence of the date on which it was pronounced according to law.

The effect to be given to the word 'refused' on a registered cover as proof of tender of the packet to the addressee, is one of fact on which it is impossible to lay down any general rule. Each case must be decided under Section 114 of the Evidence Act according to its peculiar circumstances. The L. C's. held that notice was not duly served in the present case and the H. C. re-

Sup: Govt. acts (I of 1872) *(Contd)*

fused to interfere in their decision. GOPAL RAGHUNATH KULKARNI *v.* KRISHNA. **8 B. L. R., 420.**

248. S. 114—*Presumption can not shift the burden of proof.*

Where the fact giving rise to a presumption under S. 114 is undisputed and no explanation negativing the presumption is given the Court may lay the burden of proof on the party against whom the presumption is made. But where explanation negativing the presumption is given the Court should not make the presumption without hearing evideoee in support of the explanation. Such a presumption can not shift the burden of proof, at the most it can shift the burden of evidence, and S. 4 gives the Court discretion to decide whether such a presumption is strong enough to produce even that limited effect. 29 C. 334 dissented from. PAKKOO MUSALMAN *v.* DAYALI. **1. N. L. R. 169.**

249. S. 114 (e)—*Presumption—Irregularity of sale.*

The onus is on the person who seeks to have a sale set aside, to establish that the requirements of the statutes had not been complied with by the Collector under the Revenue Sale Law Act XI of 1859 *(Bengal)* SHEIKH MOHAMMED AGHA *v* JADUNANDAN JHA.—**10. C. W. N. 137.**

250. S. 114 (e)—*Onus—Resumption and transfer—Act VI of 1870 (Bengal.)*

Held, per Mitra and Woodroffe, J. J.—When the plaintiff sues for the recovery of possession of land on the allegation that the land is *Chaukidari Chakran* land and lies within his Zemindari and the Collector has transferred the same to him, he is bound, in the first instance, to prove so much of his case as has been denied or has not been admitted by the defendant.

It being found that the land was not *Chaukidari chakran* land and did not lie within the Zamindari of the plaintiff, any transfer made by the Collector, in his favour under S. 50 of the Act, is not autherised by the Statute and does not confer any title on him. The mere fact that the Collector has made the transfer does not raise any presumption that the land was *Chaukidari chakran land* and that the Collector acted within the Statute. Section 114 of the Evidence Act has no application to such a case.—*21 C. 626 and 24 B. 435 followed.*

Per Pargiter, J. Contra.—Under S. 114 of the Evidence Act there is a presumption that the resumption was made legally, and by S. 61 of the *Chaukidari* Act, the resumption is final. RAJA NARENDRA LAL KHAN *v.* JOGI HARI.—**2. C. L. J. 107.**

251 S. 114 (e)—*Revenue-sale—Act XI of 1859, ss. 5, 6, 7, 93—Ben. Act VII of 1868, s. 8—Certificate of sale—Onus of proof—Notice—Irregularity and illegality in form and service*

In a suit to set aside a sale for arrears of revenue, the onus of proving that there has been irregularity or illegality in the prepara-

Sup: Govt. acts (I of 1872) *(Contd.)*

tion, service or posting of notice rests on the person who seeks to have the sale set aside. The Presumption under s. 114, cl. (*e*) of the Evidence Act would arise in respect to the service of such notice until the contrary is proved. *Ashanullah Khan Bahadur* v. *Trilochan Bagchi*, (I. L. R., 13 Cal. 197) and *Horro Doyal Roy Chowdhry* v. *Mahomed Gazi Chowdhry*, (I. L. R. 19 Cal. 699), distinguished. The fact that the inadequacy of price fetched at the sale was the result of the irregularity complained of may be either established by direct evidence or inferred, when such inference is reasonable, from the nature of the irregularity and the extent of the inadequacy of price. In a sale for arrears of revenue, after the certificate of title has been issued to the purchaser, s. 8 of Ben. Act VII of 1868 will operate as a bar to a suit to set aside the sale on the ground of irregularity in serving and posting notices under s. 6 of Act XI of 1859. *Lala Mobaruk Lal* v. *The Secretary of the State for India in Council*, (I. L. R., 11. Cal. 200) and *Bal Mokoond Lal* v. *Jirju Dhun Roy*, (I. L. R., 9 Cal. 271), distinguished. Omission to serve notice under s. 7 of Act XI of 1859 can hardly render a sale for arrears of revenue liable to be annulled under s. 33 of that Act, especially after issue of the certificate of title to the purchaser. *Gobind Chandra Gangopadhya* v. *Sherajunnissa Bibi*, (13 C. L. R., 1) and *Mahomed Ashar* v. *Raj Chunder Roy*, (I. L. R., 21 Cal. 354), referred to.—SHEORUTTON SINGH *v.* NETT LOLL SAHU, **I. L. R., 30 C. 1.**

252 S. 114 (e)—*Presumption—Whether Sarishtedar was authorized to sign a warrant under S. 251. C. P. C.*

It could not be presumed under S. 114 (e) that the Sarishtedar had been appointed by the Court to sign a warrant under S. 251 C. P. C. Under S. 114 (e) the Court is authorized to presume that an appointment, if made, has been made regularly, but it is not authorized to presume without evidence that any particular appointment has been made. THE DEPUTY LEGAL REMEMBRANCER *v.* MIR SARWARJAN **6 C. W. N. 1902. P. 845.**

253. S. 114 *Ill. (g) and S. 4—Presumption—Where a person does not produce a document.*

Where a party having a document in his possession does not produce it the Court may presume that its production is damaging to his case. S. 4 gives the Court a judicial discretion to decide in each case whether the presumption rising from non-production of the document has been duly made. The Court, may, however be induced by circumstances to call for confirmatory evidence that the document was against the interest of the non-producer. RAGHUNATH *v.* HOTI LAL. **1 A. L. J. 121.**

254. S. 114 (g)—*Road-cess Returns—Returns made under S. 95, Bengal Cess Act (Bengal Act IX of 1880)—Enhancement of rent.*

Sup: Govt. acts (I of 1872) *(Contd).*

In a suit for enhancement of the rent of a *taluqdar* tenure, road-cess returns rendered under S. 95 of the Bengal Cess Act (Bengal Act IX of 1880), though not conclusive, were held to be admissible in evidence as a basis on which to ascertain the assets of the taluq, and so fix a fair and equitable limit of enhancement. When such returns, produced by the plaintiff, showed that the taluqdars were receiving from their sub-tenants a considerably higher rent relatively than that which they were paying to their superior landlords, and that the claim for enhancement could *prima facie* be supported on the ground that the existing rate was consequently not "fair and equitable" within the meaning of the Bengal Tenancy Act, they were held sufficient to shift the onus to the defendants to rebut the presumption so raised against them. To rebut such presumption the defendants might have produced their collection papers, but did not do so.

Held, that the Court was justified in acting on the presumption under S. 114 (*g*) of the Evidence Act (I of 1872.) HEM CHANDRA CHOWDHARY *v.* KALI PROSANNA BHADURI. **30 I. A. 177=8 C. W. N. 1 =30 C. 1033.**

255. S. 114 (i) See S. 34 and 114. 29 C. 334 P. C. *No. 64 supra.*

256 S. 115—*See ss. 68, 69, & 115—4. O. C. 408 No 119 Supra.*

257 S. 115—*Minor—Estoppel—Statement known to be false by person to whom it is made.*

S. 115 of the Evidence Act (1 of 1872) does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties. A false representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy.—MOHORI BIBEE *v.* DHARMODAS GHOSE. **I. L. R., 30 C. 539; 7 C. W. N. 441; P. C.**

258 S. 115.—*Estoppel—Judgment not inter partes.*

A person is not bound by the judgment in a case in which he was no party, although he may have derived his title to the property in suit by purchasing it at an execution-sale, subsequent to the judgment, from some person who was a party to it. Such judgment may be admissible only to show that there was a litigation as to the property and that the plaintiff, as between the then parties to the litigation, asserted his claim to it successfully.—BROJENDRA KUMAR ROY *v.* GOPI MOHAN ROY. **7. C. W. N. 574.**

259 S. 115.—*Estoppel—Civil Procedure Code (Act XIV of 1882), ss. 401 et seqq.—Suit in forma pauperis—Death of plaintiff.*

The plaintiff in a suit brought *in forma pauperis* died, but in ignorance of her death, the Court passed a decree in her favour. The defendant appealed, making respondent

Sup: Govt. acts (I of 1872) (*Contd.*)

to his appeal a lady whom he alleged to be the legal representative of the deceased plaintiff. On this appeal, an order was passed by consent of parties sending back the suit to be re-tried on the merits as between the defendant and the person nominated by him as plaintiff, and it was so re-tried, and a decree was again passed in favour of the plaintiff.

Held that it was not thereafter open to the defendant to object that there had been no inquiry into the right of the representative of the original plaintiff to sue as a pauper.—AKBAR HUSAIN *v.* ALIA BIBI. **I. L. R., 25 A. 137.**

260 S. 115—*Property held by head of a Mutt—Presumption.*

Where the head of a *Mutt* applied for and was allotted shares in a Company and payments were made by him by way of calls on the shares, and his successor in office applied to the Company for the mutation of name in favour of the *Mutt*, as the shares were not private property of the alloty but belong to the *Mutt* but he adduced no evidence that the funds applied were of the *Mutt*.

Held, that no presumption arose that the money belong to the *Mutt*. Nor was the Company estopped by S. 115 from denying that the shares were the property of the *Mutt*. MAHANT KISHORADASSJI *v.* THE COIMBATORE SPINNING AND WEAVING COMPANY. **26. M. 79.**

261 S. 115—*Estoppel by judgment—Civil Procedure Code (Act XIV of 1882), s. 13—purchaser previous to suit—Defence in previous suit—Vendor, possession of—Pleader, non-disclosure of facts by—Fraud—Silence when fraudulent.*

A purchaser of land cannot be estopped by a judgment in a suit against his vendors commenced after the purchase, although the former had, as pleader for the vendors, actively defended the suit. *Mohunt Das* v. *Nilkomul Dewan*, (4 C. W. N. 283) followed. If, however, the purchaser had allowed the vendors to remain in possession intending to mislead the plaintiff who having been so misled, had sued them, the decree in the suit would bind him on the ground of fraud. Silence amounts to fraud for which a Court will grant relief only when it is the nondiscloure of those facts and circumstances which one party is *legally* bound to communicate to the other. *McKenzie* v. *British Linen Company*, (6 App. Cas. 82) distinguished. The silence must also be a true cause of the change of position of the other party. A person conducting, as pleader, the defence on behalf of a defendant is under no legal obligation to disclose to the plaintiff the fact that the defendant had, prior to the suit, transferred the subject-matter of the suit to him. S. 115 of the Evidence Act (I of 1872) does not apply to a case in which a belief otherwise caused has been only allowed to continue by reason of any omission on the

Sup: Govt. acts (I of 1872) (*Contd*)

part of the person against whom the estoppel is sought to be raised.—JOY CHANDRA BANERJEE *v.* SREENATH CHATTERJEE. **I. L. R., 32 C. 357.**

262—S. 115 *Pre-emption—Punjab Laws Act (IV of 1872), Section 13—Estoppel—Waiver.*

Section 13 of the Punjab Laws Act does not repeal, as regards pre-emption suits, section 115 of the Evidence Act, and estoppel or waiver can be alleged against a plaintiff even where no notice under section 13 has been issued.

Section 13 of the Punjab Laws Act has no application in the case of a sale by auction by order of Court. And there is no duty imposed upon a pre-emptor by law or equity to announce his intention of making a claim of pre-emption to the bidders at the auction sale. CHAUDHRI RAM KISHEN *v* SAYAD FAKIR ALI SHAH. **185. P. L. R. 1905.**

263 S. 115—*Government. Suit against—Adverse possession—Estoppel—Parlakimidi Zamindari*—Maliahs—*Forfeiture.*

The *Raja* of Parlakimidi in his suit against Government claimed proprietary rights in Parlakimidi *Maliahs* and alleged that in case he was unable to prove his ownership by express or implied grant he was entitled to full proprietary right in the said *Maliahs* by adverse possession and urged that the Government was estopped from denying his title to them. It was stated on behalf of Government that in 1800 the entire zamindari including the *Maliahs* was forfeited to Government as an act of State owing to the rebellious conduct of an ancestor of the plaintiff and that a re-grant made in 1803 excluded the *Maliahs*, that there was no adverse possession and no estoppel.

Held, by the Privy Council, that the plaintiff had failed to substantiate his case that there was no express or implied grant of the *Maliahs* after the forfeiture of the zemin, dari and the adverse possession and estoppel set up by the plaintiff were not established.

That the re-grant of the zemindari excluded the possession or holding of the chiefs of the *Maliahs* which must for that purpose be taken as including the waste lands and forests of the *Maliahs*.

That the mistaken view of the officers of Government acting under the Court of Wards that the *Maliah* forests belonged to to the zemindari and working these forests for the benefit of the zemindari and encouraging expenditure of zemindari funds upon the *Maliahs* did not create any estoppel. GOURA CHANDRA GAJAPATI NARAYANA DEO MAHARAJULUN *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL.—**9. C. W. N. 553. P. C.**

264—S. 115—*Estoppel—Rule of equity—*

If a man under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created and encouraged by the landlord that he shall have a certain in-

Sup: Govt. acts (I of 1872) *(Contd.)*

terest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. The Crown comes within the range of this equity.

This rule of equity differs essentially from the doctrine embodied in section 115 of the Evidence Act, which is not a rule of equity, but is a rule of evidence that was formulated and applied in Courts of law, while the former takes its origin from the jurisdiction assumed by the Courts of Equity to intervene in the case of, or to prevent, fraud.

It is no objection to that equity that the interest in the land was not originally moulded in a form recognized by law: that does not prevent the Court to impose subsequently such terms as will prevent that which a Court of Equity would regard as a fraud. THE MUNICIPAL CORPORATION OF BOMBAY *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **7. B. L. R. 27.**

265 S. 115—*Estoppel – Purchaser at a Court sale – Khoti Act (Act 1 of* 1880, *Bom.), Section* 10—*Khot—Khoti Khasgi lands—Lapsed lands —Khot's power over lapsed lands—Dunlop's proclamation of* 1824.

Per Chandavarkar, J.—To create an estopple against a party, his declaration, act or omission must be of an unequivocal and unambiguous character.

A Court sale cannot by itself be taken to create an estoppel either in favour of or against a Court purchaser as against or in favour of the person whose right, title and interest the Court purchaser buys from the Court.

Mr. Dunlop's proclamation of 1824 could not apply to villages which had been alienated by Government in favour of the Inamdars before its date.

Per Batty J.—A Khot has a right to dispose of lands which have lapsed, either by taking them into his own permanent occupancy or by letting them out for short terms or by assigning them to privileged occupants.

As long as a Khot's power of permanent disposal rests with him and has not been alienated to a tenant with privileged occupancy rights, the land must be regarded for all purposes as undistinguishable from ordinary Khoti Khasgi, the right remaining with the Khot at pleasure to recover the land on the determination of any yearly or short term tenancy. GAJANAN VASUDEV *v.* NILO SAKHARAM. **6. B. L. R. 864.**

266. S. 115—*Estoppel—Vendor and purchaser—Sale of land by Government to a purchaser at a certain rate—subsequent enhancement of revenue.*

Held reversing the decree and setting aside the order of enhancement, that the

Sup: Govt. acts (I of 1872) *(Contd.)*

plaintiff had a right to hold the land for over on payment of assessment at the rate of nine pies per square yard per annum, and that the Government had no right to enhance the said rate. Janardhan Gopal had purchased the property out-and-out for its full value. To such a purchaser the right to enhance the assessment should in all fairness have been clearly disclosed. The meaning that a reasonable man would under the circumstances ascribe to the Collector's letter of the 25th July 1887, was that a specific limit of nine pies per square yard per annum was established under s. 8 of Bom., Act II. of 1876. That being so, the Government and the Collector were bound. The conduct of Government coupled with the statement of Government made on their behalf for the purposes of the purchase was, under the circumstances, such as to create and encourage in the purchaser as a reasonable man the belief that he was purchasing property substantially worth Rs. 33,000, and that Government were not silently reserving to themselves an unfettered right to destroy the value of that property and practically to confiscate that which had been sold. DADABA JANARDHAN *v.* COLLECTOR OF BOMBAY. **I. L. R., 25 B., 714.**

267. S. 115.—*Transfer of Property Act (IV of 1882), S. 41—Consent—Estoppel.*

The consent under S. 41 of the Transfer of Property Act must be free and not one brought about by misrepresentation on the part of the person making it as to his legal rights. An admission on a point of law is not an admission of a thing within the meaning of S. 115 of the Evidence Act. DUNGARIA *v.* NAND LAL. **A. W. N. 1906, P. 182 = 3 A. L. J. 534.**

268. S. 115.—*Partnership—Participation in profits—Test of—Intention—Estoppel—Contract Act, s. 245.*

The right to participate in the profits of trade is in itself a strong test of partnership. But participation in profits although strong evidence is not conclusive evidence of a partnership and that question of partnership must be decided by the intention of the parties to be ascertained from the contents of the written instruments, if any, and the conduct of the parties. The mere facts of a lender's participating in the profits or taking active interest in the business in which he advanced money, does not necessarily make him a partner. *Mollow, March* v. *The Court of Wards* (10 B. L. R., 312); *Badeley* v. *Consolidated Bank* (L. R., 38 Ch. D. 238) and *Cox* v. *Hickman* (9 C. B. N. S. 47) followed. Where a person who is not himself a partner to a business, but shows himself as such to strangers by his conduct, he is liable as a partner to persons who acted upon such belief. Even the want of knowledge, on his part, of the effects of his acts or conduct would not absolve him from liability, if his acts and conduct were such as would induce a reasonable man to believ

Sup: Govt acts (I of 1872) *(Contd).*
that he was a partner and to act upon such belief. *Carr* v. *London and North Western Railway Company* (L. R. 10 C. P. 316); *Cornish* v. *Aleington* (4 H. & N. 549) *Dickenson* v. *Valpy* (10 B. & C. 128) referred to. COLONEL A. R. PORTER *v.* W. INCEL, **10 C. W. N. 313.**

269. *See 115 Mortgage—Occupancy holder.*
Where an occupancy tenant mortgaged his right in the land to the appellant and put him in possession but afterwards dispossessed him and mortgaged the land to another man and gave him possession and the appellant sued them both for possession whereupon, the tenant respodent contested that the transfer of an occupancy holding was illegal under section 5, Oudh Rent Act XXII of 1886.

Held, that the mortgage was invalid being opposed to the Rent Act and that the tenant respondent was not estopped from denying its validity. BENI MADHO *v.* KALI PERSHAD SINGH. **6 O. C. 331.**

270. S. 115.—Wakf *property—Suit for cancellation of sale of—Parties in pari delicto.*
The plaintiff who had sold *wakf* property to the defendants, shortly after sued them for cancellation of the sale deed, alleging *wakf* and fraud and misrepresentation on the part of the defendants. Fraud was not proved. It was proved that the defendant did not act upon any mistaken belief as to the title induced by any representation of the plaintiff.

Held, that the plaintiff was not estopped from proving that he held the property as a trustee and that the transfer of it was invalid. The rule of estoppel by deed or by writing is that if a distinct statement of a particular fact is made in a deed and a contract is made on that statement the party who made that statement could not deny the truth of it.

Held, further, that as both parties were in *paridelicto*, the position of the defendant could not be assailed by the plaintiff. As the Specific Relief Act gave a discretion to the Court to grant a relief the suit was rightly dismissed. ABDUL GHAFUR KHAN *v.* WAHID ALI SHAH. **6 O. C. 355.**

271. S. 115.—*Estoppel—Pre-emption—Withdrawal of money—Waiver of right.*
The vendors left some money with vendees for payment to a creditor. The plaintiff withdrew the money and brought a suit of pre-emption regarding the property.

Held, that the withdrawal of money could not operate as a waiver of the right of pre-emption. The plaintiff by taking the money did not acquiesce in the sale. 2 *A. L. J.* 145 *and* 9 *A.* 234 *referred to.*

In the presence of the rules of estoppel given in Section 115 of the Evidence Act there is no need for a Court to rely on analogies of the Mohammadan Law in a case of pre-emption between the Hindus. 5 *A.* 197 *referred to.* AJUDHIA CHAUDHARI *v.* CHHATARPAL LAL. **A. W. N. 1907, P. 88=4 A. L. J, 210.**

Sup: Govt. acts (I of 1872) *(Contd).*
272. S. 115.—*Continued arrangement when binding.*
Estoppel is created where the representation as caused the person, to whom it has been made, to act on the faith of it. Estoppel does not depend on the motive or knowledge of the representer. It is not essential that representers intention should have been fraudulent, or that he should not have been under a mistake or misapprehension. 19 *I. A.* 203=20 *C.* 296 *referred to.* HELANDASI *v.* DURGA DAS MANDAL. **4 C. L. J. 323.**

273. S. 115, 116, 117—*Ejectment, suit for —Dispute between rival vendees—Estoppel.*

A, who had purchased from X, brought a suit against B for ejectment, alleging that B was in wrongful possession of his land. A admitted that X had sold the same property previously to B, but contended that B, as the *muktear* of X, had obtained possession fraudulently and by undue influence. B alleged that he purchased the property from X previously, ignorant of the fact that she had no title, and that in reality P was the true owner. Subsequently B purchased from P. A contended that, even if X had no title, B, by reason of having obtained possession from X, was estopped from alleging that A had no title. *Held* that X having no title, the conveyance to A was invalid, and the rule of estoppel only existed as long as the grantee claimed under the title of the grantor. Woodroffe, J.—X had no title, and therefore B was not estopped from raising that defence. It was not sufficient for B to establish that the sale to A was voidable at the option of the vendor: He must show that it was absolutely void. *Lala Achal* v. *Raja* (*Kazim* L. R., 32 I A. 113), referred to.—RUP CHAND GHOSH *v.* SARVESWAR CHANDRA CHANDRA, **I. L. R., 33 C 915=10 C. W. N. 747.**

274. S. 115, 116.—*Estoppel—Limitation Act (XV of 1877), S. 22—Amendment of plaint.*
A mortgaged certain property to B. Five years after, A granted to C lease in respect of a portion of such property. B brought a suit on the mortgage in which A and D (as son and heir of C then deceased) were defendants. It having been found afterwards that C had left a will in which D was appointed executor, the plaint was amended and D was made a defendant as an executor, instead of as an heir.

Held, that though D was the representative of C, the lessee, he was not estopped from contending that, when the property was mortgaged 5 years before the lease, A, the lessor, was not entitled to the whole of the property mortgaged.

Held, also that the amendment of the plaint, making D a defendant as an executor instead of as an heir, did not involve any addition of a new defendant, so as to bring it within the provisions of S. 22 of the Limitation Act. PROSUNNO KUMAR SEN *v.* MAHABARAT SAHA. **7 C. W. N. 575.**

Sup: Govt. acts (I of 1872) (*Contd.*)

275. S. 115, 116, 117.—*Estoppel—Heir of wakf property.*

Where some of the heirs of a deceased person took possession of a certain property as a valid *wakf.*

Held, that they could not be barred by the rule of estoppel from disputing the validity of the *wakf* as against the remaining heirs. 9 *Q. B.* 48 *dissented from.* ALAMGIR KHAN *v.* KAMAR-UN-NESA KHANAM. **4 C. L. J. 424.**

276. S. 116.—*Suit for rent—Defendant tenant's plea that the landlord was only a* benamidar—*estoppel.*

In a suit for rent, instituted by the person, in whose favor a tenant has executed a lease, the tenant is estopped by S. 116 from raising a plea that the ostensible landlord was only a *benamidar* for somebody else. The question of a lessor's title is wholly foreign to a suit of this nature. *7 B. L. R., 723, followed, 7 B. L. R., 720 and 24 W. R., 44, dissented from.* BOGAR *v.* KARAM SINGH. **13 P. W. R. 1907=141 P. R. 1906.**

277. S. 116.—*See 115, 116 and 117. 4. C. L. J., 424. Nos. 274 and 275 supra.*

278. S. 116 & 117. *Estoppel—Vendor and purchaser—Possession from vendor without title—Denial of vendor's title.*

The plaintiff sued the defendant for possession of land claiming title under a sale from one *P.* alleging that a previous sale by *P.* to the defendant was fraudulent and void. The defendant pleaded that *P* had no title to the land and that he had obtained a conveyance from the real owner after he learnt that *P.* had no title. The plaintiff contended that the defendant was estopped from disputing the title of P. and was bound to restore possession to the plaintiff as assignee from *P.* It was found that *P.* had no title to the land.

Held, that since *P.* had no title which could be conveyed, the plaintiff's suit must be dismissed, and that the defendant was not estopped from denying the title of *P.* RUP CHAND GHOSH *v.* SARVESWAR CHANDRA CHANDRA. **3 C. L. J., 629=10 W. N., C. 747=33. C. 915.**

279. S. 117. *See S. 115, 116 and 117-4. C. L. J. 424 No. 275 supra.*

S. 117. *See S. 116 & 117. 33 C. 915. No. 278 supra,*

280. S. 118 The Sessions Judge refrained from examining a witness on the ground that 'he was a very small boy.' *Held* that the witness should have been examined unless under the words of Section 118 of the Indian Evidence Act, the Sessions Judge considered that the boy was prevented from understanding the questions put to him, or from giving rational answers to those questions by reason of tender years. QUEEN EMPRESS *v.* RAM SEWAK. **23. A. 90.**

281. S. 120 & 132.—*Civil Procedure Code (Act XIV of 1882) Sections 59 and 129—Divorce Act (IV of 1869), Sections 7, 51 and 52—Evidence Act (I of 1872), Sections 120 and*

Sup: Govt. acts (I of 1872) (*Contd.*)

132—Suit for dissolution of marriage on the ground of adultery—Rights of parties as to discovery of documents—Parties not compellable witnesses.

In a suit for dissolution of marriage under the Divorce Act on the ground of adultery by the wife, the respondent and co-respondent are competent witnesses only in the sense that if they offer themselves as provided by Section 51 of the Divorce Act, they may be examined like any other witnesses, but cannot be compelled to give evidence unless they offer themselves as witnesses.

The rule applicable to compulsory oral evidence is applicable to compulsory disclosure of documents. The petitioner is not entitled to any information from the co-respondent as to the acts of adultery charge until such time as the co-respondent offers himself as a witness. The co-respondent cannot be compelled to file an affidavit declaring what letters from the respondent are in his possession, but affidavit may be required in respect of letters written by the petitioner to the co-respondent.

A list of documents proving adultery should be filed with the plaint, and when it is not done the petitioner may be ordered to file an affidavit disclosing all letters in his possession or power relating to the adultery charged on which he relies. C. *v.* C. AND B. **11. P. R. 1902.**

282. S. 123.—*Affairs of state—Evidence.*

It is open to Government by Resolution or otherwise to sensure or reprimand an officer. The resolution complained of by the plaintiff, being an official communication, was absolutely privileged. It could not be put in evidence or produced in Court and no secondary evidence it could be given in respect of such official communications no allegation of malice is allowed and no proof of malice takes away the privilege. JAHANGIR M. KERSETJI *v.* SECRETARY OF STATE FOR INDIA. **5 B. L. R. 30=27 B. 189.** *See Act of State column 42.*

283. S. 123 & 124.—*6 B. L. R. 133—See Act of State columns 43—47.*

284. S. 124.—*6 B. L. R. 133—See S. 123 and 124, No. 283 supra.*

285. S. 126.—*Privileged communications—Client—Legal adviser.*

Section 126 of the Evidence Act can have no application where the statement made by a client to his solicitor was made not as confidential but for the purpose of communication. EMPEROR *v.* MARIANE G. RODRIGUES. **5. B. L. R. 122.**

286. S. 126—*Document. Privileged documents—Legal adviser—Court—Discretion.*

Under the Evidence Act, in regard to certain documents absolutely privileged, the Court has no power whatever to order production. But under S. 130 of the C P Code, the Court does possess the discretion, and the discretion is to be exercised according to the practice of the Court. And although a document may not be such as passed di-

Sup: Govt. acts (I. of 1872) (*Contd*). rectly between the legal adviser and the client, yet if it is of such a nature as to make it quite clear that it was obtained confidentially for the purpose of being used in litigation and with a view to being submitted to legal advisers, then the Court will not compel the production of such a document. VISHNU YESHAWANT WAGH *v.* THE NEW YORK LIFE INSURANCE CO., **7 B. L. R. 709.**

287. S. 196. *Privilege—Communication to pleader.*

Where a pleader acted as a professional adviser to both the parties to a dispute and a certain communication by the complainant was made to him not in the course and for the purpose of his employment as a pleader:—*Held*, that the communication was not privileged under section 126 of the Evidence Act. EMPEROR *v.* BALA DHARMA. **4 B. L. R. 460.**

288. S. 152. *S. 120 & 152 11. P. R. 1902 No. 281 Supra.*

289. S. 132. *Defamatory statement in deposition when privileged.*

The accused, while deposing before a Magistrate, was asked by the cross-examining pleader "whether Kanu had asked pardon of Haidar Ali in a *punchayet*" and in the course of his answer he made the following statement which was false, viz., "Haidar Ali admitted in the *punchayet* that Kanu beat him with a wooden shoe."

Held, that the statement of the accused was defamatory under S. 500 of the Penal Code and was not privileged under S. 132 of the Evidence Act, as it was a voluntary statement not relevant to the issue in the case in which he deposed and was not elicited by the pleader putting questions, and as, further, the accused was actuated by malicious motives against Haidar. 21 C. 392, F; 17 B. 573; 11 M. 477; 17 B 127, Refd. to. HAIDER ALI *v.* ABRU MIA. **9 C. W. N. 911=2 C. L. J. 105=2 Cr. L. J. 459.**

290. S. 136 & 157. *Examination of witnesses—Order—Direct evidence and corroborative evidence.*

Corroborative evidence under section 157 of the Evidence Act should not be admitted until afer the witness sought to be corroborated has himself been examined. *Nistarini Dassee* v. *Rai Nundo Lall Bose* (*1900*) 5 C. W. N., xvi, referred to. SHWE KIN *v.* KING EMPEROR **3 L. B. R. 1906 P. 240.**

291. S. 137. *See SS 136 & 137 3. L. B. R. 1906. P. 240 No 291 Supra.*

292. S. 154 *Witness—Hostile witness—Right of party calling a witness to cross-examine him.*

Common fairness requires that a party calling a witness should be allowed to cross-examine him if the witness unexpectedly makes a statement adverse to the case of the party calling him. When it is not done, the evidence is of no value. KALAGURLA SURYANARAYANA *v.* YARLAGADDA NAIDOO. **6. C. W. N. 513. P. C.**

Sup: Govt. acts (I of 1872) (*Contd*).

293 S. 154.—*Accused's right to cross-examine witness not produced by him.*

The accused called Inspector of Police as a witness for the defence. When the witness attended the Court; the accused declined to examine him, but his statement was recorded by the Court. The Court refused to allow the accused to cross-examine the Inspector on the ground that he had been called by the defence and although not produced by the defence, he must be regarded as a defence witness.

Held, that he could not be regarded as a defence witness and the accused was entitled to cross-examine him. MOHENDRA NATH DAS GUPTA *v.* THE KING EMPEROR. **6. C. W. N. 550.**

294 S. 155 & 157—*Advocate—professional misconduct, Charge of—value of evidence—proof.*

The appellant, an advocate of the Chief Court, was convicted of gross professional misconduct in having advised a client G to bribe a witness in a case under trial at the Criminal Sessions of the Chief Court.

The charge against him was based on two conversations between appellant and E, his senior in the case. E's statement regarding these conversations was corroborated by certain persons to whom he had repeated their purport on the day they took place. Both these conversations were hurried; the actual words used in one were not completely remembered by E and the words that were accurately remembered might, in certain contexts, have an innocent meaning; the other was a whispered conversation in Court during the examination of a witness by E. The charge was also supported by admissions made by the client G to E and to the Government Advocate, but G, when examined as a witness, denied having made these admissions.

Held, that the admissions made by G, even if admissible to discredit his sworn statement as a witness, were not admissible as against appellant; that although the statements of the persons to whom E reported his conversations with appellant were admissible as supporting the credibility of E's evidence, the charge against appellant depended entirely on the correctness of E's impression of the effect of these conversations; and that, considering the circumstances of the conversations and the probabilities of the case, the evidence was insufficient to support the grave charge against appellant. BOMANJEE COWASJEE *v.* THE CHIEF JUDGE AND JUDGES OF THE CHIEF COURT OF LOWER BURMA. **4 L. B. R. 1907. P. 27.**

295. S 155 (3) & 157.—"*Charge*"—*Professional misconduct—Advocate—Probabilities—Evidence, appreciation of.*

The appellant, an advocate, was charged with professional misconduct in that he suggested or hinted to his client that he should influence or attempt to influence an expert witness in handwriting by improper means in order that the witness might be induced

Sup: Govt. acts (I of 1872) *(Contd).*

to express opinions favourable to the prosecution case in connection with certain letters produced during the course of the said case. To prove the charge, one Mr. *E*, the senior advocate who appeared with the appellant in the particular case was called and he deposed to certain hurried conversation lasting for half a minute which took place between the appellant himself, when the witness was engaged in Court in examining a witness in the case. To corroborate him, three other witnesses were called who deposed that the senior advocate repeated to them his impression of the effect of his conversation with the appellant.

Held, that the evidence of the said three witnesses was admissible under S. 157 of the Evidence Act, but apart from its tending to support the credibility of *E's* evidence, it did not carry the matter any further on the real issue in the case, *i. e.*, whether the appellant did in fact advise his client to bribe the expert witness. Mr. *E.* also deposed to a certain conversation that took place in the absence of the appellant between himself and the client who was alleged to have been instructed by the appellant. Another witness, the Government Advocate, also deposed to particulars of a long conversation between him and the client.

Held (1) that the evidence was inadmissible to prove the charge against the appellant.. (2) That in the circumstances of the case, *E's* evidence was quite insufficient to support the grave charge made against the appellant.

Held also, that in a case of this kind it is permissible for judges of fact to consider the probabilities and that in the light of those probabilities, it is impossible that the appellant would have conducted himself in the way which he is alleged to have acted. BOMANJI *v.* CHIEF JUDGE OF THE BURMA. CHIEF COURT. (LORD DAVEY). **11 C. W. N. 370; 34 I. A. 55; 5 C. L. J. 123; 9 B. L. R. 3; 17 M. L. J. 67=2 M. L. T. 96=5 C. L. J. 50=4 L. B. R. 27=34 C. 129 P. C.**

296. S. 157.—*See S. 155 and 157—4 L. B. R., 1907, p. 27 and 34 C. 129 Nos. 294 and 295 supra.*

297. S. 157 to 160.—*"Pyatpaing"—Admissibility in evidence.*

The "Pyatpaing" or outer foil of the Revenue Register of Mutations when not signed by the owner of the land is not admissible in evidence to prove the terms of a report of a transaction in land made to the headman or surveyor who keeps up the Register (*Maung Cheik* v. *Tha Hmat*, 1 L. B. R. 260). But if the headman or surveyor who wrote the *pyatpaing* is called as a witness and gives evidence, from his own memory, of the terms of the report, then it is admissible to corroborate his statements under section 157 of the Evidence Act. It may also be usefully used under sections 159 and 160 of the same Act. *Ma Dan Da* v. *Kyaw Zan*, 3 L. B. R., 5, referred to. SHWE PAN *v.* MAUNG PO. **3. L. B. R., 1906, P. 250.**

Sup: Govt. acts (I of 1872) *(Contd).*

298. S. 159.—*See S. 157 to 160—3 L. B. R., 1906, p. 250, No. 297 supra.*

299. S. 159.—*Refreshing memory—Account books.*

Account books regularly kept in the course of business can be used to refresh the memory of witness and also as corroborative evidence of the story he tells. BHAG HONG KONG *v.* RAMANATHEN CHATTY. **6 C. W. N. 401=29 I. A. 43=4 B. L. R. 378=29 C. 334.**

300. S. 160.—*See S. 157 to 160—3 L. B. R., 1906, p. 250, No. 297 supra.*

301. S. 163.—*See S. 21 and 163—31 C. 380 No. 40 supra.*

Evidence Act (I of 1872) Section 163.

A party to a suit by calling for and inspecting a document takes the risk of making it evidence for both parties. MAHOMED KHAN *v.* ABDUL-REHMAN. **5 B. L. R. 380.**

302. S. 167.—*Evidence improperly admitted or rejected.*

Held, that S. 167 applies to Civil as well as Criminal proceedings. Where more than three charges were tried together and the trial was conducted in a manner prohibited by Law, the trial was held to be altogether illegal and the conviction was set aside. SUBRAHMANIA AYAR *v.* KING-EMPEROR. **28 I. A. 257=3 B. L. R. 540=5 C. W. N. 866=11 M. L. J. 233=25 M. 61, P. C.**

32.—ACT IX OF 1872 (CONTRACT ACT.)

1. S. 1.—The parties to a contract can not agree to any terms the incidents of which are inconsistent with the provisions of the Contract Act. BRIJ KOOMARE *v.* SALA MANEDA FIRE INSURENCE CO. **32 C. 816.** *(See S. 78, No, 315 infra.)*

2. *Scope of the Act—30 C. 539 see No. 28 infra.*

3. S. 2 (d).—*Failure of consideration—Specific Performance, suit for—Ekrar—Attempt by party to rescind agreement of which his heirs afterwards seek specific performance.*

Where parties had made a promise comprising an agreement, the chief consideration for which was the execution of an *ekrar* by one party acknowledging the title (as adopted son) of the other party to the agreement, and the former had subsequently by his conduct (in bringing a suit to set aside the adoption and alleging that the *ekrar* had been obtained from him by fraud) attempted and in a great measure succeeded in depriving the latter of the benefit of the agreement.

Held, in a suit by the heirs of the party, who had so tried to rescind the agreement that there had been a failure of consideration and the conduct referred to was at variance with and amounted to a subversion of the relation intended to be established by the compromise; and that specific performance of the agreement could not be enforced. SRISH CHANDRA *v.* BANOMALI. **8 C. W. N. 594=6 B. L. R., 501=M. L. J. 1904, P. 185; P. C.=31 I. A. 105=31 C. 584.**

Sup: Govt. acts (IX of 1872) *(Contd.)*

4. S. 2 (d).—*Contract—Privity—Rights of third party to sue*—Trustee *and* cestui que trust.

To entitle a third person, not named as a party to a contract, to sue either of the contracting parties, that third person must possess an actual beneficial right which places him in the position of *cestui que trust* under the contract. Whether a trust exists so as to give the third party a right to sue must depend upon the construction of the deed embodying the contract—very little will suffice in law to create privity of contract where it is so convenient for all parties that the matter should be carried out between the two parties really interested. *30 Ch. D. 57, 2 Q. B. 136, 7 B. H. C., 144 referred to.*

A trustee cannot be allowed to buy property burdened with the trust either for his own benefit or the benefit of others in whom he is interested and then say that the trust is gone. RAKHMABAI *v.* GOVIND MORESHWAR. **6 B. L. R. 421.**

5. S. 2 (d).—*Marriage settlement—To pay annuity to bride—Bride's right to sue.*

At the marriage of A, then a minor, with the son of B, B agreed with the father of A to pay to A unconditionally the sum of Rs. 500 a month from the date of the marriage, and the payment of this allowance was made a charge upon certain immoveable property specified in the agreement. A after a time refused, for reasons stated by her in her plaint, to live with her husband. Subsequent to this, the stipulated allowance having been stopped, A sued on the agreement above referred to, to recover arrears amounting to Rs. 15,000.

Held, that A, though not a party to the agreement in question, was entitled to sue B on it; also, on a construction of the agreement, that no conditions as to the conduct of A being laid down therein, the fact that A refused to live with her husband was no bar to the suit. HUSSAINI BEGAM *v.* KHWAJA MAHAMMAD KHAN. **1907 A. W. N. 3=4 A. L. J. 13=29 A. 151.**

6. S. 2 (d).—*Third party's right to sue—Specific Relief Act, S. 23 (c).*

When the agreement in question was a family settlement of doubtful right.

Held, that the general rule that a person who was not a party to a contract could neither be bound nor take advantage of it was not applicable as that rule is subject to exceptions. *L. R. 2 Ch. 293 referred to.* AVADH SARJU PRASAD *v.* SITARAM. **1 A. L. J. 829.**

7. S. 2 (d) & 10.—*Contract—Right of plaintiff to sue on agreement entered into between others—English Law—American Law to be followed by Indian Courts—Consideration—Inadequacy of consideration—Family compromise—Civil Procedure Code (Act XIV of 1882), Sections 27, 32 and 53—Amendment of plaint—Addition or substitution of plaintiffs—Suit for specific performance of contract—Decree for damages—Discretion—Specific Relief Act (I of 1877), Sections 19 and 21 (g).*

Sup: Govt. acts (IX of 1872) *(Contd.)*

According to the English Law of Contract where the plaintiff is not himself a party to a contract which is made between others, he is not competent to sue to enforce any provision in it which is intended for his benefit even if the contracting parties have agreed to that effect. The only exceptions to this rule are cases falling properly under the head of trusts.

On the other hand the rule prevailing in the United States of America generally is, that a third person, for whose benefit a promise is made by *A* upon a consideration moving from *B*, may maintain an action upon the promise, provided he was the person directly intended to be benefited.

The Indian Contract Law is modelled largely upon the Contract Law of England but the two laws are not absolutely identical. The doctrine of the American Courts is more suited to the Contract Law of India. In view of the differences that undoubtedly exist between the Indian and English Contract Law, it is more consonant with reason that Indian Courts should follow the American opinion.

The plaintiff sued her father-in-law on the basis of an agreement entered into between her father and the defendant. By the agreement the defendant agreed with the plaintiff's father that he would bring about cohabitation between plaintiff and her husband and would also treat her well, and promised in case he failed to do so, to allow her a maintenance of Rs. 10 per mensem and to give her one of his three houses to live in. The claim was made for Rs. 380 on account of maintenance for thirty-eight months at the rate of Rs. 10 per mensem and for a decree for possession of one of the three houses. It was contended for the defendant, *inter alia*, that the plaintiff was not entitled to sue, for she was no party to the contract and there was no consideration for it and that the plaintiff was not entitled to the relief claimed.

Held, that the plaintiff was entitled to sue.

That the plaintiff must be held to have given consideration in part at least, for she went to live with her husband in pursuance of the agreement. The adequacy of the consideration is not of much consequence in an agreement of this sort, which, moreover, being in the nature of a family compromise, stood on a special footing and was governed by special equities.

That the true view of the contract was that it was one between the plaintiff and the defendant and that in entering into it the plaintiff's father acted for her. According to the custom of the country she would not appear in public and on an occasion like this would very properly be represented by her father.

That since there was no doubt that the plaintiff's father was competent to sue, his name could be added or substituted in the plaint, if plaintiff were held not entitled to sue.

Sup: Govt. acts (IX of 1872) *(Contd).*

That the claim as made was for specific performance of the second promise. That this was not a case in which specific performance should be decreed as it would be opposed to the terms of section 21 (*g*) of the Specific Relief Act. That under section 19 of the Specific Relief Act claim for damages should be made in the alternative in a suit for specific performance. That the plaint might be treated as amended by the addition of an alternative claim for damages.

Decree was given for Rs. 120 for damages for one year's maintenance and for Rs. 130 for damages for breach of the covenant to furnish a residence for the plaintiff. MUSSAMMAT DAROPTI *v* JASPAT RAI. **28. P. L. R. 1905=49. P. R. 1905.**

8. S. 2 (d) & 25—*Promissory note executed by minor.*

The words "at the desire of the promisor' in S. 2 (*d*), do not contemplate a promisor, possessing contractual capacity at the time. Where a promissory note was executed by a minor for consideration and on attaining majority he executed another promissory note, in settlement of the earlier one: *Held* that the second promissory note was void for want of consideration.

Held also that S. 25 of the Contract Act is exhaustive. INDRAN RAMASAMI PANDIA THALAVAR *v.* ANTHAPPA CHETTIAR, **16 M. L. J. 422.**

9. S. 2, 10, 11. A female minor cannot sue for compensation under the Contract Act for the breach of a promise of marriage made to her—But where the circumstances entitle her to compensation under the Buddhist Law, she can succeed independently of contract. *L. R. 30, I. A. 114, 5. C. 669, 1. S. J. L. B. 114, 1 S. J. L. B. 235: 1 S. J. L. B. 533, 2. U. B. R. 189-96. P. 200, 2. U. B. R. 1897—1901 P. 499. Refd to.* KAN GAUNG *v.* MI HLA CHOK. **U. B. R. 1907. P. 5 (Contract).**

10. S. 2, 23, 65 & 63.—*Municipality—District Municipal Act (Bom. Act II of 1884), S. 27 (2), (17) and 30—Special general meeting—President—Dispensation or remission—Promise—Contract by Coporation—Executed consideration.*

In order that a meeting of the Special General Committee of a District Municipality should be properly constituted, it must be called by the President under S. 27 (2) of the District Municipal Act (Bom. Act II of 1884). If the meeting be not so called, the defect is not cured by section 27 (17). Under S. 63 of the Contract Act (IX of 1872) there can be dispensation or remission only by means of a promise. There must be a proposal of the dispensation or remission which is accepted. Under S. 10 of the Contract Act, consideration is not an essential of an agreement. In the Act the word "agreement" refers to "a promise" and a "set of promises forming the consideration for each other." Though a contract by a Corporation must ordinarily be made under seal, still, where there is that which is known as an executed consideration, an action will lie though this formality has not been observed.—ABAJI SITARAM *v.* TRIMBAK MUNICIPALITY, **5 B. L. R., 689 =28 B. 66.**

11 S. 4—*Formation of contract—Railway—Carriage of goods—Rules of Company for consignment of goods—Re-booking of goods after arrival at original destination.*

The rules of a Railway Company prescribed certain procedure for the booking o goods. In accordance with those rules certain goods were booked from Trichinopoly to Bagalkot. The plaintiff requested A, the goods clerk and station master at Hotgi (on defendants' Railway), to have the goods re-booked from Bagalkot to Hotgi, and for this purpose handed him the railway receipt with a written application, which, however, was not in the form of consignment used by the Company. A, accordingly, sent a service telegram to the station master at Bagalkot asking him to re-book the goods. The station master there did not re-book the goods and they were delivered at Bagalkot. The plaintiff sued the Railway Company for damages for non-delivery at Hotgi.

Held that the defendant Company had not contracted with the plaintiff to carry the goods from Bagalkot to Hotgi. The mere fact that the plaintiff got A, the station master at Hotgi, to send a service telegram to Begalkot did not constitute a contract to bind the Company.—MALKARJUN SHIDAPA *v.* SOUTHERN MAHRATHA RAILWAY COMPANY. **4 B. L. R., 890=27 B. 126.**

12 S. 4—*Proposal through Agent—Acceptance to Agent.*

Where a principal made a proposal through his agent to B and B Communicated the acceptance to the Agent who made the proposal.

Held the contract is complete and binding as if the acceptance had been communicated to the Principal himself. TRICUMDAS MILLS Co. *v.* HAJI SABBOO SADICK. **4 B. L. R., 215.**

13 S. 4—*Evidence—Contract—Terms to be spelt out of correspondence.*

Where there is no memorandum or document showing distinctly the terms of the contract the Court must look to the letters and whole correspondence which passed between the parties to see if it can spell out a contract containing definite terms. THE ARYODAYA S & W Co. *v.* JAVALPRASAD DALBTRAI. **5 B. L. R., 909.**

14 S. 4, 5, 6—*See S. 17 Ex: 3 cl: 1 C. P. C. —7 C. W. N. 912, 28, M. 19, 27. M. 355, 32. C. 884 and 32. C. 146.*

15 S. 6 cl (2)—*See S. 4—4. B. L. R., 215 No 12 Supra.*

16, S. 8, 10, 25 Cl. 2. *Contract by correspondence, where completed—Jurisdiction Suit for damages for breach of contract—Forum*

Where a contract is entered into between parties residing in two different places by

Sup: Govt. acts (IX of 1872) (*Contd*)

means of correspondence or otherwise, the contract is concluded, where the offer is accepted; and the Court of such place has jurisdiction to take cognizance of a suit for damages for breach of the contract under S. 17, C.P.C. *3 Wilson and Shaw 218.*

T, a resident of Midnapur, owed a debt to K, to satisfy which T drew two cheques at Midnapur in favour of N, at Purulia with whom he had transactions, one upon his banker X, and the other upon his banker Y, both at Calcutta; T made them over to K who took them to Purulia and presented them to N; N took the cheques, paid K, and subsequently presented the cheques at Calcutta where they were dishonoured. N. sued T at Purulia to recover the amount paid.

Held, that there was an implied proposal by T to N, which was accepted at Purulia and, as the contract was completed at Purulia the suit was maintainable there. SITARAM MARWARI v. THOMPSON, **2 C. L.J. 66=32 C. 84.**

17. s. 10. *Oudh Land Revenue Act (XVII of 1876), Chapter VIII—Capacity of disqualified proprietor to contract.*

Under the provisions of the Oudh Land Revenue Act, Chapter VIII, the whole of the property of a ward vests in the Court of Wards when it takes up the management of the ward's estate, particularly when it is not shown that any property was specially reserved, either by the ward or the Court of Wards, from the control of the latter. The ward is incompetent to make any contract respecting any part of his property, and the incapacity would affect the contracts entered into by him outside the local limits of the Act. The fact that any property was not stated in the list prepared by the Court of Wards of the property of the ward does not allow the wards to deal with that property as the disqualification is personal. LACHMI NARAIN *v.* FATEH BAHADUR SINGH. **W. N., A., 1903, p. 8.=25. A. 195.**

18. s. 10. *Hindu Law—Gift—Possession Transfer of Property Act (IV of 1882), Section 123—Gift to agent.*

Where the Transfer of Property Act is in force a gift of immovable property is not invalid by reason of its possession not having been delivered to the donee, if the requirements of the Act have been complied with.—*14 Cal., 446, followed.*

There is nothing to prevent an agent from being the object of the bounty of his principal. If an agent can clearly show that gift was made in his favour by a donor who was in a position to exercise a free and unfettered judgment with full knowledge of what he was doing, the gift will be upheld. PHUL CHAND *v.* LAKKHU. **A. W. N. 1903. P. 70.=25. A. 358 at 365.**

19. s. 10. *See S. 2. (d) & 10—28. P. L. R. 1905. No 7 Supra.*

20. s. 10. *See S. 2, 10, 11—U. B. R. 1907. P. 5 No 9 Supra.*

Sup: Govt. acts (IX of 1872) (*Contd*)

21. s. 10, 11, 64, 65. *Minor, contract by*

S. 64, 65 of the Contract Act deal only with contracts entered into by parties competent to contract and do not apply to cases where there is not and could not have been any contract at all. *Mohori Bibee* v. *Dharmodas Ghosh*, (I. L. R., 30 Cal. 539) followed. A mortgage entered into by a minor is void *ab initio.*—KAMTA PRASAD *v.* SHEO GOPAL LALL, **A. W. N., 1904, p. 41.=26. A. 342.**

22. s. 10. *See S. 8, 10, 25—32. C, 84 No 16 Supra.*

23 S. 10, *11, 68, 247 and 248—Bond for debts contracted during minority executed and majority accrues.*

S, a minor had a business in the course of which he had dealings with and became indebted to her for the price of goods supplied to him. S, after attaining majority, executed a bond for the above debt and for some money advanced to him at the time of the execution of the bond.

Held, that S. was liable for the whole amount secured by the bond. It is not illegal in a minor's paying for the property he has received and promised to pay its price but he can not be compelled by Law to pay it if he does not perform his promise. MT. KUNDAN BIBI. *v.* SREE NARAYAN **11. C. W. N. 135.**

24. S. 11. *Advocate, Capacity of, to sue or be sued in connection with professional services—Barrister-at-law—General practitioner—Indian Contract Act, s. 11.*

A Barrister-at-law who has been admitted as an advocate of the Chief Court and who combines the various functions performed by legal practitioners of every class in England must be considered to act in this country not in virtue of his membership of the English bar, but in virtue of his office as an advocate. He is therefore capable of suing for fees for professional services and of being sued for negligence. The Land Mortgage Bank of India Ltd. v. Elmes (1876) 25 W. R., 332, followed. *Queen* v. *Doutre* (1884) L. R. 9. A. C., 745: *C. Ross Alston* v. *Pitambar Das*, (1903) I. L. R. 25 All., 509; *Kennedy* v. *Broun*, (1863) 13 C. P., N. S., 677: referred to. *Grey* v. *Diwan Lachman Das*, (1895) P. R. 219, dissented from. A. P. PENNELL AND ANOTHER *v.* F. A. HARRISON AND OTHERS. **4. L. B. R. 1907 P. 55.**

25. S. 11. *Lease by minor void.*

A minor having given a lease of his land sued the defendant for the cancellation of the lease and possession of the land after attaining his majority.

Held that a minor is incompetent to contract and the lease is absolutely void, and the Lower Court was wrong in dismissing the plaintiff's suit 30. C. 539. P. C. followed. MOHAMMAD SALIM KHAN *v.* NAGO MARAR, **1 N. L. R. 185.**

26. s. 11 *See s. 10, 11, 64, 65—26. A. 342. No. 21 supra.*

Sup: Govt. acts (IX of 1872) *(Contd)*

27. s. 11. *See s. 10, 11, 68, &c.—11 C. W. N. 135 No. 23 supra.*

28. S. 11, 19, 64, 65.—*Transfer of Property Act (IV of 1882), Section 7—Minor—Void agreement—Evidence Act (I of 1872), Section 115—Estoppel—Representation by infant as to his age—Specific Relief Act (I of 1877), Section 41—Equity—Discretion of Court—Notice—Knowledge of attorney.*

The knowledge of the attorney in charge of a transaction is to be taken the knowledge of his principal.

Section 115 of the Evidence Act does not apply to a case where a false statement as to his age by an infant is made to a person who knows the real facts and is not misled by the untrue statement.

There can be no estoppel where the truth of the matter is known to both parties.

An agreement entered into by a minor is void and not enforceable.

Section 65 of the Contract Act, like section 64, starts from the basis of there being an agreement or contract between competent parties, and has no application to a case in which there never was, and never could have been, any contract.

When a money-lender lent money to a minor on a mortgage of his property, knowing that the borrower had not attained the age of majority, the mortgage-deed was set aside as a void contract, and the Courts in the exercise of their discretion refused to order refund of the money actually advanced.

A Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void. MOHORI BIBEE *v.* DHARMODAS GHOSE. **A. W. N. 1903, P. 441 = 5 B. L. R. 421 = 30 I. A. 114 = P. C. = 30 C. 539 (P. C.)**

29. S. 11.—*Document executed by lunatic effect,*

A document executed by a lunatic is void under S. 11. *30 C. 539 P. C. Appl. referred to.* MACHAIMA *v.* USMAN BEARI. **17 M. L J. 78.**

30. S. 11, 65.—*Guardian and minor—Hindu Law—Sale of minor's share by his brother—Contract Act (IX of 1872), Sections 11 and 65—Specific Relief Act (I of 1877), Section 38.*

Where a minor sued to avoid a compromise effected on his behalf by his elder brother, by which his right to possession as mortgagee of a piece of building site was given up in lieu of a sum of money.

Held, that in the absence of proof of necessity or any benefit to the minor the transfer was void. The elder brother not being natural or legally constituted guardian of the minor his act was unauthorized.

Held, also, that the plaintiff was not bound to make any refund as the transferee had knowingly dealt with the property of the minor and spent money in spite of warning given to him. 7 *C. W. N.*, 441, s. c., 30 *Cal.*, 539 (*P. C.*) ; *L. R.*, 1, *Ch.* (1902), 1, *referred to.* INDAR SINGH *v.* NARINDAR SINGH. **33 P. R. 1907.**

31. S. 11.—*See S. 2, 10, 11—U. B. R., 1907, p. 5, No. 9 supra.*

32. s. 12. *Unsoundness of mind—Suit to set aside mortgages on the ground of insanity of mortgagor at the time of execution—Decision on case not made by the evidence—Different types of insanity—concurrent decisions on facts.*

In a suit to set aside mortgages on the ground that the mortgagor was of unsound mind at the time of their execution, the plaintiff's witnesses gave evidence which showed insanity of a violent type, but their evidence was not believed by either of the Court's below. *Held* that it was not allowable for the Court of first instance to substitute for the case of insanity advanced by the plaintiff a case of weakness of mind and consequent helplessness, when the type of insanity connoted in the evidence was something quite different, and on that ground to give the plaintiff partial relief. There being concurrent decisions that there was no insanity of the type set up by the plaintiff, and it not being shown that there was any want of consideration for the mortgages, the decision of the Court of the Judicial Commissioner of Oudh dismissing the suits was upheld.—DURGA BAKHSH SINGH *v.* MUHAMMAD ALI-BEG,—**I. L. R., 27 A. 1; P. C.**

33. s. 12 and 65.—*Contract by Lunatic void.*

Money lent by a lunatic to another can be recovered in a suit on his behalf by his next friend under S. 65 of the Contract Act, even though the contract under which it was lent was void in law. JUGAL KISHORE *v.* CHEDA. **1. A. L. J. 43.** *See 30. C. 53 9 No. 28 Supra.*

34. s. 15—*Coercion—Fear of prosecution.*

A, while a prosecution was pending against him for assault, executed an agreement.

Held that it is wrong to say that the transaction was brought about by coercion or undue influence, as the only pressure if at all that was operating on A's will is the pressure of the consequences of his own lawless attack on another. MEHERALI *v.* SAKER KHANOOBAI. **7. B. L. R. 603.**

(But see s. 23 in the case of uncompoundable offence 6 B. L. R. 73=28. B. 326 No. Infra)

35. s. 16—*Undue influence—Attorney and Client—Remuneration of Attorney.*

It is a well recognized rule of law that an attorney is not entitled to any donation irrespective of his just and legitimate costs during the subsistence of the relationship.

Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they

Sup: Govt. acts (IX of 1872) *(Contd).*

can show, to the satisfaction of the Court, that the persons by whom the benefits have been conferred had competent and independent advice in conferring them.

On a claim by an attorney, based on a promissory note for services rendered, executed by a client in his favour, when there is a prayer for general relief, a decree may be passed for what would be a fair and reasonable remuneration. BROJENDRA NATH MULLICK *v.* LUCKHIMONI DASSEE **6. C. W. N. 816 = 29 C. 595.**

36. S. 16.—*Undue influence Sale—Inadequacy of consideration—Voidable contract.*

Inadequacy of consideration in conjunction with the circumstances of the indebtedness and ignorance of the vendor, are facts from which a Court may infer the exercise of undue influence.—BHIMBHAT *v.* YESHWANTRAO, **I. L. R. 25 B., 126.**

37. S. 16.—*Will—Execution by a Muhammadan parda-nashin lady—Undue influence.*

When dealing with the case of a will, or a deed, executed by a *parda-nashin* lady, a particular and peculiar *Onus* rests upon those who come forward to support the document to show that the executant thoroughly understood what she was doing, and was thoroughly and fully acquainted with the terms of the document she was executing, and the presumptions as to the knowledge of the executant of the contents of the document she is executing do not equally apply in the case of a *parda-naskin* lady as in the case of other persons.

The real question in all cases of this description is, was the testatrix of sufficient mental capacity to understand what she was doing, and did she understand what she was doing, and does the will give effect to her true intentions and wishes?

As to what constitutes undue influence in this country, a useful guide is afforded by Section 48 of the Indian Succession Act. Though the section does not apply to the wills of Muhammadans, yet it is a useful guide as to what does or does not constitute undue influence. KHAS MEHAL *v.* THE ADMINISTRATOR-GENERAL OF BENGAL. **V. W. N., C. 1901, p. 505.**

38. S. 16.—*Undue influence.*

To reap the benefit of section 16 of the Contract Act it is necessary for the defence to establish that the executants of a deed were induced to sign it because the plaintiff was in a position to dominate his will and used that position to obtain an unfair advantage.

When choice was given to the defendant of furnishing the security or being at once put into Court, *held,* that this did not amount to undue influence within he meaning of section 16 of the Contract Act. *10 All., 535, distinguished.* BANK OF BENGAL *v.* DIN DIAL. **9. P. L. R. 1901 = 36. P. R. 1901.**

39. S. 16 & 74.—*Undue influence—Penal rate of interest.*

Sup: Govt. acts (IX of 1872) *(Contd).*

In the absence of any plea or evidence that the defedant was in the clutches of an extertionate money lender the mere fact that the rate of interest agreed to by him was high is insufficient to raise a presumption of undue influence such as is contemplated in Section 16 of the Indian Contract Act.

A stipulation that the debtor shall, on default of paying principal at a certain time pay for the future interest agreed to by the debtor is not penal in its character and does not come within Section 74 of the Indian Contract Act.

The mere fact that the terms are exorbitant is by itself no ground for not enforcing an agreement. *32 P. R., 1890, followed, 55 P. R. 1901, referred to.* BULAKI MAL *v.* T. G. ACRES. **151. P. L. R. 1901 = 93 P. R. 1901.**

40. S. 16—*Undue influence—Unconscionable bargain—Interest—Dealings between banias and agriculturists.*

Although transactions between *banias* and *zamindars* require to be strictly scrutinised yet unless the Court is able to hold that the *zamindar* has been over reached, or that he has agreed to terms merely because the *bania* has been able to exercise undue influence over him, or unless it finds that the terms of the contract are inequitable and oppressive, it is not justified in setting at naught the contract between the parties.

Where the Divisional Judge disallowed the interest claimed by the plaintiff on the sole ground that the case was one beween a *bania* and a *zamindar* and there was no proof of undue influence and the terms regarding the interest were not unfair, the Chief Court, on appeal, allowed the full interest that had been agreed to between the parties. HEMRAJ *v* KHUDA BAKHSH, **80 P. L. R. 1901 = 13 P. R., 1905.**

41 S. 16.—*Undue influence—Deed by a married woman under husband's pressure.*

A married woman signed a deed under pressure of her husband in ignorance of its contents making her property a security for her husband's debts. Held the deed could not be upheld against her *2 Ves S. 627 followed.* TURNBULL AND Co. *v* DUVAL. **6. C. W. N. 815.**

42. S. 16—*Fiduciary relation—Father and adopted son—Gift by son to father—Undue influence—Onus—Delay and acquiescence—Limitation Act, Art. 91.*

The equitable doctrine of undue influence applies where the position of the donor to the donee was such that it was the duty of the donee (*e.g.*, father) to advise the donor (son), or even to manage his property for him. In such cases, the donee must prove that he has not abused his position, and that the gift made to him had not been brought about by any undue influence on his part. He must show that the donor had independent advice, and was removed from the influence of the donee, when the gift to him was made. In such

Sup: Govt. acts (IX of 1872) *(Contd.)*

cases, the question is not whether the donor knew what he was doing, but how the intention was produced, and whether all care and providence was exerted by his relatives as against those who advised him, *36 Ch. D. P. 145, 14 vescy 299 Referred to.*

Delay and acquiescence would not bar the donor's right to equitable relief, unless he knew that he had the right, or being a free agent at the time, deliberately determined not to enquire what his rights were, or to act upon them. Acquiescence, such as would bar a claim to relief, which would otherwise be good, is a question of fact *8 De. G. M. and G 133 Referred to.*

It makes no difference that the claim under the deed of gift is made, not by the donee, but by a third party; for, whoever receives the gift must take it tainted and infected with the undue influence and imposition of the person procuring it.

If a party's remedy, as plaintiff, to have an instrument avoided on the ground of undue influence, is time-barred, his right to say, by way of equitable defence, if sued, that the instrument ought not to be enforced, is not equally time barred. Delay is an equitable reply to the equitable defence, but it cannot amount to a statutory bar. Art. 91, Limitation Act, does not apply to such cases 12 B. 501 & 28 B. 639 Refd to: LAKSHMI DASS *v.* ROOP LAUL, **17 M. L. J. 19=2 M. L. T. 4=30 M. 169. (F. B)**

43 s. 16. cl: 1—*Fraud—Co-ercion—Undue influence—Borrower in urgent need of money—Promise to pay time-barred debt with interest—Unconscionable bargain.*

For S. 16, cl. 1 of the Indian Contract, 1872, first there must be subsisting between the parties some relation described in the clause; and, secondly, the dominating position arising out of that relation must have been used by one party to secure an *unfair* advantage over the other.

When a man, in urgent need of money, on account of his poverty and pecuniary difficulties, asks for a loan from another, that other is in one sense in a position to dominate the will of the former by proposing his own terms and getting the borrower to agree to them. The borrower's necessity is in such cases the measure of the terms agreed to. But that is not the vague kind of relation and domination contemplated by the plain terms of cl. 1 of S. 16 of the Act.

There are well-known relations such as those of guardian and ward, father and son, patient and medical adviser, solicitor and client, trustee and *cestui que trust* and the like, which plainly fall within cl. 1 of S. 16 of the Act. Where no such specific relations exist and the parties are at arm's length, undue influence must be proved by evidence; and in such cases, the nature of the benefit, or the age, capacity, or health, of the party on whom the undue influence is alleged to have been exerted are of great importance. In short, the test is confidence reposed by one party and betrayed by the other, which

Sup: Govt. acts (IX of 1872) *(Contd.)*

means there must be an element of fraud or coercion, under either of which the acts constituting undue influence must range themselves.

The term "unfair advantage" in that clause means an advantage obtained by *unrighteous* means.

A promise to pay a time-barred debt is valid and so is a promise to pay such a debt with interest.

A Court of Equity will not set aside a contract merely because it flows from moral, not legal, obligations, unless it is proved that the defendant was forced, tricked or misled into it by the plaintiff by means of fraud, using that word not merely in the restricted sense of actual deceit but in the larger sense of an unconscientious use of power arising out of certain circumstances and conditions and showing that the defendant being victimised by the plaintiff's unfair and improper conduct was unable to understand what he was about. GANESH NARAYAN *v.* VISHNU RAMCHANDRA. **9 B. L. R. 1164 =32 B. 37.**

44. S. 16.—Pardanashin *lady. Execution of bond by—Undue influence—Consideration—Burden of proof—Issue. Omission to frame—Irregularity.*

The plaintiff sued the defendant, his maternal uncle's daughter, a *pardanashin* lady, residing at Delhi, on a registered bond for Rs. 10,000, executed by her. The defendant had been brought up at the house of the plaintiff and married from there. The bond was registered at the plaintiff's house at Hathras in the absence of the defendant's husband and recited that the money borrowed had been spent in constructing a house. The defendant admitted execution of the bond and pleaded that the bond was without consideration and fictitious having been executed for fear of her husband who was addicted to extravagance and waste and that some money had been advanced by the plaintiff to her in lieu of which a garden had been sold to him. The plaintiff's replication was that he had paid cash both for the garden and the bond. The original Court dismissed the suit and held that payment of consideration for the bond was not proved. On appeal, it was contended that the execution and registration of the bond having been admitted the burden of proving want of consideration lay on the defendant and that the original Court should have framed a specific issue as to the passing of consideration for the sale of the garden.

Held, that though the *onus* of proving want of free consent and of consideration for the bond lay on the defendant yet under the circumstances of the particular case it was shifted on the plaintiff, who was in a position to completely dominate her Will and she was powerless to resist him. In such a case strictest proof of good faith and fair dealing was necessary and the plaintiff had failed to adduce it.

Sup: Govt. acts (IX of 1872) (*Contd.*)

Held, also, that the issue as to the payment of the purchase-money for the garden was subsidiary and the plaintiff was not prejudiced in any way by the omission. 13 *M. I. A.*, 573. (*P. C.*), 12 *B. L. R.*, 304 (*P. C.*), 21 *All.*, 71 (*P. C.*), *referred to.* HOTI LAL *v.* MUSSAMMAT RAM PIARI. **77 P. R. 1903=9 P. L. R. 1904.**

45. s. 16.—*Undue influence—Loan to disqualified proprietor—Compound interest, unconscionable stipulation.*

A disqualified proprietor under the provisions of the Oudh Land Revenue Act, through his improvidence, was largely indebted and in urgent need and was in a helpless position as his estate was under the control of the Court of Wards and it appeared that his lender of the loan in question was aware of this. His allowance from the Court of Wards was not sufficient to pay the compound interest stipulated for.

Held, that there was no fraud in the matter and no pressure was put upon the borrower, but the position of the parties was such that the lender was "in a position to dominate the will" of the borrower within the meaning of S. 16 of the Act; and it having been concurrently found by the lower Courts that the stipulation to pay compound interest at the rate of 18 per cent. per annum was in the circumstances unconscionable, the Judicial Committee agreeing with them *held* that the lender used his position to demand more onerous terms than were reasonable.

Held, further, that the Subordinate Judge was wrong in deciding the case in accordance with what he supposed to be the English equitable doctrine. He ought to have considered only the terms of S. 16 of the Indian Contract Act.

Apart from the recent statute, an English Court of Equity could not give relief from a transaction or contract merely on the ground that it was a hard bargain, except perhaps where the extortion is so great as to be of itself evidence of fraud. *11 M. I. A. 468 and 9 I. A. 182 referred to.* DHANIPAL DAS *v.* RAJA MANESHAR BAKHSH SINGH. **4 C. L. J. 1 (P. C.)=1 M. L. T. 205=3 A. L. J. 495=8 B. L. R. 491=10 C. W. N. 849=16 M. L. J. 292=9 O. C. 188 (P. C.).**

46.—s. 16. *Unconscionable bargain.*

When a person aged 28 years, the son of a wealthy father, but of profligate habits and greatly in need of money, his father having refused to supply him, executed a bond to secure a sum of Rs. 500 with interest, which amounted to Rs. 37-8-0 per centum per annum with six monthly rests. The bond also stipulated that the borrower could not repay the money within three years, and if he did pay within three years, he should be obliged to pay three year's interest at the rate mentioned. *Held* that though it could not be said that the execution of this bond was procured by means of undue influence or that the rate of interest was penal, nevertheless the bargain was an unconscionable one against which the Court might properly give relief. The High Court affirmed the decree of the lower appellate Court which gave the plaintiff the principal sum with simple interest at the rate of 24 per centum per annum. 9 A. 228, 25 A. 284, 12 C. 215, L. R., 20 I. A. 112. L. R. 10 I.A. 127 20 I. ref to.—BALKISHAN DAS v. MADAN LAL. **A. W. N. 1907 P. 55=4 A. A. L. J. 222=29 A. 303.**

47. s. 16, 19 A. *Undue influence—Unconscionable transaction.*

A filed a suit on two promissory notes, one carrying interest at 75 per cent. per annum and the other at 60 p. c. per annum. It appeared that when B passed the promissory notes in question, A was in a position to dominate his will.

Held, (1) that reading S. 16 and 19 A. together, the Court had the power to interfere and relieve a defendant against what might appear to the Court unconscionable transactions; (2) that A should under the circumstances of the case be allowed to claim interest at 24 per cent. per annum.—POMA DANGRA v. WILLIAM GILLESPIE. **9 B. L. R. 143=31 B. 348.**

48. s. 16 & 74. *Transfer of Property Act (IV of 1882), S. 86, 88 & 104—Mortgage-decree—Direction as to interest—C. P. C. S. 209—Penalty,—Interest at increased rate from date of bond—From date of default—Undue influence—Borrower in urgent need—Mortgagee retaining sums out of the consideration money as commission.*

Urgent need of money of the borrower does not, of itself, place the lender in a position to exercise undue influence on the borrower 33 I A 118 explained.

Where, out of the consideration money of a mortgage-bond, the mortgagor agreed to the mortgagee's retaining certain sums as commission.

Held, that the mortgagor could not, years after the execution of the mortgage, be allowed to turn round and say that he had not received full consideration.

When a stipulation for increased interest is retrospective, *i. e.*, the increased interest runs from the date of the bond and not merely from the date of default, it is always to be considered a penalty, because an additional money payment in that case becomes immediately payable by the mortgagor.

S. 74 of the Contract Act does not prescribe that increased interest running from the date of default must be disallowed altogether, if found to be a penalty. It directs that the party complaining of the breach shall receive from the party, who has broken the contract, reasonable compensation, not exceeding the amount of the penalty stipulated for.

Compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the

ordinary and usual stipulation, may well be regarded as in the nature of a penalty.

The Judicial Committee did not intend to lay down in *Rameswar Koer v. Syed Nawab Mehdi Hossein Khan 26 C. 39* that, in making a mortgage decree, the Court should allow interest at the mortgage rate up to the date of the actual realisation of the decretal money.

The scheme and intention of the Transfer of Property Act shows that a general account of the mortgagee's dues should be taken once for all, and the aggregate amount stated in the decree for principal, interest and costs due on a fixed day, and that, after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment and the rights of the mortgagee should thereupon depend, not on the contents of his bond, but on the directions in the decree.

Held, that the High Court was right in allowing interest at the Court rate from the day fixed for redemption, *28 I A 35 F 24 C 766, 21 M 364 ref. to.* RANI SUNDER KOER v. RAI SHAM KRISHEN, **11 C. W. N. 249 (P. C.)=5 C. L. J. 106=4 A. L. J. 109=17 M. L. J. 43=2 M. L. T. 75=9 B. L. R. 304=34. C. 150.**

49. s. 16 *Undue influence—enforcement of gifts by a client to a solicitor's clerk.*

A gift by a client to a solicitor's clerk cannot be enforced unless it is proved that the client had independent advice. HARIVALAB DAS v. BHAI JIVAJEE. **4. B. L. R. 469=26. B. 689.**

50. s. 16—*Undue influence—Pressure and coercion.*

As coercion is defined in the Contract Act its idea is clear, but pressure is not defined and the judge upon such plea is invited to wander and knows not where. It must be borne in mind that pressure includes coercion. VULLEY MAHOMMED v. DATTU BHOI **25 B. 19.**

51. s. 16—*Cl. (3)—Undue influence—Unconscionable transaction—Pro-note—s. 118 Act XXVI of 1891 N. I. A.—*

A sued B. on a pro-note for Rs. 10,000. B. pleaded that he was a minor and a youth of dissipated habits when he executed the promissory note and that he received only Rs. 25/- in cash and a pair of *kards* worth Rs. 150/-. A was a professional money lender.

Held that under s. 118 Negotiable Instruments Acts B. had to prove non-payment of consideration, but as the statement of A showed that Rs. 100,000 was not a true consideration, s. 16 contract Act was applicable, the transaction not being in the ordinary course of business, and A being a professional money lender usurious and extortionate, and B a foolish young man of reckless dissipated and extravagant habits was dominated by A's will and the onus lay upon A to prove that the consideration was paid. RAM RAGHUBIR v. JAFAR MIRZA. **5 O. C. 307**

52. s. 16—*Undue influence —Hard and unconscionable bargain —Contract voidable—*

To render a contract voidable on the ground of undue influence there must be evidence of undue influence as required by S. 16. A high rate of interest which would induce a Court of Equity to give relief against a bargain as being on that account hard and unconscionable is not by itself sufficient evidence of undue influence. Additional circumstances must be proved and they should be considered in the light of justice and equity. Where the parties are not on equal footing, when it appears that the borrower was not aware of the real nature of the bargain so that he put his signature to a document which in fact imposed terms very different from those appearing on the face of it where the actual rate of interest is many times higher than what appears on the document, where the borrower when pressed for payment for what appears due on such document has to renew on still more exorbitant terms—all these additional circumstances are sufficient to make out a *prima facie* case of undue influence so as to throw the ouns on the lender to disprove it.—CHALISING MOOLCHAND v. LIEUT. R. H. WHITCHURCH. **9 B. L. R. 1296.**

53. S. 16—*Unconscionable covenant for pre-emption for a fixed sum irrespective of market price—Mortgage suit for redemption.*

This was a suit for redemption of a mortgage executed in 1872 filed in 1897. The mortgagors had agreed by one of the terms in the mortgage-deed to assign the land mortgaged to the mortgagee for a price fixed therein, if they ever wished to assign the land. The mortgagors sold their interest to a third party in 1873. The plaintiff was representative in interest of the vendee. The mortgagee contended that the suit for redemption was barred by the covenant for pre-emption contained in the mortgage-deed.

Held, over-ruling the contention, that the suit was not barred.

Per Shephard J.—Under the covenant the defendant had no interest in the property, for a contract of sale creates no interest in the property to which it relates. His right could be no other than a right to specific performance under Section 27 of the Specific Relief Act. The plaintiff was not a transferee who took with notice of the contract sought to be enforced. Assuming that there was notice of the contract and that it was otherwise a valid contract, the defendant could not set up the defence urged by him, as no suit could now be brought to enforce the right of pre-emption.

Per Bashyam Aiyangar, J.—A mortgagee may stipulate for the collateral advantage of a right of pre-emption in consideration of his advancing the mortgage loan, if such advantage does not directly or indirectly 'clog the equity of redemption.' The principle underlying this rule is that the option of sale is still left with the mortgagor, and he may redeem or sell as he likes; the only stipulation

Sup: Govt. acts (IX of 1872) (*Contd*).

being that, in the event of his choosing to sell, he shall give the mortgagee the refusal.

On the ground that the right of redemption was subsisting and had not been extinguished at the date of the suit, and also on the ground that the defendant had failed to show that he was either at the date of the suit, or was now, in a position to enforce his right of pre-emption, the plaintiff was entitled to the decree for redemption claimed by him. RAMASWAMI PATTAR *v.* CHINNAN ASARI. **M. L. J., 1901, P. 132.**

54. S. 16,—*Unconscionable bargain or not—Interest—Compound interest—Unconscionable bargain—Unfair dealing—Delay in suit—Urgent necessity*—Pardanashin lady.

A bargain as to compound interest in a mortgage bond, which is not itself open to objection as hard and nnconscionable, cannot be held to have assumed that character by reason of the delay on the part of the creditor in suing on the bond. *Madho Singh* v. *Kashi Ram*, (I. L. R. 9 All 228), dissented from. When the interest charged in a mortgage bond is very high and the debtor is full of capacity, the general rule is that the Court will not grant relief without proof of unfair dealing or undue pressure or influence on the part of the creditor, or that the creditor has taken unfair advantage of the debtor's weakness and necessities, or that the debtor has been over-reached, tricked or deceived, or that he was ignorant of the unfair nature of the transaction. The case of a female debtor in fiduciary relation to the creditor and of an expectant heir are exceptions to the general rule. *Zebonnissa* v. *Brojendro Coomar Roy Chowdhry*, (21 W. R. 252); *Mackintosh* v. *Wingrove*, (I. L. R. 4 Cal. 137); *Magniram Marwari* v. *Rajpati Koeri*, (I. L. R. 20 Cal. 366); *Surya Narain Singh* v. *Jogendra Narain Roy Chowdhry*, (I. L. R. 20 Cal. 360) followed. *Sudisht Lal* v. *Sheobarat Koer* (I L. R. 7 Cal. 245; L. R. 8 I A. 39); *Nistarini Dassi* v. *Nundo Lall Bose* (I. L. R. 26 Cal. 891); *Khas Mahal* v. *The Administrator-General of Bengal*, (5 C W. N. 505); *Kamini Sundari Chawdhrani* v. *Kali Prosunno Ghose* (I. L. R. 12 Cal. 225; L. R. 12 I. A. 215), and *Beynon* v *Cook*, (L. R. 10 Ch. 389) distinguished. The mere fact that the debtor was in urgent need of money is not sufficient in itself to raise the presumption that the creditor took unfair advantage of his necessity.—UMESH CHANDRA KHASNAVIS *v.* GOLAP LAL MUSTAFI, **I. L. R., 31 C. 233.**

55. S. 16.—*Unconscionable agreement—Interest. Exorbitant rate of.*

The bond in suit stipulated payment of compound interest at Rs. 2 per cent. per mensem with monthly rests. It appeared that the executant of the bond was, at the time the bond was executed, a youth of about eighteen years of age and also a spendthrift and a drunkard.

Held, that the bond itself bore upon its face the impress of unconscionable dealing,

Sup: Govt. acts (IX of 1872) (*Contd.*)

the rate of interest chargeable being so exorbitant—*10 Ch. App., 391; 12 Cal., 225: 9 All., pp. 74 and 228, referred to.* KIRPA RAM *v.* SAMI-UD-DIN AHMAD KHAN. **A. W. N. 1903. P. 44.**

56. S. 16–Unconscionable bargain opposed to public policy—Gambling in litigation. See Champerty, DEBI DIAL SAHU *v.* BHAN PARTAB. **8. C. W. N. 403=31. C. 433. P. C.**

57. S. 16 & 17.—*Fraud. Plea of—Estoppel Voidable contract—Undue influence.*

Fraud does not make a transaction void but only voidable at the instance of the person defrauded.

A defendant is entitled to resist a claim made against him by pleading fraud and he is entitled to urge that plea, though he may not have himself brought a suit to set aside the transaction, and is not under certain circumstances precluded from urging that plea by the lapse of time.

Where a person is in a position to dominate, then the contract is to be regarded as induced by undue influence RANGNATH SAKHARAM *v.* GOVIND NARSINV. **6. B. L. R. 592=21 B. 639.**

58. S. 16, 19 (a) and 23.—*Ratification of contract caused by undue influence—disqualified proprietor—borrowing money without sanction of Court of Wards.*

D, a big talukdar, was declared a disqualified proprietor and his properpty was taken charge of by the Court of Wards. While thus incharge of the Court D. borrowed Rs. 4 500 from P. and executed a bond for the same agreeing to pay within two years the money with interest 24/- per cent a year. Interest was to bear compound interest if not paid up every six month. Interest was to be paid out of his monthly allowance of Rs 1250/- Three years after, D executed another bond for Rs 10000/- consisting of the principal and interest and compound interest of the previous bond and Rs. 1250/- taken in cash. Interest was fixed at Rs 18 per cent per year, and the time of payment was 7 years. Six years after the execution of this bond D's property was released by Court of Wards. Nothing being paid, P. brought a suit for Rs 42,000/- on this bond. B. contended the transaction was forbidden by Oudh Land Revenue Act XVII of 1876, S. 173 and 174 relating to disqualified proprietors and the Court of Wards, or was against public policy and void under S. 23, Contract Act.

Held that the bonds were not forbidden by the Land Revenue Act. The bonds being legal and not infringing any established principle of law, were not opposed to public policy. The transactions were not therefore void under S. 23 Contract Act.

Held that an Act must be construed according to the intention of the persons who passed it and such intention must be gathered from what they have said in the Act. As

Sup: Govt. acts (IX of 1872) *(Contd).*

to the contention that the bond sued on amounted to an unconscionable bargain.

Held that, under the circumstances of the case it was clear that D's consent was caused by undue influence under S. 16 Contract Act and the contract was voidable at the option of D.

Held also that ratification of a contract caused by undue influeuce must be proved by the clearest evidence.

Held further, that D had received benifit under the transaction and uuder S. 19. (*a*) Contract Act a transaction could be set aside upon terms. MUNESHUR BAKSH SINGH *v.* AUSERILAL. **5. O. C. 256.**

59 s. 16—*Disqualified proprietor, competency—Oudh Land Revenue Act of 1876, ss. 173 and 174—Undue influence—Unconscionable bargain—Fraud—Delay in suit upon a valid contract no ground for impeaching its validity*—Onus *of influence.*

A sued B for the recovery of Rs. 32, 837, principal aud interest due on a registered bond executed by B on the 27th January, 1896, at which time he was disqualified from the management of his estate under S. 162, cl. (g) of the Oudh Land Revenue Act of 1876, in favour of A for Rs. 9,950. The bond was payable in two years at Rs. 1-8-0 *per cent., per mensem* interest, in default, compound interest at the same rate was chargeable with yearly rests till the date of payment. B pleaded that he was not bound by the deed as its execution had been procured by the exercise of undue influence and that it was an unconscionable transaction. In appeal, it was further contended by B that the contract was invalid as, at the time of entering into it, he was a disqualified proprietor.

Held that there was no provision, in the Oudh Land Reveuue Act of 1876, which prevented B from entering into the contract suit 5 O. C. 256 followed.

Held, further, that the fact that B was disqualified from managing his estate was not in itself sufficient to bring B within the category of those classes of persons whoses upposed weakness of intellect or impaired capacity for contractual purposes *prima facie* suggest the infereuce that they have been imposed upon, so that a Court of Equity presumes that when they have made a very hard bargain, to put it at the lowest, they have been overreached and consequently places that *onus probandi* that the bargain was fair on the other party.

It is incumbent on a party, be he plaintiff or defendant, who seeks to set aside a contract on the ground of undue influence or fraud, to give in his pleadings full particulars of the circumstances on which he relies as the basis of his plea. It is not enough to boldly assert that fraud vitiated the transaction.

On the evidence, the Court held that the contract was not induced by undue influence such as is contemplated by S. 16 of the Contract Act, and was not unconscionable.

Sup: Govt. acts (IX of 1872) *(Contd).*

If a contract at its inception and completion cannot be impeached as unfair in a Court of Equity, a Court cannot impeach it subsequently because merely owing to delay, wilful or otherwise, in instituting the suit to recover upon it, a small pecuniary liability has grown into a big one, RAJA MUNESHAR BAKSH SIHGH *v.* SHADI LAL. **8. O. C. 210.**

60 s. 16—*Interest—Unconscionable bargain—Bond—Compound interest.*

One Sami-ud-din Ahmad Khan, on the 10th of November, 1892, borrowed from Kripa Ram and Ghasi Ram Rs. 900, for which he gave a bond bearing compound interest at Rs. 2 per cent. per mensem, with monthly rests, and mortgaging a 10-biswa share in a village and half pakka house in Moradabad. The obligor was, at the time of the execution of this bond, a young man of 18 years of age, a spendthrift and a drunkard. On the 13th of June, 1900, the mortgagees sued on the bond to recover Rs. 5, 380-9-0 from the surplus proceeds of the sale of the mortgaged share which had taken place in execution of a decree on a prior mortgage. The Court of first instance gave the plaintiff a decree but allowed only simple interest at the rate stipulated for in the bond. On appeal, the High Court sustained the lower Court's order as to the interest, holding that the bargain was an unconscionable bargain, against which that Court had properly relieved the defendant mortgagor. *Beynon* v. *Cook* (10 Ch. App. 391); *Kamini Sundari Chaodhrani* v. *Kali Prosunno Ghose*, I. L. R, 12 Cal. 225); *Lali* v. *Ram Prasad* (I. L. R., 9 All. 74) and *Madho Sing* v. *Kali Ram* (I. L. R, 9 All. 223), referred to. —KRIPA RAM *v.* SAMI-UD-DIN AHMAD KHAN. **I. L. R., 25 A. 284.**

60 (a) S. 16—*Undue influence—mortgage executed while under arrest in execution of decree*

B. executed a mortgage deed, the consideration for which was a previous money decree, it was found that B. was arrested and kept in custody and was released on or just before executing the deed, *held*, that the deed was not void on the ground of undue influence, merely because the deed was executed, while the defendant was under arrest in execution of the previous money decree (*4 A 352 Dis*) MUL CHAND *v* IMAM BAKHSH, **51 P. R. 1908.**

61. S. 17—*See S. 16 & 17—21. B. 639 No. 57 Supra.*

62. S. 19—*See S. 11, 19, 64, 64—30. C. 539 No. 28 Supra.*

63. S. 19 *See S. 16—5. O. C. 256— No. 58 Supra.*

64. S 19—*See S. 16, 19—31. B. 348 No. 47 Supra.*

65. S 19 *and 64 Provincial Small Cause Courts Act (IX of 1887), Schedule II, Article 15—Suit for damages after avoiding sale of property on the ground of fraud—Jurisdiction.*

The plaintiff sued the defendant, a horse dealer, in the Small Cause Court for refund

Sup: Govt. acts (IX of 1872) *(Contd)*

of the price of a mare sold by the latter to the plaintiff, on the allegation that the mare had a cracked hoof and the defendant had filled up the crack with some substance to defy detection. The Court found that the defendant was guilty of active fraud which none but an expert was capable of detecting and decreed the claim. On revision it was contended that the Small Cause Court had no jurisdiction to try the suit as it was one for rescission of contract and was excluded from the jurisdiction of the Small Cause Court by article 15 of the second schedule of the Limitation Act.

Held, rejecting the application for revision, that the contention was not valid, the suit was not for rescission of the contract but for damages after avoiding the sale on the ground of fraud. ABDULLA KHAN *v.* GIRDHARI LAL.—**49. P. R. 1904.**

66 S. 20.—*Mistake—Contract—Proposal with unqualified assent—Mistake in expression—Common mistake—Unilateral mistake—Contracting party not able to read—Contract differing from that pretended to be read.*

It is of the essence of a contract that there should be (expressly or by implication) a proposal to which an unqualified assent has been given; without such assent there is no contract, the minds of the contracting parties are not at one. Mistake in expression may be either common or unilateral. Mistake in expression implies that the minds of the parties are not at one on that which is expressed; but it does not follow that in every case, where there in fact has been such mistake, there is no contract. Practical convenience dictates that men should be held to the external expression of their intentions, unless this be outweighed by other considerations; and to this legal effect is given by the law of evidence, which permits oral proof at variance with documents only in certain cases; in the rest, the proof, if it be of mistake, is not received, so that the mistake does not come to light, and in a Court of law does not exist. The Court, administering equitable principles, permits mistake to be proved when it is common; that is, where the expression of the contract is contrary to the concurrent intention of all the parties. If such mistake be established, then the Court can give the relief of rectification but what is rectified is not the agreement, but the mistaken expression of it. The general rule is that the intention of contracting parties is to be gathered from the words they have used. Where the mistake is unilateral, it does not ordinarily affect the rights which are the legitimate consequence of the words, though it may affect the remedy that will be awarded against the party in error. But mistake known at the time to the other party may be proved and performance in accordance with the terms of the error will not be compelled. A mistake even not known has legal consequences, provided there can be restoration of all parties concerned to their

Sup: Govt. acts (IX of 1872) *(Contd).*

original position. Where a contracting party, who cannot read, has a written contract falsely read over to him and the contract written differs from that pretended to be read, the signature on the document is of no force because he never intended to sign and therefore in contemplation of law did not sign the document on which the signature is. If a person executes a document knowing its contents but misappreciates its legal effect, he cannot deny its execution. —DAGDU *v.* BHANA, **I. L. R., 28 B. 420; 6 B. L. R. 126.**

67 s. 20, 22.—*Letters Patent, Clause 12—Contract—Sale of land situated outside Original jurisdiction of High Court—Mistake, common or unilateral—Rectification of Contract—Fraud—Misrepresentation—Specific Relief Act (I of 1877), Section 12—Specific performance—Decree in* personam.

The plaintiff, a Bombay merchant, brought a suit on the Original Side of the High Court against the defendant who resided and carried on business in Bombay to get specific performance of an agreement to sell land situated outside the Original jurisdiction of the High Court, and prayed "that the defendant may be ordered specifically to perform the said agreement, and upon his making out a marketable title to the said land to execute a conveyance thereof in favour of the plaintiff." The defendant pleaded that at the time of agreement the plaintiff had acted fraudulently and misrepresented the real facts; that the agreement contained a common mistake of the parties and should be rectified so as to convey the real understanding; objection was also taken on the score of jurisdiction, and it was alleged that the agreement was signed outside of Bombay.

Held, that without regard to the ultimate end or purpose of the suit, it was immediately a suit to enforce the specific performance of a contract and fell under section 12 of the Specific Relief Act, and as such was within the jurisdiction of the High Court. The High Courts in India have all the powers of a Court of Equity in England for enforcing their decree *in personam.*

In order to obtain rectification of a contract on the ground of mistake there must be a mistake common to both parties, and the evidence of it must be strongest possible. If the mistake is unilateral, there must be fraud or misrepresentation amounting to fraud.

Where two adult men have contracted at arm's length and with their eyes open, it is eminently desirable on principle that they be held to the terms of their bargain, and this principle must be not less jealously guarded in India than in England.

The Courts are reluctant to refuse specific performance on the ground of mistake unless the defendant prove something further. What this further evidence should amount to, has been thus expressed "that a hardship amounting to justice would be in-

Sup: Govt. acts (IX of 1872) (*Contd*).

flicted upon the defendant by holding him to his bargain. HUNSRAJ MORARJEE *v.* RUNCHORDAS DHARSEY. **7 B L. R. 319.**

68. S. 20, 30 & 65—*Advance on risk (yogyam) of ship—Marine Insurance—Contract by way of wager.*

In a document, dated 3rd August 1896, signed by defendants and addressed to plaintiff, it was recited that plaintiff had lent a sum of money to defendants on the risk or security ("yogyam") of a ship belonging to defendants "now under sail to the Nicobars" from Negapatam: and the defendants stipulated that "as soon as the said ship starts for and reaches the Nicobar Isles and thence sets sail and goes to Rangoon, Moulmein and from there starts again and reaches Negapatam . . . . that is, as soon as the said ship shall come back to the Negapatam harbour again, we shall repay to you on the expiry of eight months from 23rd July 1896" the sum advanced with interest. The ship had left Negaptam on 23rd July 1896 and was lost at sea three days later. Plaintiff sued defendants for the sum advanced, on the ground, among others, that as the vessel had been lost before the date of agreement, the latter was void, and the defendants were liable to refund the amount advanced.

Held, that he was not entitled to recover. The risk which formed the basis of the agreement, according to its true construction, commenced from 23rd July 1896, as set out in the document, because it was on that day that the vessel sailed from port and commenced to incur the perils of the deep. The agreement was consequently not void under S. 20 of the Contract Act, nor were the defendants bound, under S. 65 of that Act, to restore to plaintiff the sum they had received under its terms. Such an agreement could not be held to be in any sense a policy of marine insurance.

Per DAVIES J.—The suit should be dismissed under S. 30 of the Contract Act, on the further ground that the agreement was one by way of wager. VAIPAKANDU MARAKAYAR *v.* ANNAMALAI CHETTI. **I. L. R. 25 M. 561.**

68. S. 20, 65.—*Unregistered sale deed—evidentiary admission and admissions by the pleadings—Transfer of Property Act, S. 55 (2)—Caveat emptor—Restoration of purchase money on sale being void.*

There is a distinction between evidentiary admissions and admissions by the pleadings. S. 58 governs admissions by the pleadings. Although a sale deed is admissible in evidence as being unregistered, an admission by the defendant, in his preliminary examination of an agreement alleged in the plaint, to the effect that he would make good any loss the plaintiff might incur in respect of the property sold, is not excluded by S. 91, Evidence Act, and renders proof of the agreement unnecessary.

A sued to recover a certain sum, alleging that he bought for that sum a piece of land as a house site from B and C, they agreeing to make good any loss he might incur in respect of the transaction, and that the Collector thereafter declared the land to be state property and refused permission to him to build on it. *Held* that, in the face of such an agreement, the rule of *caveat emptor* cannot be applied. Apart from the agreement, it is doubtful whether the maxim itself is current in India and retains validity in respect of the vendor's title. Moreover, the principle of S. 55 (2) of the Transfer of Property Act, under which the seller passes a covenant for title, ought to be followed as a matter of justice, equity and good conscience, although the Transfer of Property Act itself is not in force in Upper Burma. Again, both the parties believed at the time of the sale that the land was *bobabaing* and they had no knowledge or warning that it would be subsequently declared to be State. This is, therefore, such a mistake as is referred to in S. 20 of the Contract Act, and S. 65 of that Act requires the sellers to restore or make compensation for the advantage they receive, apart from any agreement which they admitted to have made. U. B. R. (1897–01), II, 379, F. SADHU *v* NGA SI GYI,—**U. B. R. (1907), E. 1.**

70. S. 20, 143 & 144—*Administration bond, liability of sureties—Mutual mistake—Indian Succession Act (X of 1865), S. 242, 256, 257, 262, and 269.*

A made false representations to the Court and thereby obtained an order granting him Letters of Administration to the estate of a deceased person, and induced two other persons to stand surety for him by similar misrepresentations and showing them a copy of the said order, whereupon they, in ignorance of the true state of affairs, executed an administration-bond, and Letters were issued in his favour.

Held per MACLEAN, C.J., MITRA and GEIDT, J.J. (HARINGTON and STEPHEN, J.J. *Diss*)—The case is not governed by S. 20 of the Indian Contract Act, which says that, where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. The fact that A was not entitled to the Letters is a fact not essential to the agreement between the Court and the sureties. The Court simply said that it would not issue the Letters of Administration unless A and the sureties gave the bond.

Held per HARINGTON and STEPHEN, J. J.—A mistake as to the authority of the person guaranteed is a mistake on a matter of fact essential to the agreement, because it directly affects the risk undertaken by the sureties. They guaranteed the due performance of the duties of an administrator by a person authorised, for that purpose, by the beneficiaries and not by a person not so authorised. They do not undertake the heavier risk in the letter case: The case, therefore, falls within the scope of S. 20 of the Contract Act. 17 W. R. (Eng.), 139 and 2 Q.B. 494, *Exp.* and *D.* A contract may be void so far as the

Sup: Govt. acts (IX of 1872) *(Contd).*

principal debtor is concerned but the surety is not necessarily discharged (1757) 1 Bur. 373 and 19 B. 697, *R. Per* GEIDT, J.—The mistakes which invalidate contracts of guarantee are specified in Ss. 142 and 143 of the Indian Contract Act. A mistake induced by the principal debtor does not come within the sections. DEBENDRA NATH DUTT AND BANKU BEHARI BANERJEE *v.* THE ADMINISTRATOR-GENERAL OF BENGAL, **3 C. L. J. 422 (S. B.)=10 C. W. N. 673 =33. C. 713.**

71 S. 20 *-Mistake Not prarenting party from claiming protection of a special covenant. 17 M. L. J. 167; 30 M. 254,*

72 S. 21.—*Bona fide mistake of law:*—Held, that an innocent mistake of law common to all the parties to a contract could afford no ground for an action for rescission. 17 C. 291 dist.—SABIHAN BIBI *v.* MADHO LAL. **1907 A. W. N. 1907; 4 A. L J. 475.**

73 s. 21. *Hindu Law—Will, construction of—Intention of testator—Voidability of restrictions and qualifications imposed—Trust—Right of suit—Limitation—Doubtful right—Compromise.*

When from the terms of a will taken as a whole, the intention of the testator to bequeath an estate of inheritance is manifest, the mere fact of some of the restrictions and qualifications imposed by the will being void does not affect the validity of the estate conveyed by it. *Rai Kishori Dasi* v. *Debendra Nath Sircar*, (I. L. R. 15 Cal. 409; L. R. 15 I. A, 37), *La'it Mohan Singh Roy* v. *Chukkun Lal Roy*, (I. L. R. 24 Cal. 834; L. R. 24 I. A. 76), and *Rai Bishenchand* v. *Asmaida Koer*, (I. L. R. 6 All. 560; L. R. 11 I. K. 165) followed; *Shookmoy Chandra Das* v. *Monoharri Dassi*, (I. L. R. 11 Cal. 684; L. R. 12 I. A. 103), distinguished. A Hindu governed by the Mitakshara law is competent to maintain a suit for partition of an ancestral property even when his father and grandfather are both alive, if they allow the property to be wasted and the plaintiff's interest imperilled, *Suraj Bunsi Koer* v. *Sheo Persad Singh*, (I. L. R. 5 Cal. 148; L R. 6 I. A. 88), *Jogut Kishore* v. *Shib Sahai*. (I. L. R. 5 All. 430) and *Subba Ayyar* v. *Ganasa Ayyar*, (I. L. R. 18 Mad. 179), followed. *Apaji Narhar Kulkarni* v. *Ram Chandra Ravji Kulkarni*, (I. L. R. 16 Bom. 29) dissented from. When a deed of relinquishment operating to extinguish the plaintiff's right to a property is not void *ab initio*, if it is not set aside by a suit brought within the period of three years prescribed by law, the plaintiff's right to the property, if any, is barred. *Raghubar Dyal Sahu* v. *Bhikya Lal Misser*, (I. L. R. 12 Cal. 96), and *Malkarjun* v. *Narhari*, (I. L. R 25 Bom. 337; L. R. 27 I. A. 216) followed; (I. L. R. 28 Cal. 460), distinguished. The compromise of a doubtful right is a sufficient foundation for an agreement amongst the members of a family, and shall be binding on them. *Bibee Solmon* v. *Abdool Azeez*, (I. L. R., 6 Cal. 687), distinguished. RAMESWAR PROSAD SINGH *v.* LACHMI PROSAD SINGH. **7 C. W. N 688=31. C. 111.**

73(a) s. 22—*See S. 45 and 22—76 P. L. R. 1905—No. 177 Infra.*

74 s. 23—*Act I of* 1886 *Madras, Sections 22 and 21 (e)—License to sell arrack—Sub-letting without permission of Collector.*

The plaintiff, a license-holder for sale of *arrack* sued the defendant for value of *arrack* supplied and profits according to an agreement executed by the defendant. It was contended for the defendant that the agreement was illegal, as one made without the sanction of the Collector required by section 22 of Act 1 of 1886, and the clause of the license granted to the plaintiff.

Held, that section 22 imposed a duty on the lessee or assignee, that is, on the defendant, but clause 21 of the plaintiff's license which was issued under section 21 *(e)* imposed the duty on the plaintiff also as grantee of Government to obtain the Collector's license for his lessee, and that the contract was therefore illegal. PAKURU DASU *v.* BHEEMUDU. **M. L. J. 1903. P. 133=26 M. 430.**

75. S. 23.—*Excise Act (VII of 1878 Bengal). Object of—Public policy—License—Transfer of liquor shop without renewal of license in favour of transferee, whether illegal—Contract of indemnity.*

The prohibition by the Excise Act of sale of liquor without a license is based upon public policy and on moral grounds and the purpose of the Act is not confined to the protection of the revenue.

The purpose of the Excise Law is to make the license a personal privilege not transferable by one private individual to another.

The plaintiff who carried on the business of a licensed vendor of liquor sold the stock-in-trade of his shop to the defendant, to carry on the business of vendor of liquor without obtaining a fresh license and the defendant in consideration of this agreement promised to pay monthly a sum fixed by the parties and to indemnify the plaintiff against all claims and demands against the shop. The plaintiff brought a suit to recover a sum as indemnity for alleged breach of defendant's promise and for monthly instalments that had fallen in arrears.

Held, that the indemnity was inseparable from the rest of the contract which was illegal and void, and the suit did not lie. BHEARI LAL SHAHA *v.* JOGODISH CHANDRA SHAHA. **8. W. N. C. 635=31. C. 793.**

76 S. 23—*Contract—Illegal contract—Excise Act (XII of 1896), Rules under—Excise—License. Transfer of—*

When a person to whom license for sale of liquor is granted agrees to admit another to a share in the profits of the business in consideration of his assisting the license-holder in the sales, the agreement, in the absence of any condition in the license to the contrary, is not unenforcible, for the

Sup: Govt. acts (IX of 1872) *(Contd.)*.

agreement does not operate as a transfer of the license, and is not invalid. BASHESHAR DAS *v.* GOBIND RAM. **159 P. L. R. =114 P. R., 1906.**

77. S. 23 *—Illegal contract—Champerty—Agreement against public policy.*

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherence of right and justice and necessary to resist oppression, that a suitor, who had a just title to property, and no means except the property itself, should be assisted in this manner. But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionabe, so as to be inequitable against the party, or to be made, not with the *bona fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy,—effect ought not to be given to them.

The defendant made a claim for Rs. 3,000 against the National Bank of India, Limited, which was dismissed on a preliminary point. The plaintiff paid Rs. 200 to the defendant before his filing appeal in his own name against the order dismissing the suit and agreed to pay Rs. 400, on the said appeal being successful and his recovering the decretal amount from the Bank and to inour all costs of litigation, and the defendant agreed not to compromise the case. The appeal was allowed and the defendant accepted Rs. 500, from the Bank in full satisfaction of his claim. On the suit of the plaintiff against the defendant for Rs. 1,500 including expenses and damages it was pleaded *inter alia*, that the agreement was opposed to public policy and not enforceable at law.

Held, that the contention was valid: the plaintiff was allowed to recover his expenses with interest at Rs. 6 per cent. M. R. STEWART *v.* RAM CHAND. **20 P. L. R. 1906.**

78. S. 23—*Illegal contract—Contract opposed to public policy.*

The plaintiff entered in contract with the Commissariate authorities agreeing to supply a certain quantity and quality of *bhusa* during a specified period. The plaintiff then entered into a contract with the defendant, under the terms of which it was agreed that the defendant should supply the *bhusa* to the Commissariat Department, paying the plaintiff one anna for each rupee's worth supplied.

Held, that the making of sub-contract as above was not opposed to public policy. SOBHA SINGH *v.* LORINDA MAL. **99 P. R. 1901.**

Sup: Govt. acts (IX of 1872) *(Contd.)*

79. S. 23.—*Illegal contract—Loan by a regimental* bania *to a* sowar *is not opposed to public policy—Army Regulations, India, Revised Edition, Volume II, Part 2, Section 85, has not the force of law.*

Section 85, Volume II, Part 2, of the Army Regulations, India, Revised Edition, has not the force of law.

Where the suit of the plaintiff, a regimental *bania*, against the defendant, a *sowar* in the 13th Bengal Lancers, on a book-account, was dismissed by the Small Cause Court, Rawalpindi, on the ground that the dealings between the parties were contrary to public policy and created no contractual liability—

Held, that the dismissal was wrong.—*P. R., 16 of 1873; 99 of 1901; 63 of 1884; 12 Bom., 422; 19 Bom., 626; 10 All., 577; 22 All., 220; 24 Bom., 622; 36 Ch. D., 359. at p. 364 (1887); 2 Bing., 229 (1831), L. R., 19 eq., 462, at p. 465 (1875), referred to.* JAI NARAIN *v.* SULTAN MUHAMMAD KHAN, **96. P. R. 1902=17 P. L. R., 1903.**

80. S. 23.—*Injunction—Civil Procedure Code, S. 276, 295, 492—Temporary injunction—Application for rateable share in proceeds of sale not equivalent to an attachment.*

Held, that an alienation made pending a temporary injunction under S. 492 of the Code of Civil Procedure, was not void under S. 23 of the Contract Act, 1872, or any other law. *Delhi and London Bank, Ld.*, v. *Ram Narain*, (I. L. R., 9 All. 497), followed. *Held*, also, that an application under S. 295 of the Code of Civil Procedure for a rateable share in the proceeds of the sale of property attached by a creditor other than the applicant, is not equivalent to an attachment, and will be no bar to the judgment-debtor privately selling the property attached for the benefit of the attaching creditor. *Ganga Din* v. *Khushali* (I. L. R., 7 All. 702) and *Durga Churn Rai Chowdhry* v. *Monmohini Dasi*, (I. L. R., 15 Cal. 771), followed; *Sorabji Edulji Warden* v. *Gobind Ramji* (I. L. R., 16 Bom. 91) dissented from.—MANAHOR DAS *v.* RAM AUTAR PANDE, **I. L. R., 25 A. 431.**

81 s. 23 & 239—*Illegal—Suit to recover capital advanced.*

A suit to recover the money advanced as capital for the purposes of a partnership which was party illegal is not maintainable. GOPALRAY HANMANT *v.* KALLAPPA.—**3 B. L. R. 164.**

82 s. 23—*Illegal transaction.*

To hold a transaction as illegal it must be found as a fact that the transaction in its inception amounted to, or involved an, illegality or was of such a nature that if permitted it would defeat the provisions of the law. GOVIND SUBRAO *v.* F. S. PACHECO. **4. B. L. R. 948.**

83 s. 23—*Illegal contract—Alienor alienating more than his share.*

A mortgage is not illegal under S. 23 simply because the mortgagors were entitled only to a half share and not the whole of the mortgaged property 32 C 746 follow-

Sup: Govt. acts (IX of 1872) (*Contd*)

ed. JOGOMOHAN DEB LASKAR *v* DAUDOONG BURMAN. **12 C. W. N. 94.**

84. S. 23. *Illegal contract—Counsel and client—Back fee.*

The contract to make any portion of a counsel's fee or remuneration depend on his client's partial or whole success is illegal, and makes the counsel guilty of grossly improper professional conduct. 5. P. R. 1878. F. B. over ruled 69. P. R. 1893, 21 S. W. R. 297, 4. C. W. N. 104, 5. B. 258, 8. B. 413 3. B. L. R. 102, 3. M. 138, 26. P. R. 1874, 51. P. R. 1895, 49. P. R. 1906, 5. S. W. R. 307, 25. A. 509, 194, P. R. 1883, 99. P. R. 1901, 96, P. R. 1902, 15. P. R. 1897 11. C. 257, 29. C. 595, 20 B. 677, 11. A. 72, 4. Bengal L. R. 12 & 13, 1. N. W. P. 1. 5. B. 261 referred to. GANGA RAM *v.* DEVIDAS, **45. P. W. R. 1907=33. P. L. R. 1907=61. P. R. 1907 (F. B.)**

(*See Legal Practitioners Act XVIII of 1879 S. 6. 12, 13, 27, 28, 29. 30,—Where this ruling is given in extenso.*)

85. S. 23. *Illegal contract—Claim for compensation for abduction of woman.*

Held that a promise to pay a sum of money as compensation for the abduction of a woman is enforceable, provided the abduction does not constitute a non-Compoundable offence. 106 P. R., 1879; 50 P. R., 1880; 128 P. R., 1889 (F. B.); 18 Mad, 189, *22* All., 244 referred to. SHAH RAHMAN *v.* ISMAIL KHAN. **82. P. R. 1904.**

86. S. 23—*Immoral contract—Executed or Executory transaction—Consideration—Future illicit cohabitation—Particeps criminis.*

When the consideration for an agreement is illicit cohabitation, whether the transaction be executory or executed, the agreement is void on grounds of public policy. It is liable to be set aside even at the instance of a *particeps criminis.* But transactions intended to be gifts if amounting to completed transfers of property cannot be so impeached

The qeustion, whether what is transferred has in truth been transferred by way of gift or not, must depend on the actual intention of the parties and the facts of the particular case.

Held, that the assignment of a mortgage by the plaintiff to the defendant for the purpose of future illicit cohabitation those made ostensibly for money consideration was void and must be set aside at the suit of the plaintiff even if partial effect had been given to the illegal consideration. THASI MUTHUKANNU *v.* SHUNMUGAVELU PILLAI.—**28 M. 413 M. L. J., 1905 p. 286.**

87. S. 23. & 25, (2). *Immoral consideration. Plea of—Failure to prove—Onus of proof—Cohabitation as consideration.*

In answer to a claim based on a promissory note the defendant admitted execution of the promissory note, but pleaded that the consideration for the promissory note was immoral, *viz.*, an undertaking by the plaintiff (payee) to bring her daughter to the residence of the defendant (maker), and put her under his protection as his concubine during the rest of her life, and that she failed to carry out the undertaking. The issue framed in the suit was "Was the consideration for the promissory note immoral, and is it void for failure of consideration. ?"

At the close of the defendant's case it was submitted on behalf of the plaintiff that the defendant had proved no case. The Court declined to stop the case at that stage, and her witnesses were examined. The Court then held that the defendant had failed to discharge the burden which lay on him of proving affirmatively that the note had been given for an immoral consideration, and dismissed the suit. It was also found that the plaintiff had failed to prove her allegation that she had given cash and jewels for the note.

Held, that the decision was correct.

If the defendant proves that consideration for an agreement is immoral it is immaterial whether the consideration has failed or not. Where the burden of proving an issue lies on the defendant, and the Judge hears the evidence of the plaintiff after the close of the case for the defendant, this does not show that the Judge thereby rules that the burden has been shifted to the plaintiff.

The question to be determined was not—Was the consideration of future cohabitation with the plaintiff's daughter, as alleged by the defendant, or hard cash, as alleged by the plaintiff, but had the defendant proved affirmatively that the consideration for the note was future cohabitation with the plaintiff's daughter.

There is no presumption that when a note is given during the continuance of cohabitation, the consideration in part, if not wholly, is future cohabitation.

1 *All.*, 478 ; 3 *All.*, 787 ; 4 *Amb.*, 641 ; 26 *Ch. D.*, 353 *at page* 357 ; *L. R.* 20 *Q. B. D.*, 387, *referred to*, LAKSHMINARAYANA REDDYAR *v.* SUBHADRI AMMAL. **13. M. L. J. 7.**

88. S. 23 & 24.—*Immoral consideration—Evidence Act (I of 1872), Section 92, proviso (1)—Contract—Illegal contract—Consideration—Adulterous cohabitation—Pleadings.*

Plaintiff, a married woman, living separate from her husband, brought a suit against the defendant, a married man, separated from his wife, to recover a certain sum of money as arrears of a monthly allowance alleged to be due to the plaintiff under an agreement executed by the defendant.

The agreement to pay allowance purported to be in lieu of services but it was found that cohabitation was part of the consideration for the agreement.

Held, that part of the consideration being illegal the Court was bound to dismiss the suit, notwithstanding that the agreement on the face of it appeared to be a perfectly good and valid contract and the illegality of the consideration was never urged in defence by

the defendant. I *Cowper*, 343, *L. R.*, 1892, 2 *Q. B.*, 724 *and* 3 *Mac. N. and G.*, 94 *referred to.*

If adultery past or future is the consideration for an agreement entered into in India it would make it not merely an immoral but an illegal contract. 1 *All.*, 478 *and* 3 *All.*, 787 *referred to.* ALICE MARY HILL *v.* WILLIAM CLARKE. **1 A. L. J. 632 = A. W. N., 1904, P. 238 = 27 A. 266.**

89 S. 23.—*Unlawful consideration.*

A man to whom a civil debt is due may take securities for that debt from his debtor even though the debt arises out of a criminal offence and he threatens to prosecute for that offence provided he does not, in consideration of such securities, agree not to prosecute, and such an ageement will not be inferred from the creditor's using strong language. *I. L. R.*, *XI Bom.*, 572, followed. LALA DHOLAN DAS *v.* NATHUMAL. **41 P. L. R., of 1901.**

90. S. 23.—*Unlawful consideration or object.*

A borrowed a cart and bullocks from B and C, went to D's house there gambled and lost, and to raise money pledged the cart and bullocks to respondent, B and C appellants demanded the carts and bullocks which respondent refused to return, and only on executing a bond for repayment of the amount for which they had been pledged, were they permitted to take them back.

In a suit by respondent on the bond it was held that whether the consideration was the return of the cart and bullocks which the respondent was bound by law to return or whether it was the screeming of A from the consequences of his Criminal Act, the consideration was unlawful and the bond was void against B and C, the appellants. *Pollack's Principales of Contract, P. 174 and Chitty's Contracts, P. 574 referred to.* MASHWE KHAN AND MAUNG PYAN *v.* MAUNG KHAN. **U. B. R. 1903, P. 8.**

91. S. 23.—*Unlawful consideration and object.*

An agreement by which a village headman transfers his official duties to another person who in consideration of performing them is to obtain a proportion of the commission, is one of which the consideration and object are unlawful and opposed to public policy, and which should not be enforced by a Court of Justice. MAUNG AUNG GYI *v.* MAUNG THA GYAN. **U. B. R., 1903, P. 6.**

92. S. 23.—*Fraudulent transfer—Unlawful object.*

An assignment by an insolvent in fraud of the Bankruptcy Law falls within section 6 clause (*h*) of the Transfer of Property Act and section 23 of the Contract Act and is therefore void.

The word 'object' in section 23 of the Contract Act is not used in the same sense as 'consideration,' but is used as distinguished from 'consideration' and means purpose or design. JAFFER MEHER ALI *v.* THE BUDGE-BUDGE JUTE MILLS CO., LD. **10 W. N., C., 755 = 33 C. 702.**

93. S 23—*Unlawful consideration.*

The objection of illegality of a contract urged by a party thereto for which he has received consideration must be looked on with great disfavour. A. and B's agreement not to bid against each other at an auction sale is not necessarily illegal or against public policy. The end to be accomplished determines whether it is lawful or not. When it was proved that A and B had agreed that A was not to bid and after purchase B was to convey two-thirds of the property to A, and that A advanced a portion of purchase-money,

Held, that A was entitled to that share at any rate, on the ground that B was a trustee on his behalf in making the purchase. GOBINDA CHANDRA JHA *v.* SHYAMLAL JHA. **1 C L. J. 85.**

94. S. 23——*See sections 16, 19 and 23—5 O. C. 256, No. 58 supra.*

95. S. 23,—*Unlawful object—Contract—S. 23.*

Money lent for the purpose of enabling the borrower to gamble is not recoverable by Civil Suit if the gambling contemplated by the parties when the money was lent is such as is prohibited by law but if the gambling is not illegal a suit for the recovery of the loan will lie. *U. B. R. 1897-1901, P. 322 referred to.* MAUNG THA DUN *v.* MAUNG SU YA. **U. B. R. 1905, P. 7 (contract).**

96. S. 23.—*Consideration opposed to public policy—parents making profit for themselves out of the marriage of their daughter—Act IX of 1887, Sch. ii, cl 38—Small Cause Court suit.*

The parents of a girl caused her to enter into an utterly unsuitable marriage, the husband agreeing to pay a certain sum monthly for the maintenance of the parents. On a suit by the mother to recover certain instalments of the maintenance so promised, it was *held* (1) that the suit was one not cognizable by a Court of Small Causes; and (2) that the agreement was one which was opposed to public policy and ought not to be enforced. *Bhagwantrao* v. *Ganpatrao*, (I. L. R., 16 Bom., 267); *Dholidas Ishwar* v. *Fulchand Chhagan*, (I. L. R., 22 Bom., 658) and *Visvanathan* v. *Saminathan*, (I. L. R., 13 Mad., 83). BALDEO SAHAI *v.* JUMNA KUNWAR. **A. W. N., 1901, P. 155 = 23 A. 495.**

97. S. 23. *Unlawful consideration. Drainage Act (Ben. Act VI of 1880)—Bengal Act II of 1902, ss. 42, 44B (b)—Drainage, recovery of, cost of—Contract Illegality.*

There is nothing in the Drainage Act to render invalid a contract between landlord and tenant by which the latter agrees to pay the former drainage cost in respect of land on which rent has for the first time been imposed, in consequence of any scheme of works carried out under the Act benefiting it. Section 44B of the Act (as amended by Ben. Act II of 1902) does not apply where the plaintiff seeks to recover under a contract.—JYOTI KUMAR

Sup: Govt. acts (IX of 1872) (*Contd*).

MUKERJEE *v.* HARI DAS MAITI, **I. L. R., 32 C. 1019.**

98. S. 23. *Reward to procure wife for a Hindu Public policy.*

A sued B on a *ruka* whereby B agreed to pay a certain sum to A on B's son's marriage with C's daughter. Held the agreement to give reward to A if he succeeded in effecting the marriage was opposed to public policy and void. SURJUN PARSHAD *v.* NARAIN PARSHAD. **2. O. C. 365.**

99. S. 23 *Hindu Law—Custom—Exchange-marriages. Validity of—Damages—in case of.*

Where the *only* consideration for the marriage of a girl is a sum of money to be paid for her, the contract would be one void as opposed to public policy.

A family arrangement amongst persons of the same class, by which the family A gives a girl to be taken as a wife, on equal terms, into a family B, and a girl of a family B is, at the same time, given as a wife into family A, stands on a totally different footing from what is really the sale of a girl, the suitability of the marriage and the prospective happiness of the girl being entirely lost sight of in the latter case in view of the pecuniary gain.

A number of *Khatris*, all of the same caste and community, arranged a number of a marriages amongst themselves, none of which was shown to be *prima facie* unsuitable or undesirable. There was nothing to show that the performance of any one of the betrothal contracts was to be made dependant on the previous performance of any of the others. The arrangements were made independently of each other, though at one and the same time.

Held, that the betrothal contracts were not opposed to public policy and damages could be recovered on breach of them. AMIR CHAND *v.* RAM. **95. P. L. R 1903 =50 P. R. 1903.**

100. S. 23—*Public Policy—Marriage promise for money Refund—Onus.*

An agreement to pay money to the parents or guardian of a bride or bride-groom in consideration of betrothal is not necessarily immoral or against public policy. Where A not caring the welfare of his daughter, gave her to a husband who was ineligible, for money, the agreement is opposed to public policy and void. Where such agreement is under the circumstances of the case neither immoral, nor opposed to public policy, it will be enforced and damage also will be awarded for its breach. In any case a suit is maintanable for the recovery of any sum actually paid under the agreement, if the contract is broken and marriage does not take place. The Onus of its being against public policy lies on the man who asserts it. A suit for the value of ornaments or presents given to an intended bridge or bridegroom on the breach of the contract of marriage is maintainable. BAKHSIDAS *v.* NADU DAS.—. **1 C. L. J.—261.**

101. S. 23—*Hindu Law—Marriage—Wife—Conjugal rights, suit for enforcement of—Residence of wife at her parental house–Agreement contrary to Hindu Law and opposed to public policy—Conditions imposed by decree on husband.*

The duty imposed upon a Hindu wife to reside with her husband, where-ever he may choose to reside, is a rule of Hindu Law and not merely a moral duty. An antenuptial agreement on the part of the husband that he will never be at liberty to remove his wife from her parental abode would defeat that rule of Hindu Law, and is invalid on that ground, as well as on the ground that it is opposed to public policy.—TEKAIT MON MOHINI JEMADAI *v.* BASANTA KUMAR SINGH. **R., 5. C. W. N. 673= 28. C. 751.**

102. S. 23—*Marriage contract for money—Provincial Small Cause Courts Act*, 1887, *Schedule II. Clause* (38).

When the parents of the girl are not seeking her welfare but give her to a husband, otherwise ineligible, in consideration of a benefit secured to themselves, an agreement by which such benefit is secured is opposed to public policy and is not enforceable.

A suit for maintenance based on such an agreement is exempted from the cognizance of Court of Small Causes, under Cl. 38, Schedule II of the Provincial Small Cause Courts Act.—16 *Bom.* 267, 22 *Bom.* 658, 13 *Mad.* 83 *referred to.* BALDEO SAHAI *v.* JAMNA KUNWAR. **A. W. N. 1901 P. 155=23. A. 495.**

103. S. 23.—*Agreement opposed to public policy—Promissory note given for repayment of money in respect of which a criminal prosecution might possibly have lain.*

Where a *bona fide* debt exists and where the transactions between the parties involve a civil liability as well as possibly a criminal act, a promissory note given by the debtor by a third party as security for the debt constitutes, a valid agreement. *Keir* v. *Leeman* (L. R 9 Q B. 371, 392: 72 R. R., 298); *Flower* v. *Sadller* (L. R., 10 Q. B. D. 572) and *Kessowji Tulsidas* v. *Hurjivan Mulji.* (I. L. R., 11 Bom. 566), referred to.—JAI KUMAR *v.* GAURI NATH, **I. L. R., 28 A. 716.; 3 A. L J. 506.**

104. S. 23. *Agreement to stifle a prosecution—Compounding a non-compoundable offence—Agreement at defence in a civil action—Suit for wrongful confinement.*

The plaintiff sued the defendant for damages for wrongful arrest and confinement. The defence pleaded an agreement whereby the parties had agreed to settle their differences in consideration of compounding some criminal charges, one of which was not by law compoundable and which were then pending between the parties in a Criminal Court. The Lower Appellate Court

Sup: Govt. acts (IX of 1872) *(Contd).*

held that the plaintiff was prevented from bringing the action by reason of the agreement. On appeal: *Held* that the object of the agreement being to stifle a prosecution was bad in law, and that the agreement, therefore, could not be set up as a defence in a Court of law. DALSUKRAM *v.* CHARLES DE BRETTON, **6 B. L. R. 73=28 B. 326.**

See S. 15 supra No 34. 7. B. L. R. 603.

105. S. 23—*Illegal contract—Trusts Act (II of 1882), Section 82—Contract opposed to public policy—Public Officer's incapacity to maintain suit extends to persons deriving title from him.*

Held, that if a public officer himsef cannot maintain a suit for property based upon an illegal agreement persons deriving title from him are in no better position.

Section 82 of the Indian Trusts Act cannot be so interpreted as authorizing Courts to give effect to an agreement the object of which is unlawful. SHEO NARAIN *v.* MATA PRASAD. **1. A. L. J. 412=W. N., A., 1904, p. 167=27 A. 73.**

106. S. 23—*Part consideration opposed to public policy—Whole agreement void.*

A sued to recover an iron box containing jewelry alleged to have been entrusted with B. A had, prior to the suit, instituted proceedings against B. for criminal breach of trust in respect of the same box. The parties to the criminal proceedings came to an understanding. B agreed to forego his claim against the A in respect of a debt due to him, a part consideration for such relinquishment being the dropping of the prosecution by A against him. In the present suit, B pleaded that under the settlement above referred to, A waived her right to the suit-box.

Held, that the part of the consideration for the agreement being the abandonment of the criminal prosecution, the whole of the agreement was void under S. 23. Therefore, the evidence could not prevail. A. K. R. M. N. NAGAPPA CHETTY *v* MA U,—**3 L. B. R. 42.**

107. S. 23—*Master taking pro-note from servant for amount embezzled—Against public policy.*

It is not unlawful for a master to take a pronote from a servant or agent for amounts embezzled by the latter. A mere threat of a prosecution for embezzlement if a promissory note for the amount embezzled is not executed would not invalidate it. It becomes unlawful and invalid only when the consideration therefor, wholly or partially, is an agreement not to prosecute. *11 B. 566. F. 20 B. 387. 2 P. R. 1902 Referred to.*—NANAK CHAND *v.* DURANT,—**9 P. R. 1906 =19 P. L. R. 1906.**

108. S. 23—*Illegal contract—Agreement against public policy—Champerty.*

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, is not *per se*, opposed to public policy. There may

Sup: Govt. acts (IX of 1872) *(Contd).*

be cases in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor, who had a just title to property, and no means except the property itself, should be assisted in this manner. But agreements of this kind ought to be carefully watched, and when found extortionate and unconscionable, and inequitable against the party, or made, not with the *bona fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy,—effect ought not to be given to them.

B sued for Rs 3,000 the National Bank of India, Limited and the claim was dismissed on a preliminary point. A paid Rs 200 to B before his filing appeal in his own name against the order dismissing the suit and agreed to pay Rs 400, on the said appeal being successful and his recovering the decretal amount from the bank and to incur all costs of litigation, and B agreed not to compromise the case. The appeal was allowed and B accepted Rs 500 from the Bank in full satisfaction of his claim. On the suit of A against B for Rs 1,500 including expenses and damages, it was pleaded, *inter alia*, that the agreement was opposed to public policy and not enforceable at law.

Held, that the contention was valid; A was allowed to recover his expenses with interest at Rs 6 *per cent.* M. R. STEWART *v.* RAM CHAND,—**20 P. L. R. 1906=20 P. R. 1906.**

109 S. 23—*Transfer of property Act (IV of 1882), ss. 3, 6 (h)—"Actionable claim"—"Beneficial interest in moveable property"—"Object or consideration.*

The right to claim the benefit of a contract for the purchase of goods is a "beneficial interest in a moveable property" within the definition of "actionable claim" in s. 3 of the Transfer of Property Act (IV of 1882), and as such, assignable. In s. 6 (h) of the Transfer of Property Act, (IV. of 1882) and s. 23 of the Contract Act (IX of 1872), the words "object" and "consideration" are not synonymous, but distinct in meaning, the words "object" meaning "purpose." *Semble*—The benefit of contract, that is, the beneficial right or interest of a party under the contract and the right to sue to recover the benefits created thereby, are assignable, provided that (*a*) the benefit is not coupled with any liability or obligation that the assignor is bound to discharge, and (*b*) the contract has not been induced by personal qualifications or considerations as regards the parties to it. JAFFER MEHER ALI *v.* BUDGE BUDGE JUTE MILLS Co., **10 C. W. N. 755=33 C. 702.**

Sup: Govt. acts (IX of 1872) *(Contd).*

110. s. 23. *Pronote.*
Where a pro-note was executed at the instance of the debtor and without the knowledge of the creditors in favour of one of the latter, to induce him to sign a composition deed amongst the creditors and for the purpose of carrying out an r-rangement to secure to him an advantage over the other creditors:

Held that the pro-note is void. The fact that the pro-note was executed, not by the debtor himself, made no difference JAMAL MAHAMAD PALAVAR *v.* PARAMESWARA PATTAR, **16. M. L. J. 418.**

111. S. 23—*Contract—Public policy—Landlord and Tenant—House let to prostitute—Rent. Suit for—*

A landlord cannot recover the rent of a house knowingly let to a prostitute to be used by her for purposes of prostitution. MRS. BRINKMAN *v* ABDUL GHAFUR,—**102 P. L. R., 1904=65. P. R. 1904.**

112 s. 23. *Depositing negotiable instrument. Contract.*

A lien over money lent may be created by deposit of a non-negotiable document which is evidence of the loan—Such a transaction is not necessarily contrary to public policy. R. E. LUDDY *v.* C. P. R. ARUNACHELLUM CHETTY. **N. B. R. 1904 P. 1.**

113. s. 23.—*Decree C. P. C. S. 257 A.—Agreement to pay decretal debt in excess is void if made without court sanction—deed including decretal debt, with other debts void only to the extent of the decretal debt.*

A owed B a judgment-debt of Rs. 442-9 not bearing interest, which with other debts was incorporated in a mortgage, the total mortgage debt being Rs. 2,500, the whole of which bore interest. Sanction of the Court, prescribed by S. 257 A of the Code, was not obtained to this arrangement.

Held, by Russell, C. J., that the bond contained several and distinct promises made for one and the same lawful consideration, and if the law will not enforce the promise as to the decretal amount and interest thereon, still it can and will enforce the promises for payment of the other sums therein mentioned.

Held, by Heaton, J., that the whole mortgage was not void; but the decretal amount should be entitled from the principal of the mortgage debt. The agreement in question was not "unlawful" within the meaning of S. 23 of the Contract Act, 1872. BHAGABAI *v.* NARAYAN GOPAL. **9 B. L. R. 950=31 B. 552.**

114. S. 23 *Contract—Agreement opposed to public policy—Indian Contract Act, s. 23.*

Where part of the consideration for an agreement was the abandonment of a prosecution for criminal breach of trust.

Held, that the whole of the agreement was void under section 23 of the Indian Contract Act, 1872. *Srirangachariar* v. *Ramasami Ayyangar*, (1894) I. L. R., 18 Mad., 189,

Sup: Govt. acts (IX of 1872) *(Contd).*

followed. NAGAPPA CHETTY *v.* MA. U.—**3. B. L. R. 42.**

115. S. 23—*Usufructuary mortgage of occupancy holding s. 20, 21 and 31 T. A. 1901.*

An occupancy tenant executed a usufructuary mortgage of his occupancy holding, and then executed a *kabuliat* undertaking to pay rent for the mortgage land.

Held, on suit by the mortgage for rent, under the terms of the *kabuliat*, that the agreement between the parties was of a nature which, if permitted, would defeat the provisions of the Tenancy Act, 1901; that it was unlawful within the meaning of section 23 of the Contract Act, and void. A. U. N. (1906) 302, 300, 28. A. 696 followed. RAM SARUP *v.* KISHAN LAL. **A. W. N. (1907), 76.**

116 S. 23—*Illn. (f)—Office brocage—Agreement—pro-note.*

A promise to pay money with a view to procure resignation in order that the promiser may secure the appointment, is an office brocage agreement and unlawful as shown in illustration (f) s. 23. Such a contract is invalid and against public policy. A pro-note contained such a promise and evidenced notice to the endorsee of the character of the transaction.

Held that endorsee could not succeed in a suit brought on the pro-note. 1 H. B. 1322, 2. R. R. 773 referred to. SAMI NATH AIYAR *v.* MUTHU SWAMY PILLAI. **17 M. L. J. 252**

116 (a). S. 23 & 24.—*Contract to idemnify surety for his bail-bond illegal—Criminal Procedure Code, (Act V of 1898), Section 513—One single consideration.*

In a criminal case against A his pleader B stood bail for him; and as an idemnity for the bail took from A a sale deed and a rent note regarding his house. The sale deed was for sum of Rs. 8,000 of which Rs. 5,000 were the indemnity for the bail-bond and the remaining Rs. 3,000 represented the advances to be made thereafter by B. B sued on the rent note to recover from A the sum of Rs. 2,000 as rent.

Held, that the contract for idemnifying B for his bail-bond was illegal: and this illegality rendered the sale-deed void. (15 *Q. B. D.* 561 *followed*):

That the rent note was tainted with the same illegality which affected the sale-deed and could not stand on any separate footing;

That the agreement was an indivisible agreement: part of a single consideration for one unlawful object, and, therefore the whole agreement was void under S. 24 of the Contract Act.

Held, further, that the deposit under S. 513, Cr. P. C., is allowed in substitution only of the bond which the principal himself would otherwise execute, not in substitution of any bond which his surety executes. LAXMANLAL K. PANDIT *v.* MULSHANKAR PITAMBARDAS. **10 B. L. R. 553.**

116 (b). S. 23, 24 & 26.—*Agreement by a*

Sup: Govt. acts (IX of 1872) *(Contd)*

Hindu bridegroom not to marry again while his marriage with first wife continues.

An agreement by a Hindu with the father of his first wife and to marry again during the continuance of his marriage with that wife is not, *prima facie*, void either under S. 26, as an agreement in restraint of marriage, or under S. 23 or 24, as importing a consideration which is immoral or opposed to public policy. [*L. R. Ch. D. 399* (*1875*) *referred to.*] KUAR LAXMAN RAO *v.* KESHAO. **4 N. L. R. 90.**

117. S. 23 & 24.—*Enhancement.*

An agreement by a tenant to pay rent excluding by more than one anna in the rupee of his previous rent in contravention of sections 49 and 50 Oudh Rent Act (22 of 1886) is void. RAMANAND *v.* NADIR ALI. **1 O. C. 78.**

118. S. 23 & 24.—*Agreement to supply goats, straw, &c. in a lease.*

A *darpatnidar* stipulated in his *kabuliat* to supply goats, straw, &c., which the *patnidar* was bound to supply to the zamindar or in default to pay their value is not void under Sections 23 and 24. BISHUN PRIYA CHOWDHURANI *v.* BHABA SUNDAI DEBYA. **28 C. 318.**

119. S. 23 & 27.—*Agreement in restraint of trade 29 B. 107 see S. 27 infra No. 141.*

120. S. 23 & 27.—*Illegal contract—Restraint of trade—Public policy.*

An agreement entered into between several joint stock companies to pool their profits is not opposed to public policy.

A part of an agreement may be void while other parts of it may be enforceable at law.

There is a marked distinction between the prohibition or prevention of a trade and the regulation or governance of it.

The word "restraint" in section 27 of the Contract Act implies a total restraint. A contract whereunder several persons agree not to sell a particular commodity at a place under a fixed price is not necessarily void.

Several manufacturers of an article may agree that the manufacture and sale of the article shall be distributed among them according to certain proportions and the manufacturing capacities of their factories shall remain in the *status quo.* THE BOMBAY ICE CO., L D. *v.* S. B. FRASER & CO. **6 B. L. R. 23.**

121 s. 23 and 43—*S. 8, cl. c (1)—Mortgage by a disqualified proprietor—Suit after disqualification is over—Not maintainable—Consideration—Void.*

A disqualified proprietor, under the Jhansi Encumbered Estates Act, mortgaged his property during disqualification period.

After the disqualification had ceased the mortgagee brought a suit for foreclosure.

Held, such a mortgage being forbidden, by the provisions of the law, the consideration was also forbidden and it was void under S. 23 Contract Act, and S. 43 cannot be applied to such a case. RADHA BAI *v.* KAMOD SINGH. **4. A.L.J. 696=30 A. 38.**

Sup: Govt. acts (IX of 1872) *(Contd.)*

122 s. 23 and 65—*See S. 2, 23, 65—28. B. 66, No 10 Supra.*

123 ss. 23 and 65—*Monopoly.*

Agreements having for their object the creation of monopolies are void as opposed to public policy under the English Common Law and also under contract Act, SS. 23 and 65.

Where a Municipality received a certain sum as fee for license granted to the plaintiff under an agreement which was void, and the plaintiff brought a suit against the Municipality for its refund, and it was contended that the amount should be viewed as collected under the provisions of the Madras District Municipalities Act, 1884, and therefore under section 262 (2) of the Act was not recoverable by suit.—

Held, that the contention had no force and the plaintiff was entitled to the refund claimed by him. SOMA PILLAI *v.* THE MUNICIPAL COUNCIL MAYAVARAM. **28 M. 520.**

124 *See S. 65 infra.*

125. S. 23 and 65.—*Money paid under illegal contract not recoverable for non performance of the contract.*

A sued B to recover Rs 400/- consisting of Rs 300/- which he alleged he had paid to B as rent for a fishery sublet by B. to him and Rs 100/- damages for loss sustained by him as B failed to allow him to work the fishery B. denied the claim *in toto*. The Original Court decreed A's claim for Rs 50/- on basis of the sub lease. On appeal the D. T. dismissed A's claim holding the contract void under S. 23. On second appeal A urged that the proceedings did not show when the contract was made or that there was any thing fraudulent in it or that the Government was a loser, and as there was nothing fraudulent in B subletting (under rule 116 under the Upper Burma Land and Revenue Regulation) there was nothing fraudulent in A agreeing (before the auction) to take such a sub lease unless it could be proved that B would have otherwise had to pay more for the fishery at the auction than he did pay for it. Finally, A contended that even if the contract was illegal, B not having allowed A to use the fishery in pursuance of the Contract, the money was recoverable under S. 65 contract Act, as money paid for a future illegal object. It appears from the circumstances of the case that the Government was a loser by the conduct of the parties and that the contract was illegal. *Held* that when both parties are "in paridelicts" the Law will not assist persons to recover money paid under an illegal contract. There was no foundation for the contention that because the illegal contract was not carried out the money was recoverable, 2 U. B. R. 1897—98 P. 17 contract, L. J. R. Q. B. Div, (1892) P. 738 referred to. MAUNG SHAIN GAH *v.* MAUNG KANTAKE. **U. B. R. 1901. P. 39 (Contract.)**

Sup: Govt. acts (IX of 1872) (*Contd*)

126 S. 23 and 25.—*Secret agreement injurious to a third partner.*

Held that a secret agreement between two partners which implies a civil injury to a third partner is an agreement with an unlawful object, and is void. Pollock's Principles of contract pages 264 & 362 referred to. LEON GRIN *v.* AGHA ALI AKBER SHIRAZI. **U. B. R. 1903. P. 4 (contract).**

127 S. 24—*Agreement between master and house-keeper—Allowance for future adultery—Question of illegal consideration not raised in pleadings—Evidence disclosing illegal consideration—Duty of Court—Evidence Act S. 92 (1).*

A brought a suit to recover arrears of monthly allowance based on an agreement executed by B.

Though, on the face of it, the agreement appeared to be a valid one, yet the evidence disclosed that part of the consideration was for future immoral purposes.

Held, that, under S. 92, Proviso (1) of the Evidence Act, it was open to a person to seek to invalidate an agreement, which, on the face of it, appeared to be a perfectly good agreement, by showing that the whole or part of the consideration was in reality illegal.

Held, also, that, where it was brought to the notice of the Court that the whole or part of the consideration for a contract sought to be enforced was for an illegal purpose, the Court is bound to take notice of such fact and to give effect to it, notwithstanding the fact that the contract might appear on the face of it to be a perfectly legal contract and that no question of illegal consideration was raised in the pleadings by the defendant. 1 Cowper 341, L. R. 2 Q. B. D. 724 (1892) L. R. 2 Q. B. D. 214 (1900), 3 Mae N. & G. 94 (1850) Ref. In India, unlike in England, adultery is an offence under the Criminal law. If adultery, past or future, is the consideration or an indivisible part of the consideration or an agreement, such an agreement is not merely an immoral but an illegal one, and therefore void 1 A 478,3 A 787 Refd to. ALICE MARY HILL *v.* WILLIAM CLARKE. **1. A. L. J. 632 = A. W. N. 1904. P. 238 = 27. A. 266.**

128 S. 24—*See S. 23 & 24—1 O. C. 78 No 117 Supra.*

129 S. 24—*See S. 23 & 24—28. C. 318 No 118 Supra.*

130 S 25—*Limitation Act (XV of* 1877*), Section* 19.

When before the expiry of period of limitation prescribed for the recovery of a debt the creditor has orally agreed to extend the time for payment, time does not begin to run until the expiration of the extension. SHRINIVAS SUBBAYA *v.* RAGHUNATH NARSINVHA. **4. B. L. R. 50.**

131 S. 25—*Execution of Decree—Limitation—Civil Procedure Code, s. 258—Limitation Act (XV of 1877), s. 20—"Debt".*

Held that for the purpose of deciding whether or not an application for execution

Sup: Govt. acts (IX of 1872) (*Contd*).

is barred by Limitation, it is competent to the executing Court to take into consideration a payment made out of Court by the Judgment-debtor in part satisfaction of the decree, although such payment may not have been certified in the manner provided for by s. 258 of the Code of Civil Procedure. *Kishan Singh* v. *Aman Singh*, (I. L. R., 17 All. 42), and *Tukaram* v. *Babaji*, (I. L. R., 21 Bom. 122), followed. *Mitthu Lal* v. *Khairati Lal.* (I. L. R., 12 All. 569), overruled. *Held* also that the word "debt" as used in s. 20 of the Limitation Act, 1877, includes a judgment-debt. *Ramhit Rai* v. *Satgur Rai*, (I. L. R., 2 All. 247); *Janki Prasad* v. *Ghulam Ali*, (I. L. R., 5 All. 201); *Muhammad Said Khan* v. *Payag Shahi*; (I. L. R., 16 All. 228); *Billing.* v. *The Uncovenanted Service Bank*, (I. L. R., 3 All. 781): *Heera Lal Mookhopadhya* v. *Dhunput Singh*, (I. L. R., 4 Cal. 500); and *Shripatrav* v. *Govind Narayan*, (I. L. R, 14 Bom. 390), referred to. *Kally Prosonno Hazra* v. *Heera Lal Mundale* (I. L. R., 2 Cal. 498). *Mungal Prashad Dichit* v. *Shama Kanto Lahory Chowdhry*; (I. L. R, 2 Cal. 708), and *Cader Buksh Sarker* v. *Gour Kishore Roy Chowdhry*, (6 C. W. N. 766), not followed.—ROSHAN SINGH *v.* MATA DIN, **I. L. R. 26 A. 26.**

132. S. 25 *Delivery of possession under Mahomedan Law—Subject-matter of gift remaining in donor's hands, effect of—Buddhist Law (Gifts).*

S. 4 (1) of the Upper Burma Civil Courts Regulation (or S. 13 of the Burma Laws Act 1898) only refers to cases of succession, inheritance, marriage or caste, or any religious usage or institution. And questions relating to gifts, which do not fall under any of those heads: must be governed by S. 25, Contract Act. This has been so held in regard to gift by and to Buddhists C. A. No 208 of 1905 referred to, the effect of Expln. 1 to S. 25, Contract Act, is that a gift actually made is valid, though it may not have been expressed in writing or registered.

The Mohamedan Law does not render it impossible for a husband to make a gift to his wife of the house in which they both live 23 A. 147 referred to. Actual delivery of possession is not necessary. If the character of the possession changes, the mere retention of the subject-matter of the gift in the hands of the donor would not affect the validity of the gift.

Under the Mohamedan Law, the husband takes a fourth of his wife's estate: where there are children.

It depends upon the circumstances of each case whether the Mohomedan or the Buddhist Law applies to gifts. ABDUL GAFUR *v.* D[Y]AN SINGH, **U. B. R (1907),** *Buddhist Law—Gift, 1.*

133. S. 25. *Consideration—Affection for brother.*

The defendant undertook to discharge a certain debt due by the plaintiff, his brother, to one N. The defendant having failed to discharge it the plaintiff himself paid it and brought the present suit to recover it from

Sup: Govt. acts (IX of 1872) (*Contd*).

the defendant. The defendant was a party to the document executed and registerd in favour of *N.* in which he undertook to discharge the debt, but it was not signed by him.

Held, that the breach of the obligation which was for love and affection for his brother was actionable under Section 25 of the Contract Act, and the suit was maintainable. VENKATASAMY NAIDU *v.* RANGASAMY NAIDU. **13. M. L. J. 428.**

133 a. S. 25.—*Ante-nuptial Contracts.*

For the enforcement of an ante-nuptial contract it must be proved by clear evidence that marriage was the consideration of the promise. On the grounds of public policy ante-nuptial contracts, which are not the usual incidents of a Budhist marriage, must be admitted with caution and only on strict proof.

A promise made on account of love and affection would not be a contract unless there was a consideration, and it would not be enforceable except on the conditions specified in S. 25 Contract Act. Marriage is a good consideration if it is proved that it was the consideration of the promise. MAUNG BA *v.* MA OK. **U. B. R. 1902. P. 1 (Budhist Law marriage).**

134. S. 23—*See S. 2 (d), 25—16. M. L. J. 422. No 8 supra.*

135. S. 25 *cl. 2—See S. 8, 10, 25—32. C. 84. No 16 supra.*

136. S. 25. (3).—*Acknowledgment—Novation—Limitation Act (XV of 1877), Section 19.—*

A transaction between two parties which results in the striking of a balance may, according to the particular facts and the nature of the entry, amount to one or other of two things.

In the *first place* it may amount merely to an acknowledgment of the existence of a debt due from one of the parties to the other and of the correctness of the account as thus stated. In such a case the acknowledgment is merely evidence of the original cause of action and, if the provisions of Section 19 of the Limitation Act are duly complied with and the acknowledgment is made before the debt has become barred by time, serves to keep alive that debt for an extended period so as to enable the creditor to sue in respect of it at any time within such later period. But the acknowledgment, if it be merely such, does not of itself consititute a fresh cause of action nor can it be made the basis of a suit by the other party. The latter must base his suit on the original cause of action and plead the acknowledgment merely as evidence in support of his claim and as entitling him to sue at a period later than he would otherwise have been entitled to sue. If in any such case, the creditor bases his suit upon the acknowledgment and not upon the original cause of action, he must fail

Sup: Govt. acts (IX of 1872) (*Contd*)

as his suit, so framed, would be non-maintainable.

In the *second place* the striking of a balance may mean something more than a mere admission of liability in respect of an existing debt. It may amount to a complete *novation*, a fresh contract being substituted for the old contract—in other words, the original cause of action may by agreement between the parties be replaced by a fresh cause of action. In a case of this kind the creditor obviously acts rightly if he subsequently bases his suit not on the original cause of action but on the new cause of action derived from the statement of accounts, and it is to suits of this nature that article 64 of the Limitation Act is applicable.

Whether the striking of a balance falls under the first or the second head depends entirely on the circumstances of the particular case.

Where the balance struck off by the debtor was in the following words—

"*Lekha Ganpat Nanda Virwala da sambal 1957 mitti Katak 23 Rs. 51-14 baqi ahde Rs. 51-14 hathi Ganpal di Nanda di mawarkhi 23 Katak 1957 mubligh Rs. 51-14 rubaru Ibrahim.*"

Held, that assuming the entry was signed by the debtor it amounted to an acknowledgment of liability of the debt then alleged to exist and was not a new contract. in substitution of the original cause of action between the parties, nor could any promise to pay be reasonably held to be implied in it. GANPAT *v.* DAULAT RAM. **123 P. L. R. 1904 = 68. P. R. 1904.**

137. S. 25 (3)—*Limitation Act (XV of 1877), S. 19—Acknowledgment—Novation—Construction of document.*

Where, as in this case, a document embodies a promise to pay within the meaning of S. 25, cl. 3 of the Contract Act, and is not a mere acknowledgment of a balance, it will operate as a novation of contract and will operate to give a fresh start for limitation on the already existing cause of action. MUSSAMMAT MAHBUB JAN *v.* NUR-UD-DIN, **22 P. L. R. 1906. = 102. P. R. 1905.**

138 S. 25,—*cl. III—Agreement—Khata signed by the son of the obligee—Promissory Note—Negotiable Instruments Act (XXVI of 1881).*

The defendant signed on the 30th March, 1902, a *khata* made up after taking accounts in the *khata* of defendant's father. The *khata* in question ran as follows:-

" ~~Rs.~~ 291-2 namely (rupees) two hundred and ninety-one and annas two were found due on the account of the previous *khata* having been made up. For the same this *khata* is passed. The same (*i. e.*) the moneys are payable by me. I am to pay (the same) whenever you may make a demand (therefor)."

Held, (1) that the *khata* was not a promissory note within the meaning of the Negotiable Instruments Act, 1881.

Sup: Govt. acts (IX of 1872) *(Contd)*

(2) that it would be a promise within S. 25, cl. (iii) of the Contract Act, if it be proved that at the time when the defendant signed the *khata* he was one against whom the debt might have been enforced but for the law of limitation. CHANDRAPRASAD HARIPRASAD *v* VARAJLAL UMEDRAM,—**8 B. L. R. 644.**

139. S. 25—*(3) Promise to pay barred debt —Novation.*

The mere srtiking of a balance of barred debts by the plaintiff in the defendants' account book which is not signed by the defendant and does not acknowledge liability by defendant is neither an acknowledgment under S. 19 Limitation Act, nor an account stated under Art. 64, nor a promise under S. 25 (3) of Contract Act. *8 B. 194, 8. B. 405, 23. A. 502 referred to.—122. P. R. 1889, 102 P. R. 1905 distinguished.*

A promise to pay is an essential part of contract falling under S. 25 (3) of the Contract Act. The contract must be an express one according to the authorities, i. e. not to be deduced by implication from a mere acknowledgment. GULZARI MAL *v.* KISHAN CHAND.—**132 P. R. 1907.**

140. s. 25. (3). *S. 19—Contract Act (IX of 1872), S. 25—Agreement to pay a barred debt—Express Contract—Consideration valid.*

B executed a *Sarkhat* in favour of A's firm, in respect of a barred debt due by him to the firm, stating that no interest was to be paid.

Held, that in order to maintain the suit, it was necessary to show express promise to pay and not only that the intention to pay was deducible from the language of the acknowledgment.

Held, further that to hold that whenever there was a clear acknowledgment of a debt whether time barred or not, that was equivalent to a promise to pay upon which a suit might be maintained, would be to nullify the effect of S. 19 of the Limitation Act. 33 *C. 1047 (1058) discussed.*

Held, further that under S. 25 (3) of the Indian Contract Act, a promise, made in writing, and signed by the person to be charged therewith to pay a barred debt was a good consideration, but there must be a distinct promise and not a mere acknowledgment. GOBIND DAS *v.* SARJU DAS, **5 A. L. J. 274.**

141. s. 27. *Restraint of trade—Continuous cause of action—Damages previous & after the institution of suit—Decree directing accounts —Company—Liability to account—Transfer of business to a limited Company.*

The mere fact that an agreed scheme would limit competition and keep up prices, does not necessarily bring the agreement within the terms of S. 27 of the Contract Act. To bring a case under this section one must establish that the suit is one to enforce an agreement, whereby some one is restrained from exercising a lawful profession, trade or business of any kind.

Sup: Govt. acts (IX of 1872) *(Contd).*

Where a decree directs a Company to furnish accounts, and the Company, in the meanwhile, transfers its business to a limited company, the latter Company is not bound by the decree, as it is a distinct legal person; and the decree does not operate beyond the date of such transfer.

Apart from the question whether the High Court can award damages in respect of a continuing cause of action up to the date of the decree, it is impossible to treat subsequent successive accruals of an obligation to contribute, as falling within that description. In other words, when they are all as distinct from each other as successive instalments of rent, they cannot be awarded in a suit where they have accrued due subsequently to its institution 8. B. 164 (167) and 9. C. 143 referred to.

Semble.—If two persons execute a deed on the faith that a third person will do so, and that is known to the other parties to the deed, the deed does not bind in enquity if the third refuses to re-execute. 11 Ch. D. 121 (125) r ferred to. S. B. FRASER & CO. *v.* THE BOMBAY ICE MANUFACTURING CO. LTD., **7 B. L. R. 107.=29 B. 107.**

142. s 27. See S. 23 and 27-6. B. L. R. 23 No 120 *Supra.*

143. s. 28. *Arbitration—Arbitration Act (IX. of 1899), ss. 4, 20—Arbitration clause in a contract—Reference to an association—*

An arbitration clause in a contract amounts to a "submission" within the meaning of s. 4. of the Arbitration Act, and is valid, being covered by exception (1) to s. 28 of the Contract Act. When reference is made to an association consisting of a large and fluctuating body of persons who cannot sit as a tribunal; the association has power to appoint individuals to act as arbitrators, and the rules of the association will be binding on the parties. —GANGES MANUFACTURING COMPANY *v.* INDRA CHAND, **I. L. R. 33 C. 1169.**

144. S. 29 & 87.—*Void for uncertainty and indefiniteness.*

A mortgaged indigo cakes to B describing them as those to be manufactured from the crops to be grown on lands of factory C, from the date of the execution of the mortgage up to the date of its being paid off.

Held, that this mortgage contract was neither vague nor uncertain to become void on that account. BALDEO PARSHAD *v.* A. MILLER. **31 C. 677.**

145. S. 30.—*Meaning of* Badni *Contracts—Right of agent to recover payment actually made by him—Proof of agency.*

Held, that money paid on wagering or *Badni* Contracts are not recoverable, and that an agent, before he can recover from his principal the amount claimed for losses in wagering contracts, entered into under the principal's instructions, must prove either actual payment on his pricipal's behalf, or that a liability has been occurred which is

enforceable by law, and that a surrender of claim to profits made under a *Badni* Contract does not constitute an actual payment.

Held also, that an agent is entitled to recover actual expenses, which he has incurred out of his own pocket, under the direct instructions of his principal, and on his behalf, but the *onus* of proving this lies heavily on him.

Held further, that, in the present case, the plaintiff failed to prove that he was acting as an agent, and that the allegation of agency was made for obvious reasons as is generally done in the *Badni* Contracts to evade the consequences of S. 30 of the Contract Act. *80 P. R. 1895 referred to.* KASHMIRI MALL *v.* GIRDHARI LALL. **57 P. W. R. 1907.**

146. S. 30.—*Brokerage on wagering contract whether void.*

A contract by way of wager is not illegal, although it cannot be enforced in a Court of Law. Although a contract to pay differences only on contracts for the purchase and sale is void as being of the nature of a wager, collateral agreements which are themselves devoid of the element of wagering, though they may be entered into with knowledge of the nature of the principal contract, are not avoided by S. 30 or by any other provision of law. English law cases referred to. 24 B. 227 not followed. M. A. OOTHMAN *v.* KONG YEE LONE & Co. **1. L. B. R. 1900-02. P. 128.**

147. S. 30. *Wagering Contracts—Broker—Payment by broker to third parties—Suit by agent for re-imbursement.*

The plaintiff, as broker for the defendant, entered into various contracts with third parties for the sale and purchase of large quantities of rice. The transactions were merely speculations on the rise and fall of prices. The plaintiff sued the defendant for Rs. 120 on the allegation that the transactions had resulted in a loss and that in accounts the defendant owed him the amount claimed. It was contended for the defendant that the transactions being of a wagering nature such as would, between the parties, fall within the purview of section 30 of the Indian Contract Act, the plaintiff could not maintain the suit.

Held, that section 30 of the Indian Contract Act does not bar such a claim, for the sum was due to the plaintiff out of what he had paid as the defendant's agent to third parties on account of differences under wagering contracts entered into with them by the defendant through the plaintiff. CHEKKA VENKATASWAMY *v.* GAJJILA NAGABHUSHANAM. **14. M. L J. 326.**

148 s. 30—*Wagering Contracts Gambling transactions—Contracts for sale and purchase of goods without intention to complete them by delivery and payment—Agreement for "differences"—Suit on promissory note given for differences—English Gaming Act (8 & 9 Vic. c. 109).*

Where the circumstances as to contracts for sale, purchase and delivery of goods at

a given time and place are such as to warrant the legal inference that the contracting parties never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, the contract is not a commercial transaction, but a wager on the rise or fall of the market. There is no distinction between the expression "gaming and wagering" in the English Gaming Act, 1845, and the earlier Indian Act XXI of 1848, and the expression "by way of wager" used in s. 30 of the Indian Contract Act (IX of 1872). Transactions for the purchase and sale of goods comprised two clases of contracts—the one class suitable to traders, such as the defendants were and all duly fulfilled by delivery and payment, and the other class extravagantly large and left without any attempt at fulfilment.

Held, that the inference was that in the latter class the parties never intended completion, but that the contracts were for differences only; and where such differences formed the consideration for which a promissory note was given, the plaintiffs could not recover in a suit on the note. *The Universal Stock Exchange* v. *Strachan*, (1896, A. C., 166), referred to.—KONG YEE LONE & Co. *v.* LOWJEE NANJEE. **I. L. R, 5. C. W. N. 714 3 B. L. R. 476=29 C. 461 P. C.**

149 s. 30—*Wagering contracts—Their criterion.*

To decide questions whether the transactions in a suit are genuine mercantile transactions or mere agreements by way of wagers, the Court should not simply look at the transactions as they appear on the face of them, but should go behind and beyond them, and ascertain the true nature of dealings between the parties, by probing into surrounding circumstances and minutely examining the position of the parties and the general character of the business carried on by them. The Court must be careful not to be misled by the mere rectitude of the documents evidencing the transaction or the mere protestation of one of the parties as to his real intention. The Court must for itself find out what were the primary intentions of the parties, when they entered into the transactions in question. The attitude generally adopted by the party to the transactions, who, on the due date, stands to make a profit, and his protestation that he is or was always ready to give or take delivery, or that he always intended to do so, ought not to weigh with the Court, but the Court must, with the materials placed before it, endeavour to find out what both parties originally intended to do, when they first entered into the contract If the Court is satisfied that, when the parties entered into the agreements they intended neither to take or give delivery, but merely to adjust the transactions, on the due date or dates, by the payment or receipt of differen-

ces of prices of the commodities ruling at the market, at such due dates, then, the Court should have no hesitation in holding that the transactions were mere agreements by way of wagers, and as such, void in law. 16 B 441 discussed: 7 B. L. R. 611=30 B. 205, 14 B. 32), 2 Bom, L. R 450, 24 B. 227=1 Bom., L. R., 786, 28 B. 616=6 Bom., L. R. 521, 30 B. 83=7 Bom., L. R. 381 *referred to.* HURMUKHRAI *v.* NAROTAMDASS. **9 B. L. R. 125.**

150. S. *30—Wagering contracts—Agreements to pay differences—Act III of 1865.*

The law upon the subject of wagering contracts, which is contained in S. 30, Contract Act and in Act III of 1865, is that the Court must not only consider the terms in which the parties have chosen to embody their agreement, but it must look to the whole nature of the transaction or institution, whether it may be: and it must probe into all the surrounding circumstances, including the conduct of the parties, with a view to ascertain what was the real intention or understanding between the parties to the bargain. The actual form of the contract is of little moment, for gamblers cannot be allowed to force in jurisdiction of the Courts by the expedient of inserting provisions, which might, in certain events, become operative to compel the passing of property, though neither party anticipated such a contingency.

In case of wagering contracts, the Courts should be astute to discover what, in fact, was the common intention of both parties, and do all that is possible, to see through the ostensible and apparent transaction into the underlying reality of the bargain. MOTILAL PERTABCHAND *v.* GOVINDRAM JAICHAND. **7 B. L. R. 385=30 B. 83.**

151. S. 30.—*Contract by way of wager void—Admissibility of oral evidence.*

Oral evidence may be let in to prove that a contract is void on the ground that it is by way of wager. 28. I. A. 239-5 C. W. N. 714 referred to. 9 C. 791 overruled. BENI MADHAB DASS *v.* SADASOOK KOTARY. **9 C. W. N. 305 (F. B.)=1 C. L. J. 155=9 C. W. N. 305=32 C. 437 (F. B.).**

152. S. 30.—"*Badni*" *transaction—Wagering contract.*

Contracts are not wagering contracts unless it b) the intention of both contracting parties at the time of entering into the contracts, under no circumstances to call for or give delivery from, or to, each other. *Tod* v. *Lakhmidas Purshotamdas.* (I. L. R., 16 Bom. 441) followed. AJUDHIA PRASAD *v.* LALMAN. **I. L. R. A. W. N. 1902, P. 178=25 A. 38.**

153. S. 30.—*Wagering contract—Principal and agent.*

Held, that an agent who has received money to the use of his principal on an illegal contract between him as such agent and a third party cannot be allowed to set up the illegality of the contract as a defence in an action brought by the principal to recover from the agent the money so received. BHOLANATH *v.* MUL CHAND. **A. W. N. 1903, P. 161=15 A. 639.**

154. S. 30—*Wagering contract—Contract colloteral to a wagering contract not void.*

Although by reason of S. 30 of Contract Act 1, a wagering contract is void, a contract, collateral to such a contract, is not necessarily unenforceable, and the fact that a person has constituted another person his agent to enter into and conduct wagering transactions in the name of the latter, but on behalf of the former, the principal, amounts to a request by the principal to the egent to pay the amount of the losses, if any, on those wagering transactions. *Parakh Govardhanbhai Haribhai* v. *Ransordas Dulabhdas* (12 Bom., H. C. R., 51) and *Thacker* v. *Hardy* (L. R., 4 Q. B. D. 685), referred to.—SHIBHO MAL *v.* LACHMANDAS. **A. W. N. 1901. P. 33=23 A 165.**

155. S. 30—*Act III of 1865. Bombay—Wagering contract.*

Section 30 of the Contract Act provides that agreements by way of wager are void, but that a transaction may fall within this provision of the law there must be at least two parties, the agreement between them must be by way of wager, and both sides must be parties to that wager.

It is of the essence of a wager that each side should stand to win or lose according to the uncertain or unascertained event in reference to which the chance or risk is taken. SIR E. SASSOON *v.* TOKERSEY JADHAWJEE. **6 B. L. R. 521.=28 B. 616.**

156. S. 30.—*Wagering transaction.*—Badni—*Evidence.*

In order to constitute a wagering contract and to make it void under the Contract Act or under the provisions of Act III of 1865, Bombay, what is necessary to establish is, that it was not the intention of the parties actually to deliver or to take delivery of the commodity, in other words, if it is proved to the satisfaction of the Court that the parties were merely contemplating a nominal contract, dealing only in differences and agreeing either to receive or pay differences according to the rise and fall in the market, and if as a matter of fact neither of the parties intended to deliver or receive the commodity the contract is null and void.

In order to ascertain whether or not it was the intention of the parties to deal in actual commodities or only to receive and pay differences the Court is bound to look at all the surrounding circumstances of the case. It has to look into the contract itself—if there is a contract in writing to consider its provisions to look at the dealings of the parties immediately before and after the transaction—to look into the circumstances of the persons dealing or professing to deal in the various commodities under dispute. In fact the Court has to look at all the surrounding circumstances that may in any way throw light on the question in order to ascertain the intention

Sup: Govt acts (IX of 1872) *(Contd)*

of the parties—whether they were dealing in real commodities or only in differences. SIR E E. A. D. SASSOON *v.* TOKERSEY JADOWJEE. **5 B. L. R 503.**

157. S. 30. *Wagering transactions.*

The provisions of section 30 of the Contract Act are substantially a transfusion of English Law into the Indian Statute Book.

Two parties may enter into a formal contract for sale and purchase of goods at a given price, and for their delivery at a given time. But if the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market-price of the goods should vary from the contract price at the given time, that is not a commercial transaction but a wager on the rise or fall of the market.—*L. R.*, 1896. *App. Cas.*, 166 *approved.* KONG YEE LONE & Co, *v.* LOWJEE NANJEE **3 B. L. R. 46 = 5 W. N., C. 714 = 29 C. 461 (P. C.).**

158. S. 30. See S. 20, 30 and 65. 25 M. 561 No. 68 *supra.*

Wagering contract—Condition as to anticipation of date of performance and measure of damages—Suspending payment—Insolvent.

The mere fact that a provision is inserted in the contract, by which under certain unusual circumstances the date for the performance of the contract may be anticipated and the measure of damages may be ascertained in a particular way, does not render it void as coming within the provision of the law relating to gambling transaction.

Therefore a condition in a contract that one of the parties becoming unable from pecuniary circumstances to perform the contract shall not put an end to it but if the contract is beneficial to that party the damages shall be then and there ascertained and shall be paid over to that party, does not bring it in the catagory of a gambling transaction.

The expression "suspending payment" is a well-known commercial expression, and a merchant suspends payment, when he ceases to discharge his mercantile obligations in due course—when he does not pay his debts as they become due from time to time as they are usually paid by merchants.

In ordinary parlance "insolvent" and "suspending payment" have practically the same meaning. CHAMPSEY PURBUT *v.* GILL AND Co. **7 B. L. R. 154.**

159. S. 30. *Suit against stake-holder.*

In a suit to recover money which the plaintiff has deposited with a stake-holder the "paying over" which would bar the suit means paying over upon the event of the wager—where in such a suit the plaintiff does not repudiate the wager but claims not only his original stakes but the whole winnings, he can get nothing 2 U. B. R 1897-01 P. 329, 1 Q. B. D. 744, S. J. L. B. 130, Shirley's Leading cases referred to. NGA HLAING *v.* NGA KYAN THA. **U. B. R. 1904 P. 3.**

Sup: Govt. acts (IX of 1872) *(Contd.)*

160 S. 30—*Suit for winning on a wager—* A suit for the amount deposited by the plaintiffs with a stake-holder, on a wager, will lie; but a suit for the amount deposited by both parties to the wager is barred by S. 30 S. J. L. B. 130 (1881), L. J. 36. 1867, N. S. C. L. 178: 2 L. B. R. 216 (1904) referred to. TUNHLA *v.* MAUNG TO. **2. L. B. R. 1904 P. 271.**

161 S. 30—*Wagering Contract—Differences in accounts—Teji Mandi—Nazrana—Nichrawal.*

An agreement is a wagering agreement when the intention on both sides is that only differences are to be accounted for.

The nature of *nazrana* transactions which are also known as *Nichrawal* and *Teji Mandi* is as follows:—

A agrees with B. for a certain quantity of grain at a fixed price for a certain future date and pays to B. a sum known as *nazrana*. On the said date A. has the option of declaring bought or sold. If the rate has risen A. naturally declares "bought" and is credited with difference in prices, if the rate has fallen A declares "sold" and receives a corresponding credit. The agreement is in fact neither of sale nor of purchase, B. accepts a certain sum on the chance that on a certain date prices will range within a certain limit. If he succeeds in foretelling the exact price then he pockets the *nazrana*, but if prices rise or fall beyond his margin of risk he is bound to lose. L. R. 28. I. A. 239. (P. C.) followed. 21. B 227 refd to. RAMRATAN *v.* SETH KANAK MAL. **15. C. P. L. R. 1902. P. 58.**

162. S. 30 & 235.—*Untrue representation of agency—Gambling contracts—Right of betting agents to recover losses paid on behalf of principals.*

An untrue representation of agency falling under S. 235, Contract Act, need not necessarily be made in express and literal words. It may be conveyed by any words, spoken or written, combined with acts or omissions which, under the circumstances of the particular case, do in fact lead the person induced to contract, into a reasonable belief that the professed agent has the authority represented. The fact that the pretended agent has acted under the belief that he had the authority he represented himself to have does not affect his liability under this section except in the cases where he would be protected under S. 208 of the Act.

An untrue representation under S. 235 must be one of fact and not merely one of law.

Under S. 30 a contract for a wager si void and cannot itself be made the basis of a suit. But such a contract is not illegal merely because it is for a wager. Therefore contracts which are not by way of wager, but are collateral and subsidiary to wagering contracts are not void, and may be enforced by suit.

Sup: Govt. acts (IX of 1872) *(Contd).*

Where, therefore, the plaintiff, a commission agent, made debts in his own name for the defendant at his request, and, on the bets being lost paid the losses in the ordinary course of business.

Held, that the plaintiff could legally recover from the defendant the sums so paid, and that S. 30 afforded no answer to the claim. J. C.'s select cases No. 19, second appeal No. 234 of 1884, 12 Bom. H. C. R. 51, 23 A. 165, 25 A. 639, *referred to.* BHAVANI PARSHAD *v.* SRI NARAIN RAMBILAS MARWARI. **17 C. P. L. R., 1904, P. 67.**

163. S. 30 & 213.—*Wagering Contracts—Badni transaction—Liability of agent to render accounts—Presumption from non-production of account-books.*

Defendants purchased gram for plaintiff at his request and subsequently sold it without disclosing the names of the purchasers, and the plaintiff accepted the sale and entered it up in his account.

Held, that the defendants were responsible to the plaintiff for payment of the differences, *i. e.*, for any profits that they received, although the transactions entered into by the defendants were *badni* transactions and void under Section 30 of the Contract Act.

Held, also, that under Section 213 of the Contract Act the defendants were bound to render proper accounts to the plaintiff. As no objection was taken by the defendants as to the amount of profits claimed by the plaintiff and accounts were not produced by them, the plaintiff's claim was decreed in full. *No.* 80 *P. R.*, 1895, and *No.* 90 *P. R.*, 1880, *followed.* 24 *Bom.*, 227, *referred to.* DEBI SAHAI *v.* GANESHI LAL. **P. L. R., 95 of 1901 = P. R. 46 of 1901.**

164. S. 37.—*Contract—Executory contract—Parties to suit—Assignee.*

When the assignor and the assignee both sue there is no question as to which of them is to recover.

Executory contracts are not assignable to third parties so as to affect the rights of the original contractee. His rights and liabilities remain just the same whether there is assignment or not. The third party, the assignee, cannot in his own name file a suit for the performance of those contracts against the original contractee, but if the contracts are not of such a personal character that their performance cannot be claimed except by the original parties themselves, then even if they are contracts of an executory character, there is no reason why such contracts should not be treated as perfectly assignable between the parties, that is to say, the benefit of the contract would pass to the assignee, and the assignee can have the benefit of these contracts so far as they are consistent with the rules of procedure. They may make use of the name of the assignor, subject to that, the benefit passes on to the assignees. JIWAM VURJUNG *v.* HAJI OOSMAN HAJI OOMER. **5. B. L. R. 373.**

Sup: Govt. acts (IX of 1872) *(Contd).*

166. S. 37.—*Specific performance claimed by an heir.*

J and G. made a contract by which J was to supply funds to conduct a litigation, to recover certain property and to enjoy it on payment of rent. Subsequently J entered into another contract with G to give him a two-third share in the tenure if he supplied the funds. *Held* J's representatives could not enforce the contract with G even though such contract was expressly to bind and benefit representative as the consideration to such contract had failed.

Held, also, that as personal quality of the party with whom the contract was made, was a material ingredient in the contract, his representative after his death was not entitled to enforce specific performance of the contract.

Held, further, that the right to specific performance was lost by reason of the delay and laches on the part of the party and his successors.

A party can not call upon a Court for specific performance unless he shows himself ready, desirous, prompt and eager.—MOHENDRA NATH MOKEJEE (MUKHOPADHYA) *v.* (SAMU BIBI) KALI PRASAD JOHURI. **7. C. W. N. 229 = 30. C. 265.**

167. S. 39—*Refusal, what is.*

There was a contract to deliver goods in two instalments and the plaintiff failed to tender for, or take delivery of, the first instalment although the market was in his favour. Regarding the second instalment, he made a tender which the defendant refused to recognise on account of his previous failure.

Held, that, under the circumstances, the conduct of the plaintiff had not amounted to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescision, and therefore the defendants could not accept it as a reason for not performing his part (4 C. 252 relied on).

As to what amounts to a 'refusal' in cases of the present class, S. 39 of the Indian Contract Act discussed and the test laid down by Lord Coleridge in *Freeth* v. *Burr*, L. R. 9 C. P. 208, and adopted by the House of Lords in *The Mersey Steel Co.* v. *Naylor*, L. R. 9 App. case 434, applied — RASH BEHARI SHAW *v.* NRITYA GOPAL NUNDY. **3 C. L J. 249 = 33. C. 477.**

168. S. 39 & 64.—*Mortgage—Incomplete transaction—Mortgagee failing to redeem previous mortgages—Rescission of contract—Compensation for breach of contract.*

When a mortgagee by the terms of his mortgage agreed to redeem previous mortgages immediately or within a reasonably short period and failed to perform his promise.

Held, that owing to his default the mortgagee was not entitled to recover from the mortgagor possession of the mortgaged property or the amount advanced to him.

Sup: Govt. acts (IX of 1872) (*Contd.*)

SAUDAGAR SINGH *v.* SANT RAM. **87 P. L. R. 1906=103 P. R. 1906.**

169. s. 42 & 43—*S. 22—Joinder of defendant after expiry of limitation period.*

When a plaintiff is entitled to proceed against such of the original promisors or their representatives as he pleases, under S. 42 and 43 of the Contract Act, his suit is not barred under S. 22 of the Limitation Act against the promisors or the representatives of the promisors, against whom the suit is filed within the period of limitation prescribed for the suit, by reason of another promisor or representative of a promisor being impleaded after the expiry of the period of limitation. 53 P. R. 1896 referred to. JAWAHIR *v.* S. HARI SINGH. **116 P. L. R. 1905.**

170. s. 43. *Parties to suit—Contract made by a firm.*

Under S. 43 the plaintiff in a suit brought upon a contract made by a firm may select as defendants those partners against whom he wishes to proceed allowing his right of suit against those whom he does not make defendants to be barred, 6 B. 700 followed. JAGLAL *v.* SHIBLAL. **25 P. L. R. 1902 =37 P. R. 1902.**

171. s. 43 *See S. 42 and 43—136 P. L. R. 1905 No 169 supra.*

172. s. 44. *Contribution between co-mortgagors C. P. C. S. 295 Prov. (c)—Sale proceeds —Surplus of.*

If a mortgagee receives any money out of the surplus sales-proceeds of a share in the property mortgaged to him, sold in execution of a decree on a prior mortgage from some of the mortgagors to whom the share belonged and against whom the decree was obtained, he is bound to apply the money to the satisfaction of his mortgage debt only in case he receives it by virtue of his security and not otherwise, although the payment might be made to him by the said mortgagors in satisfaction of other debts due to him from them. GANGA RAM MARWARI *v.* JAIBALLAV NARAIN SINGH, **I. L. R. 30 C. 951.**

174. s. 42 and 45.—*Suit to recover debt due to a partnership—Contract with one partner only, whether such partner could sue by himself.*

This was a suit under a contract entered into with the plaintiff, who was one of the partners of a firm. A preliminary objection was urged that the plaintiff, who admittedly had a partner with him, could not sue alone, without joining such partner as co-plaintiff.

Held, that as, in the present case, the bond sued on was executed by the defendants in favour of the present plaintiff alone, it was competent for him to maintain the suit by himself, without making his partner a co-plaintiff. MEHR SINGH *v.* CHELA RAM. 7 B. 217, 20 B. 435, 17 B. 413, and 29, 7 C. 739, 18 M. 33, 62 P. R. 1873, 156 P. R. 1889 and 86 P. R. 1891, referred to. **127 P. R. 1906 =10 P. W. R. 1907=58 P. L. R. 1907.**

175 s. 45—*Right of succession by legal representative—Aliyasantana law—Fund settled on marriage of husband and wife—Interest payable to both jointly—Death of husband—Claim by widow by right of survivorship—Right of husband's legal representative to his share.*

Sup: Govt. acts (IX of 1872) (*Contd.*)

Upon the marriage of first defendant with K, a sum of money was settled by first defendant's mother, on first defendant or on K. This money was lent on mortgage, and by the terms of the mortgage, interest was payable by the mortgagors to first defendant and to her husband K, jointly, with the exception of that which would accrue in respect of the last year of the term, which, together with the principal sum secured by the mortgage, was to be paid to first defendant herself. K. died, whereupon plaintiff, as K's legal representative, brought the present suit to recover the interest due under the mortgage:

Held, that plaintiff was entitled, under s. 45 of the Contract Act, as the legal representative of K, to a moiety of the interest which had accrued since the death of K, first defendant being entitled to the other moiety, and that the right to the whole of the interest did not pass by survivorship to first defendant. The circumstance that K and first defendant intended to live and did in fact live together as husband and wife under the Aliyasantana law was insufficient to raise the presumption of a contract that there was to be a right of succession by survivorship between K and first defendant in respect of the settled fund.—KANTHU PUNJA *v.* VITTAMMA. **I. L. R., 25 M. 385.**

176 s. 45—*Suit by Partnership—Parties representatives of a deceased partner—Debt due to partnership when deceased partner was alive.*

The representative of a deceased partner are not necessary parties to a suit for the recovery of a debt, which accrued due to the partnership during the life-time of the deceased 9 A 486, 17 B 6, 17 M 198, 20 A 365 followed 18 C 86 dissented from.—MULK RAJ *v.* GEORGE KNIGHT. **10 P. R. 1906.**

177 S. 45—*S. 22—One of several co-promisees sued alone—Others jointly interested to sue made parties after expiry of limitation—Effect on the original plaintiff's claim.*

One of the members of a trading joint Hindu family, sued in his own name for recovery of a debt due to the family. The defendants objected that the undivided sons of the plaintiff ought also to be joined as parties to the suit. The plaintiff's sons were brought in, but they stated that they had authorised plaintiff to sue alone and that they did not wish to be added as co-plaintiffs. Hence they were added as defendants. But this was at a time when the period of limitation fixed for the suit had expired. The original defendants contended that, as when the sons of the plaintiff were brought on the record, the period of limitation for the suit had expired, the suit ought to be

Sup: Govt. acts (IX of 1872) (*Contd*)

dismissed as barred, under S. 22 of the Act. *Held*, the suit was not barred. It is not sound law to hold that a plaintiff, who has sued for relief within the period of limitation, must lose his suit because all the possible plaintiffs have not been joined and those not originally suing have been joined as defendants after the period of limitation has expired. S. 22 of the Act ought to be interpreted strictly, and the bar of limitation created by it ought not to be extended to cases not clearly covered by its provisions. Here, there was no community of interest between the first set of defendants and the second set of defendants. There is no authority for holding that one of the several co-promisees cannot sue for enforcing his rights under the contract, if the others entitled to sue jointly with him do not join him in suing or refuse to join as co-plaintiffs. If it should be held that he cannot sue independently, his rights under the contract would be destroyed by the refusal of others to join him. The debtors, the first set of defendants, had a right to protect themselves against harassment by insisting that all persons interested to sue them are brought on the record. This protection they have secured by the joinder of the second set of defendants. When this has been done, they cannot be allowed to plead that, because the other set of defendants have been brought on the record subsequent to the period of limitation, their own rights have been prejudiced or that the suit by the original plaintiffs, as against themselves, is barred by limitation. The rule of English Law in this respect does not apply to India. Further, S. 45 of the Contract Act permits a suit being brought by one of several co-promisees: He cannot, therefore, lose his rights because others refused to join. 27 B. 11. 27 C. 540, 156 P. R., 1889, referred to.

Held, further, that the plaintiff was entitled not merely to his proportionate share of the amount but to the whole amount of the claim. 3. C. 26 referred to. LABHU RAM *v.* KANSHI RAM. **76 P. L. R., 1905, (F. B)**

178. S. 45.—*Representatives of a deceased partner not necessary parties to a suit for debt due to partnership—Hindu Law.*

The representative of a deceased partner are not necessary parties to a suit for the recovery of debt which accrues due to the partnership in the life time of the deceased. It has been so held by the High Courts of Allahabad, Bombay and Madras. 17 M. 108, 20 M. 232, 19 B. 338 and Pollock on Contract Act, referred to. 18 C. 88 dissented from. K. V. P. L. PRIANEN CHETTY *v.* ARMUGA PATHER. **4 L. B. R. 1907, p. 99.**

179 S. 46—49—*Pakky adat agency—Place of performance of a contract—Cause of action —Jurisdiction.*

The Contract Act makes no provision for the place of performance when no time or place is fixed and where there is no provision to perform without application.

Sup: Govt. acts (IX of 1872) (*Contd*)

If a debtor is bound to perform a contract out of the jurisdiction of a Court if required, the contract cannot be said to be one, which, according to its terms, ought to be performed within the jurisdiction.

The liability of a *pakka adatia* cannot be classed with that of an ordinary buyer and seller, bound to find out his creditor at his place of business. He undertakes to find out a customer, himself or another at current prices for his constituent, and guarantees payment to the constituant of the profits if any. He undertakes to send such profits, not as debt due from himself, but as proceeds realized by him on the constituent's behalf, at the constituent's charges, and he is entitled to such charges as an agent for expenses properly incurred by him in conducting such business. He is to do certain set of service which can be perfomed consistently with the terms of his undertaking at his own place of business. In the absence of express or implied promise for performance elsewhere, the undertaking only gives rise to a cause of action in the Court within whose jurisdiction he resides 1 Q B 103 followed.

The nature of relation between a *pakka adatia* and his constituent discussed 6 B. L. R. 1038 not followed and commented on. KEDARMAL BHURAMAL *v.* SURAJMAL GOVINDRAM, **9 B. L. R. 903.**

180. S. 46, 49, 94.—*Letters Patent, cl. 12. —Commission Agent—Place of payment of debt—Cause of action—Jurisdiction.*

The plaintiff, a commission agent and merchant carrying on business in Bombay, gave instructions to the defendants also commission agents and merchants carrying on business at Phulgaon in the Birda Zilla, to enter into certain transactions on behalf of the plaintiff and the defendants entered into those transactions as commission agents on behalf of the plaintiff. Accounts were sent and advices were transmitted from Phulgaon to the plaintiff in Bombay and from Bombay by the plaintiff to the defendants at Phulgaon. Subsequently the plaintiff, having applied for leave under cl. 12 of the Letters Patent, brought a suit in the High Court at Bombay to recover the amount due from the defendants at the food of the accounts between himself as principal and the defendants as commission agents at Phulgaon: the defendants pleaded want of jurisdiction. *Held*, that as (1) instructions were sent to the defendants from Bombay, (2) accounts were rendered to the plaintiff (at Bombay) and (3) demand was made from Bombay to the defendants at Phulgaon, the payment of money therefore was clearly to be in Bombay. 12 B. D. 103 (107) 36 ch. D. 453 (644) 11 B. 257 Referred to. *Per Curiam:*—The expression "cause of action" means the bundle of facts, which it is necessary for the plaintiff to prove before he can succeed in his suit, not irrelevant, immaterial facts, but material facts without which the plaintiff must fail. If

any of these material facts have taken place within the jurisdiction of the Court, then leave can be given under clause 12 of the Letters Patent. But if no such material facts have taken place within the jurisdiction of the Court and leave is given, then it is open to the defendant to contend at the hearing that the Court has no jurisdiction...Where no specific contract exists as to the place where the payment of the debt is to be made, it is clear, it is the duty of the debtor to make the payment where the creditor is. 20. Q. B. D. 158 followed.—MOTILAL *v.* SURAJMAL, **30 B. 167; 6 B. L. R. 1038.**

181. S. 49 - See S. 46 and 49—9 B. L. 903 and 30 B. 167 Nos. 179 & 180 *Supra.*

182. S. 49.—*Civil Procedure Code (Act XIV of 1882), Sections 17, 57—Jurisdiction of Court—Suit based on contract—Place where payment to be made—Return of plaint to be presented to proper Court—Contract Act (IX of 1872), Section 49.*

In India, the rule as to the place of performance of a contract whether it be payment or any other mode of performance, is to be determined by section 49 of the Contract Act, although the common law rule is that the debtor must seek out the creditor.

The plaintiff basing his claim on a contract, and alleging that the payment was to be made to him at Sirsi brought a suit in the Sirsi Court. The defendant objected that the Court had no jurisdiction inasmuch as the defendant did not reside within the jurisdiction of the Court. The objection failed in the first Court. On appeal the District Judge dismissed the suit "subject to the condition that if the plaintiffs so desire, the plaint may be returned to them for presentation in the proper Court."

On second appeal—

Held, that the District Judge in proceeding to dismiss the suit was wrong: inasmuch as there was no jurisdiction to institute the suit in the Sirsi Court, the proper order was, as indicated by Section 57 of the Civil Procedure Code, to direct that the plaint should be returned to be presented to the proper Courts. PUTTAPPA MANJAYA *v.* VIRABHADRAPPA N. **7 B. L. R., 993.**

183. S 51.—*Suit for damages for breach of contract—Readiness and willingness to pay without making actual tender of money.*

In a suit for damages for breach of a contract to deliver cotton, there was evidence that the plaintiffs had called on the defendant to perform his part of the contract by giving delivery, but that he had refused to do so and had repudiated the contract. The plaintiffs prove that they were ready and willing to carry out their part of the bargain and had made preparations with the object of having the money ready to pay for the cotton on delivery.

Held, that under S. 51 of the Contract Act (IX of 1872), they had done sufficient to entitle them to recover damages, and were not obliged to show that they made an actual

tender of the money. SHRIRAM RUPRAM *v.* MADANGOPAL GOWADHAN, **8 C. W. N. 25=30 C. 865, P. C.**

184. S. 51 & 52.—*Demand of the fulfilment of contract—Duty—Demandant's fault.*

A man is bound to be ready and willing to carry out his contract from the very earliest moment at which fulfilment of it can be demanded, and if a man calls upon another to do an act, the doing of which puts the demandant under an obligation to do another act, then the demandant must be ready and willing to do that act at any time the other party does the act which lays the demandant under that obligation. PANDURANG *v.* DADABHOY **4 B. L. R. 453=26 B. 643.**

184. (a) S. 52.—*See S. 51 and 52—26 B. 643 No. 184 Supra.*

185. S. 55. *Time essence of the contract —Forfeiture C. P. C. S. 214, 311—Agreement to pay off decree on a certain date.*

Whether the time of performance fixed by an agreement is of the essence of the contract or not depends upon the intention of the parties. It must be ascertained, whether, in fact, the performance of the contract by one party was meant to depend upon the other party's promise being fulfilled by the day named therefor, or whether a day was named merely in order to secure performance within a reasonable time. If the former is found to have been the intention, no relief can be claimed against for eiture; if the latter is found to have been the intention, equity will not refuse relief if the promise required to be performed was performed within a reasonable time. Where the parties agreed that if the judgment-debtors pay a certain sum to the decree-holder within one month, the execution sale shall be set aside:

Held, that the intention of the parties was that performance within the prescribed time was essential. Even if performance within the time had been merely material and not essential, no relief could be granted unless the delay which occasioned the default was satisfactorily explained and accounted for. Such an agreement is a valid and enforceable agreement, 29 C. 577 ref. to. HARAKH SINGH *v.* SAHEB SINGH. **6 C. L. J. 176.**

186. S. 55 & 75. *Contract—Damages—Building contract not performed within time fixed—Extension of time—Approval of work.*

The plaintiff sued the defendant, a Railway Company, as a signee from one *S.*, a Railway contractor, of all the moneys and outstandings due to him by the defendant under a contract between him and the defendant. The claim was in respect of a certain sum deposited by *S.* as security for the performance of the contract and another sum representing the 10 per cent. deductions withheld by the Company, under the provisions of the contract, as further security, from payments made, from time to time, to *S.* and subsequent to the assignment to the plaintiff for works done by *S.* up to the date

Sup: Govt. acts (IX of 1872) *(Contd).*

on which the defendant took over the remaining works from his hands, after giving him due notice and entrusted the same to the plaintiff under a fresh contract. It was pleaded for the defendant that *S.* having failed to complete the works within the stipulated time to the satisfaction of the Engineer mentioned in the contract had forfeited the sums claimed by him, and that *S.* was liable for loss and damage sustained by the defendant and also for the loss of profits and liabilities incurred by a third party for whose benefit the contract was entered into by the defendants. The plaintiff contended that there was no breach of contract for *S.* was unable to complete the works within the stipulated time partly because of the laches and negligence of the defendant in furnishing him with the plan of one of the works to be built and partly in consequence of the fact that the quantity of work which had to be actually done turned out to be much in excess of the estimated quantity, and that the defendant acted unlawfully in taking over the unfinished works from *S.* The loss claimed by the defendant represented the cost of the special establishment continued to be maintained by the defendant in connection with the unfinished contract work.

Held, that *S.* had committed a breach of the contract, for it was proved that he sought an extension of time to complete the work and the defendant allowed him one month's extra time, and the latter acquiesced in it and raised no objection as to the insufficiency of the extension. The contract was not an indivisible one, each of the works therein referred to being in itself an entire contract upon the completion of which *S.* was entitled to receive the price thereof and the plan of one of the works not having been furnished in time did not preclude the defendant from taking over other works from the hands of *S.*

That the original deposit by way of security and the 10 per cent. deductions only formed an indivisible consolidated security for the due performance of each and all of the several works, and could not be treated as a penalty or as liquidated damages, for it was held by the defendant under the express terms of the contract as security 'to be applied on or towards satisfaction of any loss or damage which the company may sustain or incur' by reason of the contractor's breach of contract. The *onus* was on the defendant to prove the actual damage sustained.

That the loss representing the cost of special establishment was recoverable from the defendant, but the defendant had no right to claim loss of profits and liabilities incurred by any third party, being too remote and not under the contemplation of *S.*

If the building owner has ordered extra work beyond that specified by the original contract, which has necessarily increased the time requisite for finishing the work, he is thereby prevented from claiming the pe-

Sup: Govt. acts (IX of 1872) *(Contd.)*

nalties for noncompletion provided for by the contract. If the extra work be one which the contractor was not bound to undertake, but which he nevertheless undertakes, and if such extra work cannot be regarded as a separate and independent works, but is one connected with the work originally stipulated for, the offer and the acceptance of such additional work will, by necessary implication; operate as a variation of the original contract, as to the time therein fixed for the completion of the work. The same rule would apply even if, under the term of the original contract, the builder had agreed 'to do any extra work which the building owner or his architect might order.' The term fixed in a contract for its completion must be taken to be with reference to the works specified in the contract and not with reference also to unspecified extra works which might be ordered under the contract. NARAINASWAMI RELDIYAR *v* THE MADRAS RY. Co., LD.—**13 M. L. J. 488.**

187. S. 55, & 107—Where a party to a Contract is at liberty to rescind it under section 55, and does so, section 107 has no application—The meaning of section 107 is that "If defendant-respondant instead of rescinding the contract had chosen to re-sell at the plaintiff-appellant's risk, then, in order to be able to hold plaintiff-appellant liable for any loss on re-sale, he would have had to comply with section 107 by giving reasonable notice to the plaintiff-appellant." 6. C. 64 referred to—NGA SHWE TEE *v.* NGA CHIT SON. **U. B. R. 1905. P. 9.**

188. S. 55, 231, 232.—*Time, essence of contract—Specific performance—Pleadings.*

In a suit for specific performance it is of some importance to distinguish between negotiation and contract and to ascertain what the contract is, when and by whom it was made, and who the parties are who are bound by it. Where a party contracts with another in his own name, without disclosing at any time that he is only acting as agent for another, the burden of the contract as between the contracting parties rests with the person actually contracting, and the other party has nothing to do with the former's undisclosed intentions. If a person who has drawn up a contract with his own hand and signed it wishes to persuade the Court that somehow or other an important term has been omitted by inadvertence or mistake, he is surely bound to pledge his oath to the truth of the story, and not the less so when his oponent comes forward and swears that there is no foundation for the suggestion; and his advocate is not to be listened to, if he himself will not venture to go into the witness box in support of the story he asked the Court to believe. The defendants agreed to take a lease of certain premises from the plaintiff at a certain rent, upon the plaintiff undertaking to erect a godown in the premises, in accordance with a plan approved by the defendants. The premises were in the occupation of tenants to the knowledge

Sup: Govt. acts (IX of 1872) *(Contd)*

of both parties and who could not be ejected at a moment's notice. The plaintiff promised to clear the ground and erect the proposed buildings as soon as practicable and he also said that when the land was ready, the buildings might be finished in the course of three or four months.

Held:—That in the circumstances the plaintiff did not undertake to finish the buildings within 3 months, irrespective of the time when the existing tenants vacated the land.

That though time was not made the essence of the contract by the terms of the written agreement, in the contemplation of both parties the buildings were to be completed, without unreasonable delay; and that in case of undue delay on the part of the plaintiff, the defendants might have made time the essence of contract by giving notice that they (the defendants) would not hold themselves bound to complete the covenant unless the business was finished within a specified time, assuming the time specified to be such as the Court would hold to be reasonable under the circumstances.

In a suit for specific performance, if the plaintiff's case is clear and the written statement does not disclose any valid defence, the suit according to the English practice ought to be decreed at once. It is not incumbent on a party to go to the trial armed with official and documentary evidence to rebut and disprove insinuations which had never been made.—IRRAMULI HUG *v.* WILKIE.—**11 C. W. N. 946 = 4 A. L. J. 740 = 6 C. L. J. 682; P. C. = 17 M. L. J. 454 (P. C.)**

189. S. 56—*Sale not completed—Return of deposit—Rescission of contract*:—

S. 56 provides for a case in which the performance of the contract becomes impossible otherwise than by some act of the promisor. The contract does not become void if the promisor does something which renders the performance of the contract impossible. Where the parties to a contract agreed to sell and purchase certain property but did not get the sale completed in ten months after the agreement and allowed the property to be auctioned: *held* that the reasonable inference from their conduct was that the parties had rescinded the contract, and none of them could sue for its performance. GANGA DEI *v.* ASA RAM. **4 A.L.J. 778 = A.W.N. 1908. P 5 = 3. M.L.T. 177.**

190 S. 56—*Impossible performance, S. 375 C. P. C.—Parties to suit agreed that plaintiff and his younger brother should execute a sale deed and that the suit should be dismissed in default—Refusal of younger brother to join in its execution in effect of.*—

S. 375 C. P. C. does not prevent the parties to a suit from entering into an agreement, that the plaintiff and his younger brother should execute a joint sale-deed, within a week of the plaint property in favor of the defendant, for a certain amount, and that, if the plaintiff should fail to do so, the suit should be dismissed. Nor does it preclude the Court from giving effect to it, if satisfied that the party has failed to perform his part.

The refusal, by the younger brother, to join in the execution of the agreement, cannot make the performance of the agreement by the plaintiff impossible within the meaning of S. 56, Contract Act. RANGASWAMY KAVUNDAN *v.* TRISA MAISTRY. **17 M. L. J. 37.**

191 S. 58—*Alternative promise—Indivisible.*—

Difficulty arises where there is a single promise with alternatives which can not be separated and a single consideration. For instance where the contract between a husband and wife was that A, the husband, would live quietly with B. the wife if they could manage it and if not B. the wife would be free to live away from A.

Held, it is impossible to separate the alternative and therefore the contract is totally void. MEHER ALLY *v.* SAKRE KHAN BHAI. **7, B. L. R. 606.**

192 S. 59—*Appropriation of instalments due under one decree.*

A decree was passed on a compromise, which provided for payment by instalments, and the decree-holder was entitled to recover the whole balance immediately on default of payment of two consecutive instalments. The judgment-debtor paid three out of five instalments, specifying that the payments were to be appropriated to the second, third and fourth instalments, *held*, that S. 59 of the Contract Act did not justify such appropriation and the decree-holder was entitled to appropriate the payments to the three first instalments and to an order absolute for sale by reason of the fourth and fifth instalments being overdue. FAZAL HUSAIN *v.* JIWAN ALI, **A.W.N. (1906), 125 = 3 A.L.J. 430.**

193 S. 59.—*Revenue Sale Law (Act XI of 1859), Section 27—Revenue sale—Arrears of Government revenue—'Debt'—Title of purchaser—Date of sale—Appropriation of payment of arrears of revenue.*

As the terms of section 27 of the Revenue Sale Law show, that the sale certificate is granted to the purchaser at a revenue sale for purposes of evidence, but the title vests in the purchaser from the date of sale.

The sale law under Act XI of 1859 is complete by itself, and the relation between the Government and the holders of estates liable to pay revenue under the Act stands on an entirely different footing from that on which the relation between creditors and debtors is based; and arrears of Government revenue are not a debt within the meaning of section 59 of the Contract Act.

When *kists* of Government revenue for September 1901 and January 1902 had fallen into arrears the defaulting proprietor paid the amount due for January *kist* but the Collector credited it towards September *kist*, and the land was sold to realise revenue for January *kist*—

Held, that the action of the Collector was not irregular and the sale was not open to

Sup: Govt. acts (IX of 1872) *(Contd).*

any objection. **L.R., 20 I.A. 165** *referred to.* MUNSIFF GANGA BISHEN SINGH *v.* SHEIK MAHOMED JAN. **10. C.W.N. 948.** *But see 12 C.W.N. 646 to the contrary—No. 195 Infra (Ed.)*

191 S. 59—*Apportionment of payment—Bengal Tenancy Act XIII of 1885 S. 55.*

There is much difference between the provisions of S. 55 Bengal T. A. & S. 59 of the Contract Act. Under S. 59 of the Contract Act the Court may have regard not only to the debtors' express intimation, but also to circumstances implying that the payment is to be applied to the discharge of some particular debt. Under s. 55 B. T. A. the debtor must declare the year and the instalment to which he wishes the payment to be credited. If he does not do so, the payment may be credited to such year and instalment as the Landlord thinks fit MOHIM CHANDRA ROY *v* SHRIMAT KALITARI DEBYA **11 C. W. N. 993**

195 S. 59 & 60—*Sale under Revenue sale law—Setting aside sale—Appropriation of payments by Collector.*

A revenue sale was set aside on the ground that there was no arrear inasmuch as the Collector ought to have appropriated the amount sent by the owner to the payment of the January *kist* for which the sale was held and not to the following March *kist.*

Whether S. 59 and 60 of the Contract Act apply to the appropriation of land revenue sent to the Collector discussed 10 C. W. N. 948 & 33 C. 1193 dissented from. JOGENDRA MOHAN SEN *v.* UMA NATH GUHA **12 C. W. N. 646.**

196 S. 62—*Contract—Novation.*

A contract by novation requires this as an essential element that the rights against the original contractor should be relinquished and the liability of the new contracting party accepted in their place. NADIMULLA *v.* CHANNAPPA **5. B. L. R. 617**

197. S. 62—*Novation—Hundies in satisfaction of account—Right to sue on accounts.*

Where the plaintiff accepted two *hundis* in satisfaction of money due to him on book accounts by the defendant, and on default of payment sued the defendant for the money due on book accounts, and it was contended by the defendant that there was a novation, and the plaintiff not having sued on the *hundis* his suit should be dismissed.

Held, that the plaintiff, not having parted with the *hundis* which remained unpaid till the date of suit, was entitled to sue for the money due on book accounts independently of the *hundis.* 7 Cal, 256. 84 P. R., 1885, 82 P. R., 1891; 71 P. R., 1897, followed. BALDEO SAHAI *v.* MUL CHAND. **28 P. L. R. 1903=7 P. R, 1903.**

198. S. 62.—*Novation—Privity between parties to new contract.*

A party to an agreement cannot plead that he is no longer responsible under it by reason of the other party having accepted a fresh agreement from a third person to which he was no party. ISHER DAS *v.* HIRA NAND. **80 P. L. R. 1903.**

199. S 62 & 63—*Novation—Release.*

A sued B and C for the balance due on promissory notes. A admitted that by an agreement subsequent to pro-notes he had agreed to release B on his paying half the amount due on the notes, but as B had not paid the half in full, he claimed to be entitled to sue B and C for the full amount due on the original notes.

The document executed by A was in fact an absolute release of B from all liability on the pronotes.

Held, that the release could not be treated as a mere agreement to release upon the full payment of half the amount due on the notes; and that A had no right of suit against B on the pronote. 3 C. 321 referred to, 15 C. 319 distinguished. ABDUL MAJID *v.* K. P. M. VELLIAN CHETTY. **L. B. R. 1900-02, P. 170.**

200 S. 62, 78, 95—*Negotiable Instruments Act—Payment—Contract of purchase—Hundi taken in part payment.*

Defendants agreed to sell paddy to plaintiff on the terms that the balance of the price, after giving credit for an advance of Rs. 1,000, should be paid by plaintiff on delivery at a place mentioned. It was agreed that an assignment of a debt for Rs 100 and a *hundi* for Rs. 900 should be accepted as payment of the advance. Defendants sold the paddy to a third party at a higher price, and plaintiff now sued for damages for breach of contract:

Held, that plaintiff was entitled to damages. As the Rs. 100 assigned and the *hundi* for Rs. 900 were agreed to be the payment of the advance of Rs. 1,000, the acceptance of the *hundi* operated as payment, though it might be only conditional, and the right to receive the Rs. 900 as part of the price might revive if the *hundi* should be dishonoured, and notice of dishonour duly given.

Held also, that the property in the paddy had passed to the buyer under s. 78 of the Contract Act, and under s. 95 of that Act, the defendants, as vendors, would have a lien on the goods and would not be bound to deliver until the price had been paid, including the Rs. 900 due under the *hundi* if the latter were dishonoured.— KUTTAYAN CHETTY *v.* PALANIAPA CHETTY. **27 M. 540.**

201 S. 63—*See S. 2, 33, 63 and 65—28. B 66 No 10 supra.*

202 S. 63—*See S. 62 and 63—1 L. B. R. 1900-02. P. 170 No 199 supra.*

203 S. 63—*Remission—Dispensing with performance.*

A Municipal Committee sued a Contractor and his surety for sums due under a contract. The defence was that the Committee had in a special general meeting passed a resolution dispensing with or remitting the performance by the defendant

Sup: Govt. acts (IX of 1872) *(Contd.)*

of so much of his obligation as gave rise to the suit and that the resolution was communicated to the defendant.

Held that there could be a dispensation or remission under S. 63 of the Contract Act by means of an agreement or contract alone. There must be a proposal of the dispensation or remission and an acceptance thereof. ss. 2, 23, 25, 63, 133 and 135 of the contract Act were considered.

Held, also that the committee's Resolution was defective and illegal. ABAJI *v.* THE TRIMBAK MUNICIPALITY. **5 B. L. R. 689=23 B. 66.**

204 s. 63—*See Evidence Act S. 92. Proviso (4) 26. M. 195.*

204 s. 64—*Company—Agreement between Company and Director how far binding on Company—Scope of authority of officers of Company—Principal and agent—General authority—Ratification—Acquiescence—Invalid contract—Restitution.*

The plaintiffs who were until a short time before they filed the suit *mutsaddis* of the defendant-company brought this suit against the company and their managing agents for refund of the value of the shares they had purchased under the agreement under which they had been appointed and for other damages for breach of the conditions of that agreement.

It was alleged in the plaint that on 30th January 1899 an agreement was entered into between the plaintiffs and the defendant company under which the plaintiffs were constituted *mutsaddis* of the company for twenty years and agreed to take 400 shares of the company valued at Rs. 40,000 which they stipulated to pay between February and July 1892 and further to advance to the company Rs 30,000 in promissory notes and bills of exchange, that their remuneration was fixed at 8 annas per cent. on all purchases of raw materials and Rs 1-6 per cent. on all sales of its produce except such as the plaintiffs declined to guarantee and countersign, that plaintiffs were to be irremovable within this period except for personal dishonesty, and that accounts between the plaintiffs and defendants were to be settled according to the provisions of the agreement, that in addition to the above the managing agents of the company agreed to give the plaintiffs a quarter of their own commission, which by the Articles of Association of the company was fixed at 7½ per cent on the gross profits of its business, that plaintiffs fulfilled all the conditions imposed on them and performed their part of the agreement and worked as *mutsaddis* of the company from May 1900 to March 1901 when the defendants wrongfully put an end to the agreement and ousted the plaintiffs from their post.

It appeared that one of the plaintiffs was a Director of the company when the contract was entered into. He did not vote when the loan from the plaintiffs was accepted at a meeting of the Directors and ceased to be a Director at least from 21st July 1900. The agreement purported to be one with the defendant-company and the Directors' interest in it was patent in the writing in which it was embodied. There was no concealment and the agreement was drawn up and revised by the standing counsel of the company who had never before he appeared to conduct the defence on behalf of the company pointed out its invalidity or impropriety. In the Articles of Association of the defendant-company clauses 94 and 95 provided for Directors dealing personally with the company and laid down the consequences of such dealing. Clause 95 provided, *inter alia*, that by entering the company's service or being a Director in a similar or competing company or being directly or indirectly interested in any similar business, his post shall be vacated. Clause 95 provided exceptions, and among these were that, with the sanction of the share-holders at a general meeting, a director might buy and sell articles, land, &c. from the company and only required that he should not vote when such a contract was put before the general meeting and invalidated his vote if he did give it.

It was contended for the defendants, *inter alia*, that the agreement was invalid, for (a) it was entered into by the managing agents in excess of their authority, and (*b*) was a fraud on the company as it was against its interests and had been entered into with one of the Directors without the knowledge of other Directors and the share-holders.

Held, that in regard to no part of the agreement could it be said that the fact of one of the proposed *mutsaddis* being a Director avoided it under the Articles of Association or on the general principle that the Director of a company stands in a fiduciary position to the share-holders and cannot make any personal profit in a transaction in which the company is interested without the knowledge and sanction of the share-holders. *L. R.*, 32 *L. J. Ch.* (1863) 151, *L. R.*, 6 *H. L.* 189, *L. R.*, 42 *L. J. Ch.* 644, *L. R.*, 1 *Ch.* (1898) 358, *L. R*, 1 *Ch.* (1900) 755. *L. R.*, 22 *L. J. C. P.* (1853) 99, *referred to.*

Held, also, that the contract was not binding on the company for it was unreasonable and excessively onerous and was not covered by the general authority given to the managing agents to appoint *mutsaddis* on such terms as they might think fit. 17 P. R., 1901, s c, 93 P. L. R., 1901, *followed.*

Held, further, that the agreement was not ratified by the company and there was no acquiescence by it in its terms so as to make the agreement binding on the company. The fact of the plaintiffs being *mutsaddis* to the knowledge of share-holders could not be treated as proof of acquiescence in the terms of the agreement.

Held, also, that the plaintiffs were not entitled to refund of the value of the shares for they must be treated as outside the agreement and section 64 of the Contract Act

Sup: Govt. acts (IX of 1872) (*Contd.*)

did not apply to the case. RAM DHAND v. DIAMOND JUBILEE FLOUR MILLS COMPANY LD. **100 P. L. R. 1905=10 P. R., 1905.**

206. S. 64.—See S. 19 & 64—49 P. R. 1904 No. 64 *supra.*

207. S. 64.—See S. 10, 11, 64, 25—56 A 342 No. 21 *supra.*

208. S. 64.—See S. 11, 19, 64, 65—30 C. 539 P. C. No. 28 *supra.*

209. S. 65.—*Contract—Rectification of—Discharge of debt by mistake—Relief.*

The relief contemplated by section 65 of the Contract Act is that the party prejudiced by the mistake should be releived from the consequences thereof.

Where the plaintiffs by mistake released a debt due to them they would be entitled to be placed in the same position as they would be if there had been no release and also compensated for any loss which may have necessarily resulted from the mistake.

Where the debt which was released by mistake was on the date of discovery of the mistake not barred by the statute of limitations the party entitled to relief on the ground of mistake could claim no compensation as no loss was sustained. He can only be entitled to a declaration that the release is void and should be cancelled if in writing.

But where the debt released by mistake is barred at the date of the discovery there is a loss which is the necessary result of the mistake when relief against the mistake will comprise not only a cancellation of the release but also compensation for the loss. THE MADRAS CONSOLIDATED SUGAR AND SPIRIT FACTORIES, LIMITED v. WILLIAM SISSMORE SHAW & OTHERS. **14 M. L. J. 443.**

210. S. 65.—*Report of referee*—Onus—*Warranty as to age.*

A person insuring his life is bound to make a true statement regarding his age at the time of his insurance.

The warranty as to age is an absolute warranty and not only as one of his belief and the plaintiff on whom the *onus* lay had failed to prove the correctness of the age is warranted by him.

He is not entitled under S. 65 of the Contract Act to a refund of the *premia* paid on the policy during the lifetime of the assured. Section 65 can apply only to cases in which the agreement is discovered to be void or the contract becomes void at law for any of the reasons specified in the Contract Act. Neither that Section nor Section 64 applies to cases in which there is a stipulation that by reason of a breach of the warranty by one of the parties to the contract the other party shall be discharged from the performance of his part of the contract. ORIENTAL GOVT. SECURITY LIFE ASSURANCE COY., LD. v. NARASIMHA CHARI. **M. L. J. 1901, P. 379=25 M. 183.**

211. S. 65. *Contract by Lunatic void.*

Where money was but by a lunatic to another man held that it could be recovered in a suit on his behalf by his next friend under S. 65 of the contract Act, even though the contract under which it was but was void in law. JUGAL KISHORE v. CHEDA. **1. A. L. J. 43.** *See S. 11 &c. 30 C. 539 No. 28 supra.*

212. S. 65—*Limitation Act, (XV of 1877) sch. ii, art. 97—Agreement to sell—Suit for specific performance.*

The defendants against whom a decree for foreclosure was outstanding agreed to sell certain immoveable property to the plaintiff, and the plaintiff paid into Court as part of the consideration the amount due by the defendants under the foreclosure decree. The defendants neither executed a conveyance of the property which they had agreed to sell, nor did they return to the plaintiff the money which he had paid on their behalf. The plaintiff thereupon sued the defendants, claiming in the alternative either a decree for specific performance of the agreement to sell or a refund of the money paid by him as part of the consideration for the sale agreed upon. The Court of first instance gave the plaintiff a decree for specific performance. On appeal by the defendants, it was *held* by the High Court: (1) that the terms of the agreement to sell not being satisfactorily proved, no decree for specific performance could be made; (2) that the plaintiff was therefore entitled to get back the money which he had paid under the agreement—11 A. 47 followed UDIT NARAIN MISR v. MUHAMMAD MINNAT-ULLA. **25 A 618.**

213. S. 65—*Marriage Contract—Pan money paid—Suit for money paid and damages—Public policy—Onus.*

The plaintiff alleged that the defendants agreed to give their sister in marriage to him and he agreed to pay them Rs 190 as *pan* money, of which Rs 155 was paid in cash and the balance was to be paid on the marriage day. He also alleged that he performed all ceremonies, feasted his caste people and on the day fixed, went to the defendants house to marry their sister, but they refused to give her in marriage, and subsequently had her married to some other person. Therefore he sued to recover the sum advanced and damages. Now the question was whether the contract for marriage for a consideration was immoral and against public policy and whether the plaintiff was entitled to a refund of the money paid in part performance of the agreement and to recover damages for breach thereof.

Held, from a review of the authorities, the following rules are deducible;—(1) An agreement to remunerate or reward a third person in consideration of negotiating a marriage, is contrary to public policy, and cannot be enforced 13 B. 131, Note; 17 M. 9; 13 B. 125 referred to. (2) An agreement to pay money to the parents or guardian of a bride or bridegroom, in consideration of their consenting to the betrothal, is not necessarily immoral or opposed to public po-

Sup: Govt. acts (IX of 1872) (*Contd.*)

licy. Where the parents of the bride are not seeking her welfare, but give her to a husband, otherwise ineligible, in consideration of a benefit secured to themselves, the agreement by which such benefit is secured is opposed to public policy and ought not to be enforced 13 M. 83; 23 A. 495; 22 B. 658; referred to. (3) Where an agreement to pay money to the parents or guardian of a bride or bridegroom, in consideration of their consenting to the betrothal, is, under the circumstances of the case, neither immoral nor opposed to public policy, it will be enforced, and damages also will be awarded for breach of it 7 Bom. H. C. R. O. C. J. 122; 11 B. 412; 25 W. R. 32; (4) A suit will lie to recover the value of ornaments or presents given to an intended bride or bridegroom in the event of the marriage contract being broken 7 Bom. H. C. R. O. C. J. 122; 16 B. 673; (5) Although a Court may not enforce an agreement to pay money to the parents or guardian of an intended bride or bridegroom, on the ground that the agreement is opposed to public policy, yet a suit is maintainable for the recovery of any sum actually paid, pursuant to the agreement, if the contract is broken and the marriage does not take place 14 W. R. 154=5 B. L. R. 395; 10 C. 1054; (6) If one of the contracting parties alleges that the agreement is opposed to public policy, it is for him to set out and prove those special circumstances, which will invalidate the contract 13 M. 83. Applying the above principles to the facts of the present case, the question of the illegality of the contract was not raised in the written statement, nor was it argued in any shape in the Court of first instance. There was no allegation or proof of any special circumstances, under which the contract in this particular case could be held illegal. The contention, that what is opposed to public policy in England is necessarily opposed to public policy in this country, although the social circumstances of the two countries are admittedly widely different, cannot be accepted as correct. Similarly, the argument that a Judge has an almost unlimited right of deciding cases according to his own view of public policy for the time being, cannot be accepted. Where a plaintiff has paid money to the defendant upon an illegal executory contract, or for a future illegal object, before there has been any substantial part-performance, there does not appear to be any good reason why he may not demand or recover back the money. In the result, the suit was decreed. BAKHSHI DAS *v.* NADU DAS, **1 C. L. J. 261.**

214. S. 65.—See S. 2, 23, 65—28 B. 66 No. 10 *supra.*

215. S. 65.—See S. 10, 11. &c.—26 A. 343 No. 21 *supra.*

216. S. 65.—See S. 11, 65—33 P. R., 1907 No. 30 *supra.*

217. S. 65.—See S. 12 and 65—1 A. L. J. 43 No. 33 *supra.*

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218. S. 65.—See S. 20, 30, 65—25 M. 56 No. 67 *supra.*

219. S. 65.—See S. 20, 65,—U. B. R. 1907 P. 1, No. 68 *supra.*

220. S. 65.—See S. 23, 65—28 M. 520 No. 122 *supra.*

221. S. 65, 70, 72.—*Contract defective under Municipalities Act not binding though performed in part—Suit not maintainable.*

Section 65 applies only to cases where an agreement is void on account of mistake or impossibility or want of a legal consideration. It does not apply where the agreement was defective, for example, not being signed by a Chairman and Secretary of a Municipal Committee as required by S. 40 of Act 15 of 1883, N. W. P. and Oudh Municipal Act, and therefore did not ripen in to a legal contract. Such a contract being not binding a suit is not maintainable thereon even though there had been a part performance and materials over the value of Rs. 20 had been supplied to the Municipality. 28 B. 66 L. R. 8, App. case, 517 and L. R. 2, Q. B. D. 463 followed. RADHA KRISHEN DAS *v.* MUNICIPAL BOARD OF BENARES. **2. A. L. J. 321=A. W. N., 1905, P. 111=27 A. 592.**

222. S. 65, 73.—*Contract—Mistake of fact—Void contract—Compensation—Execution of decree—Interest awarded by decree of first Court—Decree of appellate Court silent as to interest—Execution postponed from time to time on judgment-debtor agreeing to pay interest as mentioned in the application for execution—Objection at a late stage.*

The decree of the original Court awarded interest on the debt but the decree of the appellate Court was silent as to it. In the applications for execution interest was claimed by the decree-holder. The judgment-debtor agreed to pay the principal and interest as claimed in execution and obtained abjournments from time to time. At a later stage he contended that interest not having been allowed by the final decree should not be allowed.

Held, that interest could not be allowed under the decree but since the judgment-debtor had obtained adjournments from time to time on the promise to pay interest he was bound to pay it not as interest but as compensation for the advantage received by him from the date he agreed to pay it. The agreement to pay interest was void because it was entered into under a mistake as to a matter of fact essential to the agreement, both the parties being under a mistaken belief that interest was awarded by the decree. NARAYAN VITHA MAWAL *v.* RAOJI. **6. B. L. R., 417.=28. B. 393.**

223. S. 67—*Fee of Legal Practitioner—Claim for its refund on the ground of his not appearing in the case—Justification.*

Held, that where a legal practitioner is ready and willing to conduct in Court the legal business of his client but is prevented from doing so, by an act or omission of his client (*e. g.*, compromising the case and re-

fusing to pay Court-fee required for the power-of-Attorney), the latter is not entitled to claim refund of the fee from the former on account of his not appearing in the case. JAGGAN NATH *v.* MAHTAB SINGH, **22 P. W. R. 1907.**

224. S. 68—*Sch. II, Arts. 57 and 61—Minor, suit for money advanced to—Registration of bond executed by guardian—Extension of period of limitation—Necessaries supplied to minor—Money advanced to minor for litigation purposes.*

The plaintiff lent some money under a registered bond to the guardian of a minor, to meet the expenses of a litigation, in which the minor was concerned, and brought the present suit to recover the money against the minor, after the expiration of three years from the date when the loan was made.

Held, that the claim was barred under Art. 57, and the registration of the bond could not extend the period of limitation against the minor.

Held, further that the suit could not be maintained by the plaintiff under S. 68 of the Contract Act, inasmuch as she had not pleaded, nor proved that the money advanced by her was necessary for the minor. It was not sufficient merely to prove that the money was spent for the purposes of the minor. L. R. 3 Exch 63, 13 Q. B. D. 410, 19 Q. B. D. 509 referred to. ANJUMAN ARA BEGAM (NAWAB) *v.* NAWAB ANJUMAN ARA BEGAM, **10 O. C. 38.**

225. S. 68—*See S. 10, 11, 68—11. C. W. N. 135. No 23 supra.*

226. S. 69—*Griha Pravesam and Retusanti ceremonies. Right of mother to recover expenses incurred for—*

A suit by the mother of a girl for recovery of expenses incurred by her on the ceremonies of *Griha Pravesam* and *Ritusanti* is maintainable under section 69 of the Contract Act against the defendant who takes the property left by the plaintiff's husband by survivorship. VAIKUNTAM AMMANGAR *v.* KALLAPIRAN AIYANGAR, **13. M. 25.**

227 S. 69—*Contribution. Suit for—Rent paid by one co-sharer for the entire holding—Claim for contribution against his co-sharer inequitable when the plaintiff was in wrongful possession of his co-sharer's share.*

Section 69 of the Contract Act contemplates a case in which there are several co-sharers in possession of land, and where some of them having neglected to pay what is due from them in respect of the occupation of the land, one of their number pays what is due from all. He may then recover contribution from the rest.

But when the plaintiff sues to recover what he had by the wrongful appropriation of the profits of the defendant's share already received, it would be unjust and inequitable that under such circumstances he should be allowed to sue to be reimbursed in respect of payments made with what was virtually the defendant's own money. SWARNAMOYEE DEBI *v.* HARIDAS ROY. **6. C. W. N. 903.**

228 S. 69—

The purchaser in a Court sale of revenue-paying property who has been compelled to pay the arrears of revenue that had accrued due before the sale is entitled under section 69 of the Contract Act to be re-imbursed by the previous owners of the property. *6 All., 67, distinguished.* KISHEN LAL *v.* MEGH SINGH. **W. N., A., 1901, p. 37.**

229 S. 69—*Contribution, suit for,—Putni taluq—Mortgage—Sale in execution—Arrears of rent due previous to sale—First charge.*

A mortgaged a certain *putni taluq* to B. B subsequently brought a mortgage suit against A, and in execution brought the property to sale and purchased it himself. In the meantime, the rent due to the zemindar had fallen into arrear, and the zemindar obtained a decree, and in execution thereof advertised the patni for sale. The mortgagee, to save the property, paid in the amount of the decree and afterwards sued the mortgagor for contribution. *Held* that a mortgagee, who purchases property at an execution sale, is under a legal liability to pay the rent due upon the property at the time of purchase, and therefore cannot claim, under s. 69 of the Contract Act, contribution from the mortgagor. *Maharani Dasya v. Hirendra Lal Roy Chowdhury* (1. C. W. N. 458) and *Peary Mohan Mukhopadhya v. Sreeram Chandra Bose* (6 C. W. N. 791) relied on.—(MAHARAJA) MANINDRA CHANDRA NANDY *v.* JAMAHIR KUMARI. **9 C. W. N. 670 = 32 C 643.**

230 S. 69—*Payment by one interested—Decree for land in plaintiff's favour—Land withheld pending appeals—Payment of kist by plaintiff—Suit for amount paid.*

Plaintiff had obtained decrees for possession of certain lands, but, pending an appeal and second appeal, the lands were withheld from him. He, however, paid the *kist*, and now sued to recover the amount so paid: *Held* that he was entitled to recover. It was a payment by one interested in it, which the defendants, as the persons in actual possession, were bound by law to pay.—CHINNASAMY AYYAR *v.* RATHNASABAPATHY PILLAY. **27 M. 338.**

231 S. 69—*Suit for ownership—Payment of revenue during pendency of appeal.*

A suit as to the ownership of immoveable property having been dismissed, the plaintiffs preferred an appeal. When the appeal was still pending, they were obliged to pay Government revenue in respect of that property. The appeal was eventually dismissed. *Held* that the plaintiffs were entitled to recover from the defendant the money which they had paid as Government revenue, inasmuch as they were interested in the payment of the money which the defendant was bound to pay. *Tulsa Koer v. Jageshar* (3 A. L. J. 372), followed.—KHUSAL SINGH *v.* KHAWANI LAL. **3 A. L J. 665 = A. W. N. 1906. P. 232**

Sup: Govt. acts (IX of 1872) (*Contd*).

232 S. 69—*Act United Provinces Land Revenue Act. Ss. 183 and 233—Suit to recover money paid to release attachment—Jurisdiction—Civil and Revenue Courts.*

T sued in a Civil Court to recover money from J on the allegation that certain property belonging to her, having been wrongfully attached in order to realize arrears of Government revenue due from J she had, in order to save her own property, paid the arrears of revenue due from J to Government. *Held*, that T had a good cause of action, having regard to S. 69 Contract Act and that jurisdiction of the Civil Court to entertain the suit was not ousted by the provisions of the United Provinces Land Revenue Act of III 1901, Ss. 183 and 233 (m). TULSHA KUNWAR *v.* JAGESHAR PRASAD, **A.W.N. (1906), 114=3 A.L.J. 372=28 A 563.**

233 S. 69—*Land registered in A's name, but belonged to and was in possession of B—Payment of kist by A—Suit to recover amount—Act (11 of 1864.)*

The owner of a land cannot by virtue of his ownership alone, be held as compellable to pay the revenue. Under the Revenue Recovery Act II of 1864 (Madras) the property of the registered holder, as well as the land, on which the arrear is due, may be seized and sold, and such holder may also be arrested and confined. But an owner of land, who is not a registered holder, cannot be arrested nor his property, other than the land in regard to which the arrear has accrued, can be proceeded against. No doubt, if the land liable for the revenue is sold in due course of legal process, the unregistered owner's right to the land would be lost. But, that shows nothing more than that it would be to his interest to pay up the arrear of revenue. But, such arrears cannot be said to be what the owner is *bound* by law to pay, within the meaning of S. 69 of the Contract Act.

Where, therefore, A sued to recover from B the amount *voluntarily* paid by him on account of the revenue due in respect of certain land which stood registered in his name, but which belonged to B and was in the latter's possession when the money was paid, *held* that the claim was unsustainable, under S. 69 of the Contract Act, as the demand for the revenue was one which B was not *bound* to pay. BOJA SELLAPPA REDDY *v.* VRIDHACHALLA REDDY. **1 M.L.T. 323=16 M.L.J. 569=30 M. 35.**

234 S. 69—*Government as tenant paying assessment for landlord.*

S. 69 of the Act applies, where A pays money which B is bound to pay. Payment in law means payment to another person. Government sued to recover, from a landholder under whom it held certain lands, assessment paid as tenant to prevent the land from being sold for arrears of revenue. *Held* that no suit would lie under S. 69, inasmuch as the Government had not paid the sum to any one, but had retained it all along, merely transferring it from one pocket to another, and inasmuch as the sale for arrears of revenue could only take place under the orders of the Government. 3 B 154 and 4 B 473 referred to—SECRETARY OF STATE *v.* FERNANDEZ, **17 M.L.J. 337=2 M.L.T. 320=30 M. 375.**

Sup: Govt. acts (IX of 1872) (*Contd*)

235 S. 69—*Rent paid by mortgagee for purchaser of mortgaged property—benamee purchaser.*

A. on the strength of his purchase of a share of a putni taluq from the mortgagor, got his name registered in the landlord's book, in place of his vendor (mortgagor) and in various transactions, gave himself out as the purchaser, the mortgagee of such share, who paid up the putni rent, in order to save his interest therein, can recover the amount so paid from the purchaser, as the purchaser was *prima facie* bound in law to pay the rent, and the latter cannot plead that he was only a benamidar for the mortgagor. UMESH CHANDRA BANERJEE *v.* KHULNA LOAN COMPANY. **34 C. 92.**

236 S. 69—*Auction sale subject to charge for maintenance—Purchaser's right to recover such amount paid by him, from judgment-debtor—Transfer of Property Act, S. 55 (5) (d),*

An execution-purchaser, who purchases certain property subject to a charge for maintenance, has no cause of action against the judgment-debtor, when the charge is enforced against the property and the purchaser pays to avoid a sale. In private sales, the buyer is bound under S. 55 (5) (d). Transfer of Property Act to pay the principal and interest on incumbrances subject to which the property is sold, and the same principles must apply to Court-sales. MANGALATHAMMAL *v.* NARAYANASAWMY AIYAR. **17 M. L. J. 250.**

237 S. 69—*Payment of rent to a purchaser of a putni tenure—Sale set aside at the instance of defaulters—Whether money can be recovered from putnidars:—*

See S. 72 5 C. L. J. 59 No 263 infra.

238 S. 69—*Prior and puisne mortgagees—Each purchasing at his sale—Suit for possession by prior mortgagee—Right of puisne mortgagee and purchasers not made parties in mortgage suit to redeem—Partial redemption—Interest—Account—Payments made by subsequent mortgagee to save property from rent sale, Contract Act (IX of 1872) S. 69—Bengal Tenancy Act (VIII of 1885), S. 171.*

A first mortgagee obtained a decree for sale of the mortgaged properties and purchased the same in execution, but, when he proceeded to take possession, was successfully resisted (i) by a second mortgagee, who had meanwhile sued on his mortgage, obtained a decree and purchased some of the properties in execution, and (ii by certain other persons, who had purchased some of the other properties from the mortgagor. None of these had been made parties in the first mortgagee's suit, the latter not having had notice of their interest in the mortgaged properties.

Held, that it was not obligatory on the first mortgagee to institute a fresh suit for

Sup: Govt. acts (IX of 1872) *(Contd).*

sale on his mortgage against these persons, and a suit for recovery of possession of the properties, on the basis of his purchase, was maintainable (9 C. W. N. 728=32 c. 891 fol, 21 A 301, 22 A 394 Ref.)

That, if the defendants wanted to retain possession, they must redeem the plaintiff, but as the plaintiff was both mortgagee and purchaser, the defendants were not bound to redeem the entire mortgage, but only to the extent of the properties purchased by them (2 C. L. J. 202 and 30 C. 755 Ref.)

That, to redeem the plaintiff, it was not sufficient for the defendants to pay a proportionate share of the purchase money paid by him. The amount payable must be calculated on the basis of the plaintiff's mortgage. But, inasmuch as the plaintiff had already enforced that mortgage, and the mortgage-debt had been thereby converted into a judgment-debt, he was entitled to the contract rate of interest, only up to the date of the decree in the previous suit, and interest at the Court rate subsequent thereto up to the date of payment, to be fixed by the decree in the present suit 33 C 590, 11 C. W. N. 249 fol, 8 C. 79 not fol, 17 C. 23, 18 C. 164 21 C. 366 Ref.

Held—that, in taking accounts, credit ought not to be given to the defendants for payments alleged to have been made under S. 171, Bengal Tenancy Act, to save the properties from sale, in execution of a rent decree, inasmuch as the first mortgagee was not bound by law to pay the amount, within the meaning of S. 69 of the Contract Act 22 C 800 Ref. GANGADA BHATTARS *v.* JOGENDRA NATH MITTER, **11 C. W. N. 403=5 C. L. J. 315.**

239 S. 69, 70—*Suit to recover money paid under compromise Sch. II, arts. 61 and 83—Limitation—Suit on bond to recover money of which a third party has in fact had the benefit—Compromise of suit by heirs of obligor—*

U. S. borrowed money on a bond from U. R. The sole obligor of the bond was U. S., but the money was in fact borrowed for the use of, and was paid to, one M. From time to time, the original bond was renewed, and ultimately U. R sued upon the last bond and obtained a decree for a large sum of money against the heirs of U. S The defendants appealed to the High Court, but, pending the appeal, entered into a compromise with the plaintiff on the 2nd of January, 1903, whereby they agreed to pay to the plaintiff the sum of Rs. 51,000 and costs of the High Court. Upon the 5th of November, 1902, the heirs of U. S. paid to the plaintiff decree-holder in pursuance of this compromise Rs 40,000, and on the 17th of July, 1903, they instituted a suit against M. to recover the amount so paid and their costs. *Held* that, on the facts, U. S. was not a surety for M., but the principal debtor although the money was borrowed for M.'s benefit, that the payment made on the 5th of November, 1902, in pursuance of the compromise referred to above, was not gratuitous, and that the heirs of U. S. were entitled to recover from M. the sum of Rs 40,000 so paid with interest, but not the costs of the High Court, in respect of which the suit was barred. 8 C. B. 545, 2 I. A. 131 Ref. GIRRAJ SINGH *v.* MUL CHAND **A. W. N. (1907), 214=4 A. L. T. 501=29 A. 627.**

240 S. 69 and 70—*"Person interested in the payment of money"—Volunteer—Civil Procedure Code, S. 283.*

The plaintiffs, alleging themselves to be the purchasers of the mortgagees' rights in certain land, paid the amount of a decree against the mortgagee, in order to save the property from sale. But, it had been already found, in a suit under S. 283 of the Code of Civil Procedure, that the sale to the plaintiffs was fictitious and inoperative.

Held, that the payment made by the purchasers was a purely voluntary payment, and that the plaintiffs were not entitled to recover the amount, paid as above described from their vendors 2 I. A. 131 and 11 A. 234, Ref. JANKI PRASAD SINGH *v.* BALDEO PRASAD. **A. W. N. (1908), 53.**

241 S. 69, 70—*Income tax payable by one party paid by another under protest—Right to recover.*

Where, notwithstanding the protest of A and B that the outstandings of a deceased person had not come to them but had been bequeathed under his will to C and D the income tax authorities collected assessment from them in respect of that amount, and A and B consequently sued to recover the same from C and D under Ss. 69 and 70 of the Contract Act.

Held that A and B were not entitled so to recover, and that S. 69 and 70 of the Contract Act were inapplicable, as the Collector had not determined under S. 14 of the Income Tax Act of 1886, that C and D were chargeable under Part IV, or assessed them at any amount, as it was from the plaintiffs themselves that payment was demanded and enforced by the income tax authorities and as it cannot be said to have been made by the plaintiffs for the defendants, merely because the income tax authorities ought to have demanded and exacted payment from the defendants instead of from the plaintiffs. RAGHAVAN, MINOR, BY GUARDIAN SANKARA SASTRIAR *v.* ALAMELU AMMAL and another, **3 M. L. T. 111.**

242 S. 69, 70—*Right to recover voluntary payments—Bombay Local Funds Act (III of 1869, Bom), Section 8—Superior holder*

The Chief of Patri sued the defendants, who were 'jiwak giras' (1) for a declaration that defendants were not the superior holders, they had no right to pay the local fund cess direct to Government, and the plaintiff was entitled to recover the same from the defendants and pay direct to Government; and (2) also to recover the cess which he had paid for the years 1888 to 1895.

Sup: Govt. acts (IX of 1872) (*Contd*).

Held, that the plaintiff was not entitled to the declaration prayed for, as he was not a superior holder within the meaning of Section 8 of Bombay Act III of 1869.

Held, also, that the plaintiff was not entitled to recover the cess paid by him on the ground that, though he had an interest in the village, in respect of which cess was paid by him, no emergency had arisen, or was likely to arise, to enable the plaintiff to claim re-imbursement. The mere service of notice of demand on him was not sufficient. GORDHAN LAL *v.* SURAJ MALJI. **4. B. L. R. 299 - 26 B 564.**

243 S. 69, 76—*Limitation Act (XV of 1877), Schedule II, Article 61—Suit for money payable to the plaintiff for money paid to the defendant.*

An undertaking to pay is not actual payment and does not afford a cause of action for the suits contemplated by sections 69 and 70 of the Contract Act and governed by article 61 of the second schedule of the Limitation Act. *L. R., 2 B. and A. 51; L. R., 3 East 169; L. R., 10 B. and C., 329; 13 Cal., 155, followed.*

When the plaintiff sued the defendant on the 10th November 1899 on the allegation that he had executed a pro-note to a creditor of the defendant for money borrowed by the latter on the plaintiff's security and the creditor having obtained a decree against the plaintiff the plaintiff on the 10th November 1896 in execution of the decree transferred possession of his land to the creditor as security for the debt—

Held, that the suit was governed by article 61 of the second schedule of the Limitation Act and limitation began to run on the 10th November 1896. *5 Cal., 321; 20 Cal., 18; 12 W. R., 194, referred to.* FITZGERALD *v.* MUSA. **31. P. R. 1904.**

244 S. 69, 70—"*Interested in the payment*" –

A sale under the Public Demand's Recovery Act has the same effect as a sale under C. P. C. Therefore where a Patnidar pays the amount due under a certificate issued against his *zimidar* for money payable by the latter, he can not be said to be interested in such payment" under S. 69 of Contract Act so as to be entitled to be reimbursed by the *zimidar*. No payment can be said to be made "lawfully" under S. 70 of the Act unless the payer had an interest in making it. RAJA BAIKUNTO NATH DEY BAHADUR *v.* UDOY CHAND MAITI. **2 C. L. J. 311.**

245 S. 69, 70—*Recovery of money paid to redeem mortgage of his predecessor in title. Re-imbursement Compensation for act done for the benefit of another.*

A. mortgaged land and died. His widow sold the land to B. C. sued the widow and B. to enforce his right of pre-emption. C got a decree which was upset in second appeal. In the meantime, however, C sued to redeem the mortgage and got a decree and redeemed the property by paying the mortgage debt. D a reversioner of the widow sued B to set aside the sale by the widow and to recover possession of the land. He obtained a decree and is now in possession of the land as A's reversioner. C. sued D to recover the amount of the mortgage money paid by him to redeem the land and also costs of the redemption suit.

Held that unless the case fell under S. 69 or S. 70 of the Contract Act D was not bound to pay the money to C. The case did not fall under S. 69, because D was not bound by Law to pay the mortgage debt. The case did not fall under S. 70 because the redemption was not an act done for D, but C paid the money considering himself to be the owner of the property under a title which subsequently failed. GANGA SINGH *v.* P. SANGAMLAL. **6. O. C. 212.**

246 S 69, 70—*Re-imbursement of person paying money due by another.*

A was the first mortgagee of the village and was in possession of the mortgage property. B was a puisne mortgagee of half of the village. B paid the land revenue into the *Tehsil*, A, who was responsible for revenue, was given the benefit of the payments made by B.

Held that under the circumstances, neither according to the rules of "Justice, equity and good conscience" nor under SS. 69 and 70 Contract Act was A liable to pay to B the amounts paid by the latter for the land revenue. NAJU KHAN *v.* RAM BALI. **7 O. C. 146.**

247. S. 70—*Improvement effected by co-owners of a* hat *to save the* hat *from forfeiture —Suit against other co-owners for contribution.*

A Municipality issued notices to the owners of a *hat* to effect certain improvements in the *hat*, intimating to them, that non-compliance with the said notices would lead to a withdrawal of the license granted to hold the *hat*. In persuance of the notices, the plaintiffs effected the required improvements at their own cost and brought the present suit for contribution against the defendants, the co-owners of the *hat*. *Held*, that apart from any contract to pay, alleged by the plaintiffs, the latter are entitled to contribution under S. 70. For, the *hat* was saved from a forfeiture or disability which would have injuriously affected its value and the plaintiffs did not intend to act gratuitously. *(18 M. 88, 15 Q. B. D. 60, 8 El. & Bl. 738 Referred).*—JARAO KUMARI *v* BASANTA KUMAR ROY,—**32 C. 374.**

248. S. 70—*Suit for recovery of money paid to pleaders engaged by* shebait *for benefit of a debutter estate.*

A's father was the *shebait* of certain debutter estate. But, on entering into possession, he met with considerable opposition from B who disputed his title as *shebait*. In consequence, he had to bring a suit to establish his right as *shebait* and recover possession. A, on the death of his father, paid certain amount as fees to the pleaders engaged by his father and brought the present suit against B who represented the

Sup: Govt acts (IX of 1872) (*Contd*).

debutter estate to recover the amount so paid. *Held*, the contention of B that the amount paid by A as fees to the pleaders engaged by his father for the estate cannot be charged on the *debutter* estate, is not correct. Though there is nothing to show that, when the pleaders were engaged, they were so engaged upon the understanding that the debutter estate would be liable to make good their fees, still A, as executor of his father's estate, was justified in paying up the pleader and calling upon the *debutter* estate to recoup what he had paid, under the provisions of S. 70. The payments in question were lawfully made and with no intention to do so gratuitously, and the debutter estate enjoyed the benefit thereof and was consequently liable to make the amount good. RAJA PEARY MOHAN MOOKERJEE *v* NARENDRA NATH MUKERJEE,—**9 C. W. N. 421 = 32 C. 582.**

249. S. 70—*Cess—Revenue-sale (Act XI of 1859) s. 9—Act I of 1845—Mortgagee—Part-proprietor—Mortgage lien—Transfer of Property Act (IV of 1882), s. 72—Cesses—Personal decree.*

A mortgagee of a share of an estate, who was also a part-proprietor, deposited in the Collectorate revenue and cesses payable by the defaulting mortgagor to save the property from being sold: *Held*, that on general principles of justice, equity and good conscience, the mortgagee is entitled to have the amount paid by him on account of revenue added to the amount of the original lien. *Nugender Chunder Ghose* v. *Sreemutty Kaminee Dossee*, (11 Moo. I. A. 241; 8 W. R. 17), P. C. relied upon; *Kinu Ram Dass* v. *Mozaffer Hosain Shaha*, (I L R 14 Cal. 809), distinguished. *Held*, also, that the mortgagee is entitled to a personal decree against the mortgagor for the amount paid on account of cesses, regard being had to s. 70 of the Contract Act (IX of 1872). *Smith* v. *Dinonath Mookerjee*, (I. L. R. 12 Cal 213), referred to.—UPENDRA CHANDRA MITTER *v* TARA PROSANNA MUKERJEE,—**I. L. R. 30 Cal. 794; 7 C. W. N. 609.**

250. S. 70,—*Suit by a witness for his expenses for giving evidence in proceeding under s. 145 of Criminal Procedure Code—Implied Contract—Refusal of Magistrate—Res-judicata.*

Proceeding under s. 145 Cr. P. Code, is a case of quasi-civil nature and a civil suit to recover costs incurred in giving evidence in it, is maintainable. Such a case comes under s. 70 of the Contract Act, as implied contract to pay the expenses may be inferred from the fact that on the service of the subpœna, the witness had the right to refuse to give evidence unless his expenses are paid. *Hallet* v. *Mears* (13 East's Repts. of cases 15) and *Pell* v. *Daubeny*, (5 Exchequer Report 955) referred to. The refusal of Magistrate, to pay the same on application being made for it, does not operate as *res-judicata*. NEMI CHUNDRA GHOSH *v.* AJAHAR CHOWDURY. **8 C. W. N. 178.**

Sup: Govt. acts (IX of 1872) (*Contd*.)

251. S. 70.—*Zamindar paid the water-rate Inamdars liability to pay water-rate for using water.*

An Inamdar holding land rent-free is not entitled to take water from a Government source, for the use of his land and leave the Zamindar to bear the water-rate, which, in consequence of his action, becomes payable under Act VII of 1865 (Madras).

Under S. 1 of Act VII of 1865, such water-rate is only to be levied on the land and, under S. 2, arrears are to be realised in the same manner as arrears of land revenue, that is to say, from the land-holder under Act II of 1864 (Madras).

The Zamindar himself, deriving no benefit from the water, the Inamdar, who has enjoyed the benefit of the water, is bound under S. 70 of the Act, to compensate the Zamindar by refunding the water-rate, which the Zamindar has been obliged to pay. RAJAH OF VENKATAGIRI *v.* SUBBARAYUDU. **17 M. L. J. 145 = 30 M. 277.**

252. S. 70. See S. 65, 70, 72—27 A. 592 No. *supra*.

253. S. 70. See S. 69, 70—A. W. N. 1907, P. 214 No. *supra*.

254. S. 70. See S. 69, 70—A. W. N. 1908. P. 58, No. *supra*.

255. S. 70. See S. 69, 70—3 M. L. T. 111, No. *supra*.

256. S. 70. See S. 69, 70—26 B. 564 No. *supra*.

257. S. 70. See S. 69, 70—31 P. R. 1904, No. *supra*.

258 S. 70. See S. 69, 70—2 C. L. J, 311 No. *supra*.

259. S. 70. See S. 69, 70—6 O C. 212 No. *supra*.

260. S. 70. See S. 69, 70—7 O. C. 146 No. *supra*.

261. S. 72. *Mistake—Payments made under—Suit for refund—Will—Probate—Payments made to heir—Decree in favour of executor—Suit for refund.*

The present plaintiff made payments to the heir of a deceased person under the mistaken belief that the heir was entitled to receive them. The executors of the deceased who had obtained a probate of the last Will of the deceased obtained a decree against the plaintiff in respect of the sums paid by the plaintiff to the heir.

Held, that the plaintiff was entitled to a decree against the heir for refund of the amount paid by him, even if the decree passed in favour of the executors was not satisfied by him. RAM KISHEN *v.* RANI BHAGWAN KAUR. **161 P. L. R., 1906 = 131 P. R. 1906.**

262 S. 72—*Right to recover money had and received to plaintiff's use unaffected by s. 72.*

Defendant had sought to exercise, as against plaintiff, the special powers conferred upon landholders by s. 38 of the Rent Recovery Act. In fact the relations between defendant and plaintiff were not such as entitled defendant to exercise those powers. Plaintiff, in order to avert the injury which he would

Sup: Govt. acts (IX of 1872) *(Contd).*

have sustained if his interest in the land had been sold, paid the amount demanded by the defendant, and now sued to recover from the defendant the sum so paid. *Held* that plaintiff was entitled to recover the money paid by him as money had and received by defendant to the use of the plaintiff. S. 72 of the Contract Act in no way affects the principle of law that where a defendant has received money which in justice and equity belongs to a plaintiff, under circumstances which render a receipt of it a receipt by the defendant to the use of the plaintiff, the plaintiff is entitled to recover. JUGDEO NARAIN SINGH *v.* RAJA SINGH, (I. L. R., 15 Cal. 656), approved.—NARAYANASAMI REDDI *v.* OSURU REDDI, **I. L. R., 25 M. 548**

263 S. 72—*Suit for rent-money paid under mistake.*

Held, that the plaintiffs were entitled to recover money paid on account of rent to defendant (Zamindar) while in possession as purchasers in a putni sale afterwards set aside for irregularities, the same being money paid under mistake.—NAGENDRA NATH PAL CHOWDHURY *v.* CHANDRA SEKAR DALAL. **5 C.L.J. 59.**

S. 72—*Voluntary payment—Property of third person sold in execution—His Right to recover money erroneously deposited under S. 310 A. C.P.C.*

When property belonging to A was sold in execution of a decree against *B*, and *A* had the sale set aside by making a deposit under S. 310 A of the Civil Procedure Code:

Held, that *A* has no right to sue the decree-holder for recovery of the amount of the deposit money paid to him. 15 C. 656 and 7 C. 648 referred to. *A* was not bound to apply under S. 310 A Cr. P. C., to set aside the sale, nor had he the right to do so.—KUNJA BEHARI SINGH *v.* BHUPENDRA KUMAR DUTT. **12 C.W.N. 150.**

264 S. 72—*See S. 65 & 70—27 A. 592 No. supra*

265 s. 73—*Damages—Mode of assessing damages where no proof of market price—Contract—Breach of contract.*

On 21st October 1899, defendant contracted to deliver to the plaintiff at Bombay 1,000 tons of Powell Duffryn coal, January to May shipments, 200 tons to be supplied each month. The first shipment was due in middle of February. Defendant failed to deliver any of the coal, and the plaintiff did not purchase any coal against defendant's contract. The plaintiff now sued for damages for breach of the contract. The only question was as to the mode of assessing damages. There was practically no coal in Bombay of the description contracted for at the dates at which delivery should have been given and consequently no market rate could be proved. At the hearing, plaintiff produced a statement showing the rates at which he had during the contract period settled certain contracts for Powell Duffryn coal which he had with the Bombay Company, Limited.

Sup: Govt. acts (IX of 1872) *(Contd).*

Held that under the special circumstances of the case, and in the absence of any evidence as to a market rate, the figures given in this statement might properly be received in evidence for the purpose of fixing the actual value of the coal at the dates of breach, thus affording a measure of the damages suffered.—JUGMOHANDAS *v.* NUSSERWANJI. **I. L. R., 26 B. 744=4 B. L. R. 504.**

266 s. 73—*Suit for damages for breach of contract—Damages how calculated.*

A sued B for damages for breach of a contract by B to deliver, within a specified time, to A, rice of a specified quality milled at certain specified 'big mills'. The only matter in dispute was the amount of compensation to which A was entitled. During the course of the trial, the Judge refused to allow evidence to show the rate at which rice of similar quality and description milled at small mills, was sold.

Held that the principles laid down in s. 73 of the Act must be the foundation of decision in assessing damages for breach of contract and that the market price of rice, milled at small mills and otherwise, of the same description and quality, may rightly be taken into consideration in assessing damages for breach of big mills contract. Goods, which the buyer could not be compelled to accept, if tendered, may be a basis for the calculation of damages to which the buyer is entitled for breach of contract to deliver. The measure of damages is the difference between the contract price and the market price of similar, not necessarily identical, goods, L. R. (1877) 2 App ca 455 cited. MAHOMED BHOY NANSEE KHAIRAZ *v.* MEYER. **3 L. B. R. 12.**

267 S. 73—*See S. 107—30 C. 649 No Infra.*

268 S. 73—*See S. 51—30 C. 865 (P. C.) No Supra.*

269 S. 73—*Landlord and Tenant—Contract. Breach of—Specific performance—Damages—Cause of action*

When a person to whom a house is let for a fixed period refuses to take possession of the house and abide by his contract the lessor may bring a suit for specific performance or let the house to another person and sue the lessee for damages at once and need not wait till the expiry of the term of the lease.

The measure of damages is the loss of rent suffered by the landlord after deducting such sum as he may recover from another source and it is the landlord's duty to make reasonable efforts to secure another tenant or otherwise cover the loss unless he sues for specific performance. LACHMI NARAIN *v.* VERNON. **137 P. R. 1906=5 P. L. R., 1907=1 P. W. R., 1907.**

270 S. 73—*Damages. Rate of—in case of breach of contract of sale.*

If the vendor has any specific period of time allowed to him for making the delivery, and finds, before the time has elapsed, that he will be unable to complete the delivery, and

Sup: Govt. acts (IX of 1872) *(Contd).*

gives notice to the purchaser that he refuses to proceed therewith, and the price rises, the measure of damages is the difference between the contract-price and the higher price of the subject-matter on the last day of the period within which the delivery ought to have been made—*8 Taunt, p. 540, followed.*

Where under a contract of sale of jute the delivery or shipment was at the seller's option during August-September, and the seller refused to perform the contract—

Held, that the measure of damages was the difference between the contract-price and the higher price of jute on the 30th of September. A. S. MACKERTICH *v.* NAVA COOMAR ROY. **7 W. N., C., 431=30. C. 477.**

271 S. 73—*Contract—Damages for breach of executory contract—Contract not binding on plaintiff.*

In a suit for damages for breach of an executory contract it is open to the defendant to show that it is not binding on him inasmuch as it is not binding on the plaintiff. THE AHMEDABAD MUNICIPALITY *v.* SULEMANJI. **5. B.L.R. 592=27. B. 618.**

272 S. 73—*Damages—Breach of contract of sale.*

In determining the amount of damages, in case of a breach of a contract of a sale by the purchaser, the Court has to take into consideration how much worse off is the vendor by reason of the non-performance of the contract by the vendee.

It is open to the plaintiff to sue for specific performance of a contract or damages, and a Court in estimating the damages is not to take into consideration the fact that the plaintiff has not sued for specific performance of the contract but claimed damages only. MOHAN LAL TRIBHOWANDAS *v.* CHUNI LAL HARINARAYAN. **4 B.L.R. 814.**

273 S. 73 C. P. C. S. 566—*Issues. Framing of—Duty of parties—Remand—Costs—Contract of sale—Damages.*

The omission of a party to press an essential issue in the Court of first instance, is not a ground for refusal by the Appellate Court to refer that issue for trial, if the lower Court has omitted to frame or try it. The omission should be considered in dealing with the costs necessitated by a remand of the case by the Appellate to the Original Court.

In a suit for damages for breach of a contract for sale, the issue as to damages should be,—What was the actual injury sustained by plaintiff by reason of the defendant not having performed his contract? The amount of the injury can only be ascertained by determining what the property would have fetched if put up for sale in the open market.

The Appellate Court is justified in remanding an issue under section 566 of the Civil Procedure Code, for retrial when it appears that an essential point, though included in the form of the issue framed by the Original Court, was not present to its mind prior to the remand. JOSHI MATHURESH PITAMBER *v.* BAI DAHI. **4 B.L.R. 818.**

274 S. 73—*Toll contract Traffic of people forbidden by Government owing to plague—Contractor's liability to Government not affected.*

A toll contractor sued the Government for loss sustained by him owing to a notification issued by Government, prohibiting villagers to visit other villages to avoid the spread of plague.

Held, that there was no breach of contract or commission of tort on the part of Government, and the plaintiff was not entitled to succeed. THE SECRETARY OF STATE *v.* ABDUL RAHIM. **4. B.L.R. 874.**

275. s. 73. *Contract for tolls with Local Fund Board—Implied contract to keep road fit for traffic—Damages,—Local Boards Act, 1884, S. 150—Limitation.*

Plaintiff contracted for some tolls on a certain road under the Local Fund Board for one year. During the year, he complained to the President of the Board that the road was in such a state of disrepair as to prevent traffic, and that he, in consequence, was sustaining loss, and applied for a remission. The President did not make any award in respect of this claim for compensation. Subsequently, the road, in order to enable thorough repairs to be affected, was completely closed to traffic under the orders of the President and without the consent of the contractor.

Held, that this was a breach of the implied term of the contract to keep the road open to traffic, and that the plaintiff was entitled to rescind the contract and claim damages from the Board. The measure of damages is the net amount, which the plaintiff would have received under the terms of the contract for the entire term, if he had been allowed to carry it out. The suit is not barred by limitation under S. 150 of the Local Boards Act, 1884, as the suit is not of the description provided for by paragraph 1 of that section but one for a breach of contract 2 M. 124 referred to. THE PRESIDENT, DISTRICT BOARD, MALABAR *v.* KARIYARATH PUTHISSERI KENTI KANARAM. **2 M. L. T. 194=17 M. L. J. 390.**

276. s. 73. *Damages for breach of contract—Vendor and purchaser—Contract to sell immoveable property.*

The rule in 21 W. L. B. L. 1078 and 7 Eng. and Ir App 158 that the purchaser of real estate cannot recover damages for the loss of his bargain, but only his deposit and expenses, does not apply to cases of wilful default, nor to unreasonable omission to complete the title by taking some definite steps in the vendor's power 42 B. 659, 2 C. 320 Fol, 11 B. 272 not followed.

In India, in cases of breach of contract for sale of immoveable property through inability on the vendor's part to make a good title, the damages must be assessed in the usual way, unless the parties expressly or impliedly contract that such inability should

Sup: Govt. acts (IX of 1872) *(Contd).*

not make the vendor liable for damages. RANCHHOD BHAWAN *v.* MANMOHANDAS RAMJI. **9. B. L. R. 1087.**

277. S. 73. *Right to interest—Plaintiff non-Hindu—No usage—No written instrument—No demand in writing.*

The plaintiff was not a Hindu, and there was no agreement for interest. *Held* interest could only be recovered *(a)* by mercantile usage, or *(b)* under the Interest Act, XXXII of 1839. If it is claimed under the Interest Act there must be (1) a sum certain, payable at a certain time, by a written instrument, or, (2) a demand of payment in writing, giving notice that interest will be claimed.

Where neither of these conditions are fulfilled, the plaintiff cannot claim damages under S. 73 of the Contract Act, as that section is not intended to override the provisions of the Interest Act, 9 B. L. R. 439, 26 C. 955, L. R. App. cases (1893) 434 and 20 M. 481 ref. to. HAJI MUSO, SON OF HAJI JAN MAHOMED *v.* HAJI NUR MAHOMED, SON OF ABDUL KADIR. **1. S. L. R. 179.**

278 S. 73 *Damages for breach of contract,—Damages, how and when accrue and how calcutated—Covenant, breach of Contract Act S. 73—Collateral or consequentiat damages—Remole and indirect damages.*

A contract may be broken quite as much by repudiation of liability under it, as by making it impossible to fulfil the terms of the contract.

Where a party sustains a loss by reason of a breach of contract, he is, to be placed in the same situation with respect to damages, as if the contract had been performed. Exch 850 Ref.

Where two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect of such breach of contract, should be such as may fairly and reasonably be considered, as arising naturally, that is, according to the usual course of things, from such breach of contract itself; the damages may be such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.

The damages, however, cannot include compensation for any remote and indirect loss or damages sustained by reason of the breach. 9 Exch 341, 7 ch D 490 Ref.

Where a person agrees to pay and discharge an incumbrance and neglects to perform his covenant within the time fixed therefor or within reasonable time if none is fixed the covenantee is ordinarily entitled to recover the present amount of the incumbrance 2 B & Ad. 112, 5 B & Ad. 78, 39 R R 405, 5 Ex. D 280 84 Iowa 71, 11 Am. Rep. 138, 131 Mass 93, 41 Am. Rep. 199 Ref. DASWANT SINGH *v.* SYED SHAH RAMZAN ALI, **6 C. L. J, 398.**

279. S. 73 *Agreement to let a house—Breach of contract by tenant before time for performance—Measure of damages.*

Sup: Govt. acts (IX of 1872) *(Contd.)*

Where a plaintiff agreed to let a house to defendant, and placed it at the latter's disposal, but the latter refused to take the house and broke the contract, without any justification, plaintiff was held entitled to bring an action for damages for the breach.

The measure of damages is the loss of rent suffered by the landlord, after deducting such sum as he may recover from another source, and it is the landlord's duty to make reasonable efforts to secure another tenant or otherwise cover the loss, unless he sues for specific performance.

S. 73, Contract Act, does not help the defendant. The damage caused naturally arose in the usual course of things from the breach and was not indirect or remote. LUCHMI NARAIN *v.* VERNON. **137 P. R. 1906=1 P. W. R. 1907=5 P. L. R. 1907.**

280. S. 73.—*Suit for breach of contract—Damages—Oudh Rent Act (XXII of 1886), S. 141—Liability for interest on arrears of rent—Under-proprietor—Time at which rent is payable—Statute 3, 4, Wilt. IV, c. 42.*

Although an under-proprietor is not liable for interest on arrears of rent under S. 141 of the Oudh Rent Act as not being a tenant within the meaning of that section—*Muhammad Mehndi Ali Khan* v. *Muhammad Yasin Khan*, (L. R., 26 I. A., 41; I. L. R., 26 Cal. 523)—yet there is nothing in the Act or in that decision which excludes any liability for payment of such interest which an under proprietor might be under apart from the Act. Where a compromise, containing an agreement to pay rent, come to between the predecessors in title of the present litigants, had been followed by a decree which carried into effect the terms of the agreement: *Held* in a suit for arrears of rent that the agreement was merged in the decree, by which and not by the agreement, was established the status of under proprietor from which the obligation to pay the rent was derived, and that the suit was therefore not one for breach of contract within the meaning of S. 73 of the Contract Act (IX of 1872) in which interest on the arrears could be given as damages. Nor could such interest be given under the provisions of the Interest Act (XXXII of 1839) it being necessary under those provisions for the plaintiff to show that the rent was payable "by virtue of some written instrument at a certain time;" and in this case neither the deed of compromise nor the decree prescribed any time for payment of the rent, nor contained any terms from which the time could be ascertained. The Interest Act of 1839 was passed for the purpose of extending the English Act (3 and 4. Will, IV, c. 42) to India and its provisions in this respect being the same those of the English Act, the English decisions may be referred to in construing the Indian Act. *Duncombe* v *Brighton Club Norfolk Hotel Co.* (L. R. 10 Q. B., 371) *London Chatham and Dover Railway Co.* v *South Eastern Ry. Co.* (L. R., 1 Ch. 120) and *Merchant Shipping Co.* v.

Sup: Govt. acts (IX of 1872) (*Contd*)

Armitage (L. R., 9 Q. B. 99), referred to.—GANESH BAKHSH *v* HARIHAR BAKHSH **I. L. R., 26 A. 299; 8 C. W. N. 521; 6 B. L. R., 505; M. L. J., 1904, p. 190; P. C.=7. O. C. 116=31 I. A. 116.**

281. S. 73.—*Consent decree—Effect of breach of the terms of the decree on the part of plaintiff.*

By a consent decree the defendants consented to judgment for the entire amount claimed by the plaintiff; but subject to this proviso that if on a day the defendants should pay to the plaintiff the sum of Rs. 35,000, the decree should be considered satisfied. It was also agreed that if for the payment of the aforesaid sum of Rs. 35,000 it should be necessary for the defendants to transfer the mortgaged properties or any plots or portions of them, or grant *pattahs* on receipts of *salami*, that is, premiums or *bonus* for the lease, then the defendants shall, on settling who are to receive the property, gave the plaintiff the *sthit* paper in relation to whatever properties they may from time to time determine to sell or lease before a certain date. Within 30 days from that day the plaintiff shall, at the defendants' expense, make appraisement of the *stith* in the muffassil, and after crediting the proper price, or the proper *salami*, against the defendant's debts, shall, at the defendants' expense, duly execute a deed of release or deed of consent. The plaintiff failed to make appraisement as agreed.

Held, that the plaintiff was not entitled to recover from the defendants any thing more than Rs. 34,300 (Rs. 700 having been paid by the defendants) as there was a complete breach of contract on the part of the plaintiff. HARENDRA LAL ROY CHOWDHRI *v* MAHARANI DEVI,—**V. W. N., C., 1901, p. 536 (P. C.)**

282. S. 73—*Whether Lamberdar liable to pay interest on share of profits.*

Held, that Lamberdar was not liable to pay interest on the sums found to be due to the sharer at the end of each year for which profits were claimed, and S. 73 Contract Act was not applicable. MIRZA SADDIQ HUSSAIN KHAN *v.* HAFIZUL REHMAN. **6 O. C. 89.**

282 (a) S. 73.—*Interest—Suit by superior against an under proprietor.*

A superior proprietor sued under proprietors for arrears of rent and interest thereon. Held where no contract is proved interest by way of damages can not be decreed under S. 73 Contract Act. THAKAR, HARHIAR BUKHS *v.* THAKAR GANESH BAKSH. **1. O. C. 94.**

283. S. 73.—*Breach of contract.*

A superior proprietor sued an inferior proprietor for arrears of rent and interest thereon.

Held that a Razinama in a previous suit was a proof of contract between the parties by which rent was payable by the appellant to the respondent, that the breach

Sup: Govt. acts (IX of 1872) (*Contd*)

of the contract rendered the appellant liable to pay interest as damages for such breach, and even, under S. 12 Oudh Rent Act, the appellant was liable to pay rent one month before the date fixed for the payment of the revenue. He was therefore liable to pay interest also. GANESH BAKSH SINGH *v.* HARI HAR BAKSH SINGH. **3. O. C. 22.**

284. S. 73.—*Under proprietors—Reimbursement.*

Held that when an under proprietor is compelled to pay arrears of rent payable by his co-sharers (other under proprietor) he is entitled to the amount of rent paid by him and also to interest by way of damages under S. 73 Contract Act on the amount paid from the date of payment. LALRAM KINKAR SINGH *v.* FATEH BAHADUR SINGH. **6. O. C. 346.**

285 S. 73—*Breach of contract—Assessment of damages.*

There is nothing in Contract Act which requires a person who cancels an agreement for service to accept those services as originally agreed to. The principle on which damages for breach of contract are assessed is laid down in S. 73 and its explanation shows that the means which existed for remedying the inconvenience caused should be taken into consideration. B. DEY *v.* L. J. JOHN. **I. L. B. R. 1900-02. P. 21.**

286 S. 74—*Explanation, effect of—Simple mortgage, personal liability under exists unless special contract to the contrary—Absence of specific prayer in plaint no ground for refusing appropriate relief—Delay no abandonment of right.*

In the case of simple mortgages the personal liability of the mortgagor exists, unless there is a specific contract to the contrary. 22 *All.*, 453 at p. 461 *referred to.*

Where the plaint asks for a decree against the defendants as members of the family and 'for such other relief as the Court may think fit,' the Court ought to grant the plaintiff such appropriate relief as he is entitled to and such relief cannot be refused on the ground that there is no specific prayer for such relief. Though it is within the scope of the authority of the managing member of a Hindu family to execute a mortgage so as to bind the family assets, the plaintiff in a suit on such mortgage is not entitled to a personal decree against a defendant member of the family who is not a party to the mortgage in respect of the money alleged to be in his hands.

Mere delay by the plaintiff in suing to enforce a contract is no evidence of an intention not to enforce its terms. Under the explanation to section 74 of the Indian Contract Act, it is for the Court to decide on the facts of the particular case whether a stipulation for increased interest from the date of default is or is not a stipulation by way of penalty. It was not the intention of the Legislature to enact that such stipulations are always to be

Sup: Govt. acts (IX of 1872) (*Contd.*)

considered penal. The explanation was simply intended to meet the decisions in which it was held that such stipulations are not penal and must be enforced. ABBAKKE HEGGADTHI *v.* KINHIAMMA SHETTY. **29. M. 491.**

287 S. 74—*Act VI of 1899, s. 4.—Stipulation for enhanced interest and for compound interest in case of default—Penalty.*

A bond stipulated for the payment, on a specified date, of half the principal sum advanced, together with interest at the rate of 15 per cent. per annum, and for the payment, on another date, of the balance of the principal, together with interest at the same rate. In case of default in the payment of either instalment, it was provided that the whole amount of principal then due was to become payable, together with interest at the rate agreed, and compound interest on the whole amount at the rate of 24 per cent. per annum. Default was made, but the Subordinate Court awarded no compensation: *Held*, that inasmuch as by s. 74 of the Contract Act (as amended) the Court is to award reasonable compensation not exceeding the amount named in the contract, the Subordinate Court should find whether an addition of 9 per cent. was an unreasonable sum to allow as compensation, and, if so, what compensation should be allowed as reasonable for the non-payment of principal in the manner agreed upon; the stipulation for payment of compound interest being regarded as compensation for non-payment of interest alone and not for non-payment of principal.—ANNAMALAI CHETTI *v.* VEERABADRAM CHETTY, **I. L. R., 26 M. 111.**

288 S. 74—*Penalty—Stipulation that interest shall be chargeable if instalments in repayment of principal be not paid at due dates—Applicability of Act VI of 1899 to suits filed prior to its coming into force.*

A stipulation in a bond that the principal sum shall be repaid by instalments on specified dates (no provision being made for interest) and that, on default of such payments of principal being made, interest shall be chargeable as from the date of the bond, is not in the nature of a penalty. *Semble*, that the Contract Act, Amendment Act of 1899, does not apply to a suit filed prior to the date upon which it came into force. CHANNA VENKATASAMI *v.* PEDDA KONDIAH. **I. L. R., 26 M. 445.**

Contract Act (IX of 1872), s. 74—Contract Act Amendment Act (VI of 1899), s. 4—Bond—Interest—Penalty.

Held that a stipulation in a bond for payment of compound interest on failure to pay simple interest on the same amount is not a penalty within the meaning of s. 74 of the Contract Act, 1872, as amended by Act VI of 1899.—GANGA DAYAL *v.* BACHCHU LAL. **A. W. N. 1902 P. 178=25. A. 26.**

Contract Act, (IX of 1872), s. 74—Act VI of 1899, ss. 1, 4—Bond—Stipulation for enhanced interest from date of bond in breach of covenant to pay interest—Penalty.

In a bond executed on the 8th of November 1892, to secure a sum of Rs. 8,000, it was stipulated that interest should be paid every six months at the rate of 1 per cent. per mensem, but that in case of default in payment, the mortgagor should pay interest at the rate of 2 per cent. per mensem from the date of the execution of the bond. On suit upon this bond to recover the principal sum secured with interest at the enhanced rate, it was *held* that the provisions of Act VI of 1899 were applicable, the question whether interest was recoverable at the enhanced rate having been put in issue since that Act came into force, although the bond might have been executed before.

Held also that under s. 74 of the Contract Act, as amended by Act VI of 1899, the stipulation for enhanced interest as from the date of the execution of the bond was a stipulation by way of penalty against which relief should be granted. BRIJ BHUKAN DAS *v.* SAMI-UD-DIN AHMAD KHAN.—**A. W. N. 1902 P. 226=25. A. 133.**

289 S. 74—*Interest, rate of—Exorbitant rate—Mortgage—Compound interest—Date of payment—Transfer of Property Act (IV of 1882), s. 86—Act VI of 1899.*

Simple or compound interest at a high rate is not in itself a penalty within the meaning of s. 74 of the Contract Act. *Pardhan Bhukhan Lal* v. *Narsing Dyal*, (I. L. R., 26 Cal. 300), and *Satish Chunder Giri* v. *Hem Chunder Mookhopadhya* (I. L. R. 29 Cal. 823), distinguished. The mortgagee is ordinarily entitled to interest at the rate stipulated in the bond till the date fixed in the mortgage decree for payment. He is also entitled to recover reasonable interest from that date till the date of realisation. *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan* (I. L. R. 26 Cal. 39; L. R. 25 I. A. 179), *and Maharajah of Bhartpur* v. *Rani Kanno Dei*, (I. L. R., 23 All. 181; L. R. 28 I. A. 35), followed. PRAYAG KAPRI *v.* SHYAM LAL. **I. L. R. 31 C. 138.**

290. S. 74—*Usury Laws Repeal Act (XXVIII of 1855), S. 2—Contract Act, Amendment Act (VI of 1899), S. 4—Penalty—Principal sum bearing no interest repayable by instalments—Provision for interest in case of defaults.*

Defendant was indebted to plaintiff, as the stakeholder of a "chit fund," and undertook to pay the amount of the principal by half-yearly instalments. He further undertook that, in case of default in the payment of such instalments, he would pay interest at the rate of one pie per rupee per diem from the date of default. No interest was payable on the principal sum, unless default should be made, the instalments being in repayment of the principal sum alone without interest. Default having been made, plaintiff sued on the bond, whereupon defendant pleaded that the rate of interest was penal and not recoverable:

Sup: Govt. acts (IX of 1872) *(Contd.)*

Held that plaintiff was entitled to recover. The contract was not one which provided for the payment of a given rate of interest in any event and a higher rate in case of default. Under the agreement, the debtor incurred no obligation to pay interest at all on the money which he owed. His liability to pay interest only arose in the event of default. The case was not governed, therefore, by the Contract Act 1872, or the Contract Act Amendment Act 1899.

Per SIR ARNOLD WHITE, C. J.—Under the Contract Act 1872, a stipulation that an enhanced rate of interest should be payable as from the date of default is not a stipulation by way of penalty. The explanation to S. 4 of the Contract Act 1899, which provides that a Court may treat such a stipulation as a penalty, is permissive and does not preclude it from holding otherwise.

Semble that the words "which is put in issue" in S 4 of the Contract Act 1899, mean "which is in issue" and that where there is an appeal from a decree in a suit instituted in respect of a contract, the contract is "in issue" in the appeal. Also, that the contract Act 1899 only applies to suits instituted after the commencement of that Act.—SANKARANARAYANA VAIDHYAR *v.* SANKARANARAYANA AYYAR, **11 M. L. J. 421=25. M. 343.**

291 s. 74.—*Penalty—Compound interest—Mortgage—Sale—Suit upon mortgage against mortgagor and subsequent transferee—Failure of plaintiff to prove as against transferee that the consideration entered in the bond was correct*—

In a suit for sale on a mortgage, a subsequent transferee of a portion of the mortgaged property, who was made a defendant, put the plaintiff to proof of his mortgage, and he failed to establish that the actual consideration for the mortgage was any more than about two-thirds of the consideration entered in the bond. The mortgagor himself had offered no evidence to rebut the inference derivable from his own previous statements and conduct that he had received the full consideration stated in the bond.

Held that the mortgagor was nevertheless entitled to the benefit of the finding of the Court in favour of the other defendant. *Makund* v. *Bahori Lal* (I. L. R., 3 All. 24 referred to.

Held also following the ruling in *Ganja Dayal* v. *Bachchu Lal*, (3 All. W. Notes, 1902, p. 178), that a stipulation for the payment of compound interest at the same rate as was payable upon the principal is not a stipulation by way of penalty within the meaning of the explanation to S. 74 of the Contract Act, 1872.—JANKI DAS *v.* AHMAD HUSAIN KHAN, **A. W. N. 1902. P. 218. =25. A. 159.**

292 s. 74.—*Penalty—Interest—Stipulation to pay higher rate—Subsequent reduction.*

Sup: Govt. acts (IX of 1872) *(Contd.)*

A sum of money was borrowed at a certain rate of interest. Subsequently, on a settlement of accounts between the parties, it was agreed that a lower rate of interest would be chargeable on the amount remaining due, if paid within a certain date; but if not so paid, the higher rate originally contracted for would be payable.

Held—That the stipulation for the payment of interest at the higher rate cannot be regarded as a penalty, that being the rate originally contracted for.

Where the parties are *sui juris* and there is no question of fraud or oppression or improper dealing or undue influence they are competent to make, and must stand by their own bargain. KIRTI CHUNDER CHATTERJEE *v.* J. J. ATKINSON, **10 C. W. N. 640.**

293 s. 74. *Interest—High rate—Penalty.*

A stipulation for the payment of interest at the rate of 75 per cent. per annum from the date of the bond, on failure to pay the principal amount in two instalments on dates as fixed in the bond, was *held* in the circumstances of the case to be a penalty.

It is open to a Court to consider the facts and circumstances of each case and determine wheter a stipulation for a high rate of interest is or is not a penalty, its finding on the question being rather a finding of fact than of law. MIAJAN PATARI *v.* ABDUL JUBBAR **10 C. W. N. 1020.**

294. s. 74. *Breach of contract—Penalty, stipulation by way of damages—Compound interest.*

Under S. 74, the Court has no absolute discretion to decide upon the proper measure of compensation to be awarded for the damages caused by a breach of contract. The Court can only interfere when a sum is named in the contract as the amount to be paid in case of a breach or if the contract contains any other stipulation by way of penalty. The test is whether a stipulation was intended to be carried out as part of the contract or merely as a provision to secure performance. If the latter, it should be relieved against. The rulings 25 A 26, 31 C 138, 31 C 233 & 26 M 111 were referred to the effect that an agreement to pay compound interest was not penal. The question whether an agreement to pay compound interest is a stipulation by way of penalty or not is one of fact and not of law 26 C 300 followed BHAGWANT ATMARAM *v.* GANAPATI CHOWDHARI KUNBI. **1 N. L. R. 9.**

295. s. 74. *Increased interest—Penalty—Reasonable compensation.*

Where the increased interest runs from the date of the bond and not merely from the date of default, it is always to be considered a penalty, because an additional money payment in that case becomes immediately payable by the debtor; but in such cases the party complaining of the breach is to receive from the party who has taken the contract reasonable conpensation, not exceeding the

Sup: Govt. acts (IX of 1872) *(Contd).*

amount of the penalty stipulated for. Compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty. A mortgagor undertook to pay interest at 10 p. c. per annum, and it was further agreed between the parties that interest should be paid every six months; that in case of default the mortgagor should pay interest on interest at 18 p. c. per annum, and if the amount of interest be not paid within the year, interest on the aforesaid amount of the loan should run at 12 p. c. from date of bond. The High Court decreed to the mortgagee, by way of compensation, compound interest at the same rate as the mortgagor agreed to pay as increased interest (12 p. c.) and directed it to run only from the date of default.

Held, that the course pursued was proper. RANI SUNDAR KOER *v.* RAI SHAM KRISHEN. **11 C. W. N. 249 = 4 A. L. J. 109 = 9 B. L. R. 304 17 M. L. J. 43 = 34 I. A. 9 = 34 C. 150 P. C.**

296 s. 74—*Damages Ss. 162 and 165 (Local Boards Act)—Agreement for collection of fees in a market—Construction—Penalty—Felonious Act—Civil suit without criminal prosecution.*

Even if the law of England will not allow a person injured by a felonious act to seek civil redress, unless he has endeavoured to bring the felon to justice, as to which there seems to be some doubt, that principle d... not apply where the defendant is not criminally liable for the offences committed by his agent, and the suit is not brought against the party, who is alleged to have been guilty of an offence under S. 165 of the Local Boards Act (V of 1884) 10 Ch. D. 667, 9. M. 643. Refd to.

An agreement by the defendant with the President of the Taluq Board, in respect of the collection of fees in a market, provided, among others, "If I, my agent, or servant, were to act contrary to the above regulation, I shall be liable to pay a fine not exceeding Rs. 50 imposed by the President of Taluq Board, or I am not entitled to object, if my *gutta* is put up for auction again and I am made to make up the loss that may be sustained by the Taluq Board."

Held (1) that the agreement in question is not an instrument of the same nature as a bailbond or recognizance, within the meaning of the exception to S. 74 of the Contract Act. It is a bond given for the performance of a public duty or act in which the public are interested 16 M. 175 Refd to. But there is no section in the Local Boards Act, which authorizes or requires the giving of such bond. (2) Under S. 74 the Court can award the party complaining of the breach reasonable compensation not exceeding the amount named in the bond, without reference to any actual loss sustained by the

Sup: Govt acts (IX of 1872) *(Contd).*

Board. (3) The extortion of unauthorised tolls, from the class of persons, who make use of the market, is a serious offence, and the amount of penalty specified in the bond is recoverable as compensation. (4) The provision authorizing the plaintiff to put the defendant's *gutta* up to auction does not preclude the plaintiff from recovering upon his contract. (5) The penal clauses of the Local Boards Act, S. 162 (c) and *(d)*, do not preclude the plaintiff from recovering under his contract with the defendant. TALUQ BOARD, KUNDAPUR *v.* LAKSHMI NARAYANA CAMPTHI, **17 M. L. J. 537 2 M. L. T. 461.**

297 s. 74—*Interest—Compound interest—Penalty—Delay in filing suit—Costs.*

In cases in which the stipulation for interest at enhanced rate is retrospective there is always the possibility of reducing the amount to a sum named in the bond as the amount payable in case of breach, and section 74 of the Contract Act would apply to such cases.

There is no reason to refuse plaintiff his costs on the ground that he claimed more than he was entitled to, or did not sue at once, when the defendant himself is in fault. *Pundit* LALA RAM *v.* NATHU LAL. **53 P. L. R. 1904.**

298 s. 74—*Interest—Compound interest—Penalty.*

The mere charge of compound interest at a reasonable rate when the rate charged upon the interest is not in excess of the rate charged upon the orignal principal, is not in itself a penal condition. 25 *All.*, 26 and 161; 29 *Cal.*, 51, *followed.* MUL SINGH *v.* KISHAN GOPAL. **58. P. R. 1904.**

299 s. 74—*Onerous conditions—Pre-emptor a mortgagee of the property.*

In a suit for pre-emption when the property is previously mortgaged with the pre-emptors, and the vendee takes upon himself to pay the mortgagee's money deposited with him out of the consideration for sale, the Court is not justified in going through the mortgage account to find what was due to the pre-emptors at the date of the sale. MOHAMMAD UMAR *v.* KIRPAL SINGH. **78. P. R. 1904.**

300 s. 74—*Penalty—Interest.*

A provision in a bond payable by instalments that interest shall be paid on any default in payment of any instalment from the date of the bond is a penalty within the meaning of S. 74 of the Contract Act. TRIMBAK TUKARAM *v.* BHAG CHAND. **27. B. 21 = 4 B. L. R., 713.**

301 s. 74—*Contract—Chit fund—Interest—Penalty.*

The obligor of a bond entered into in accordance with the rules of the chit fund, which were not in any way illegal was held bound by its terms as to interest when there was no allegation that he was deceived as to its terms and no ground was shown to relieve him of the stipulation to

Sup: Govt. acts (IX of 1872) (*Contd*).

pay interest at the rate agreed to by him. PERIASAMI THALAVAR *v.* SUBRAMANIAN ASARI. **14. M. L. J. 1904. P. 136.**

302 s. 74—*Interest—Penalty.*

The mortgage-money due under a simple mortgage was repayable on or before the 11th March 1889 with interest at 1½ per cent per mensem. It was also stipulated in the deed if the amount be not repaid within the time fixed, the interest on the amount of loan from after the expiration of the fixed time should be charged at the rate of 5 per cent per mensem up to the date of ultimate recovery.

In a suit on the mortgage-bond it was contended on behalf of the defendant that the stipulation as to interest at 5 per cent after the expiry of the due date was a penal provision not intended to be enforced, and the plaintiff was entitled to have interest at only a reasonable rate.

Held, that as a stipulation for increased interest from the date of default may be a stipulation by way of penalty and as not only was the increased rate of interest very high but there was some evidence to show that the stipulation was inserted to ensure prompt payment by the debtor, the case must be retried on the question of interest. In such a case if the stipulation be not strictly enforceable reasonable compensation should be granted to the plaintiff—27 *Cal.* 421 2 *C. W. N.* 234 *and* 333, 17 *Bom.* 106, 26 *Cal.* 300, 29 *Cal.* 43 *referred to.* (MULLIK) ABDUL GANI *v.* NAND LAL. **7 W. N. C. 152= 30 C. 15.**

303 s. 74—*Interest—Compound interest—Penalty—Interest from the date fixed in the decree for payment of mortgage-debt.*

A stipulation in a bond that the debtor should pay interest at an increased rate from the date of the bond, if the principal and interest is not paid on the date fixed for payment, is in the nature of a penalty.—19 *Cal.*, 392, *followed;* 17 *All.*, 511, *referred to.*

A stipulation that the debtor should pay compound interest at a rate higher than that of simple interest is a penalty—22 *Cal.*, 143, *followed;* 20 *Cal.*, 366, *referred to.*

It is in the discretion of Court to allow such interest as it considers reasonable from the date fixed in the decree for the payment of mortgage-debt.—26 *Cal.*, 39; *L. R.*, 28; *I. A.*, 35; 21, *All.*, 361, *referred to.* RAMESWAR PRASAD SINGH *v.* RAI SHAM KISHEN. **29. C. 43.**

304 s. 74—*Compound interest—No penalty—Higher rate on default from date of bond.*

An agreement to pay compound interest is not a stipulation by way of penalty, but an agreement to pay a higher sale of interest from the date of the bond on default in payment of interest is a penal clause. KALLESHAR SINGH *v* RAGHUBIR SINGH **1 A. L. J. 224.**

Sup: Govt. acts (IX of 1872) (*Contd.*)

305 S. 74.—*Construction—Liquidated damages—Specific performance—Specific Relief Act S 27—Penalty.*

A contracted with *B* that he would do certain act and to secure the performance of the act a certain sum of money was annexed therewith by way of penalty or damages. *Held* that a specific performance of the contract may be decreed but when *A* agrees to do one of two things at his own election—*i. e.* to perform the act or to pay the sum of money the contract is satisfied by the payment of that sum, and *A* cannot be compelled to perform the other alternative. If the promisee begins building on the lands which are the subject matter of the contract for sale, before completing his title to the lands, he does so at his own risk, and cannot by such precipitate act of his deprive the promisor of the option to sell the lands or not which the latter has reserved to himself. RAMDHAN *v.* MOHANLAL. **1. A.L.J. 688.**

306 s. 74.—*Hard and inequitable condition in a martgage deed*—

A mortgage deed provided for the payment of the principal within three years and the interest was to be paid annually until the principal was paid. In case of default in the payment of the principal and interest on the due date the mortgagee was to be placed in possession of the property, and the mortgagor was to have no claim to the mesne profits which the mortgagee was to retain in lieu of interest and the mortgagor could redeem the mortgaged property after twenty years. The plaintiff sued for possession, on default having been made in payment of the mortgage money. The defendant pleaded that he was willing to pay the mortgage debt that the plaintiff was not entitled to possession, that the twenty year's period fixed for payment by mortgage deed was very hard and could not be enforced in a Court of equity.

Held that S. 74 was not applicable. That section applies to cases in which pecuniary compensation is sought for breach of a contract. The rights and liabilities of the parties must be determined by their contract as evidenced by the mortgage deed as laid down in S. 98 T. P. A.

Held that the plaintiff was entitled to passession and that a condition that mortgage shall retain possession for twenty years and that the mortgagor shall not have a right to redeem within that period was not a condition restricting or clogging the right to redeem as it has not the effect of rendering the mortgage irredeemable. TIKAM SINGH *v.* MAKRAND SINGH. **6. O. C. 167.**

307. s. 74.—*Enhanced rate of interest in case of default in payment—Penalty—Compensation.*

Held that an agreement in a bond to pay interest at an enhanced rate from the due date in case of default, is in nature of a penalty and in such cases the credi-

Sup. Govt. acts (IX of 1872) *Contd.)*

tor is entitled to a reasonable compensation only. GAYADIN v. MADAN BIHARI. **3. O. C. 168.**

308. S. 74—*Penalty for breach of contract—Stipulation to pay interest in default of any instalment.*

A bond made the principal payable in some monthly instalments. There was no provision for payment of interest before default. In case of default of payment of any instalment the same was payable with interest at the rate of Rs 0/4/- P. C. P. M. calculated from the date of the bond. Held that such stipulation was penal under S. 74. 19. C. 392 followed. HANUMAN v. DEBIDIN. **5. O. C. 406.**

309. S. 74—*Mortgage-Stipulation for possession in case of default in payment of mortgage money at a certain time.*

Held, that a stipulation that if the mortgage money is not paid at a certain fixed time, the mortgagee will be entitled to possession, is not a stipulation by way of penalty, within the meaning of S. 74.

Held also that payment of a part of the mortgage money before the institution of the suit was not a ground for refusing specific performance. PIRTHIPAL SINGH v. GAYA DIN. *Civil appeal No 365 of 1901 dated 23 April 1903.*

310. S. 74.—See S. 16, 74—151. P. L. R. 1901 = 96. P. R. 1901 No 39 supra.

311. S. 74.—See S. 16 and 74—34 C. 150 No 48 supra.

311 a. S. 75.—See S. 55 and 75—13 M. L. J. 488—No 186 supra.

312. S. 77.—*Contract of sale of goods whether affected by falsified bought and sold Notes. Evidence Act S. 92—Oral evidence.*

The plaintiff bought from the defendants the whole of a certain cargo which the defendants had themselves bought from a certain firm. Seeing that the market was rising and repenting them of their bargain, the defendants, by fraud, inserted in the bought and sold notes the figures 100,000 cases as descriptive of the property sold whereas really the cargo amounted to 125,000 cases. The arrangement was that the original sale to the defendants should be simply transferred to the plaintiff as buyer. The defendants declined to transfer the entire cargo and the plaintiff sued for specific performance of contract. He also prayed that if necessary the bought and sold notes be rectified and other relief granted as the nature of the case should require.

Held, that as in India a contract of sale of goods can be proved by parol, and the bought and sold notes were falsified, the aggrieved purchaser was entitled to disregard them and to prove his contract by other and antecedent material. The case was not touched by section 92 of the Evidence Act.

That it was not necessary for the plaintiff to get the notes rectified in order to enable him to sue for damages. DURGA PROSAD SUREKA v. BHAJAN LALL LOHEA. **8 W.**

Sup. Govt. acts (IX of 1872) *(Contd.)*

N. C., 489 = 6 B. L. R., 498 = 14 M. L. J. 196 = 31 I. A. 122 = 31 C. 614 P. C.

313 S. 77, 78—*Sale of goods - Price to be paid in cash against mate's receipts—Bills of lading obtained by purchaser in exchange of the receipts before payment—Pledge of the bills to a bank by purchaser if valid.*

A sold bales of jute to *B*'s firm, the goods to be placed alongside the exporting vessel and to be paid for in cash against mate's receipts. The goods were, subsequently, shipped and two mate's receipts in the name of *B*'s firm were obtained by *A*. *A* alleged that those mate's receipts were handed over to the firm together with a bill for payment, but the firm, fraudulently and without paying for the goods, presented the receipts to the agents of the ship and obtained bills of lading in respect of the goods mentioned in the receipts and pledged the bills of lading wrongfully with *C*'s bank. In the present suit *A* claimed, as owner of the goods, to recover from the defendants, the firm and the bank, the goods sold or the documents representing them or, the payment of the price of the goods as damages. *Held*, that there was abundant *prima facie* evidence that the goods in question were appropriated to the contract by *A* and that such appropriation was assented to by *B*'s firm. The sale, therefore, was complete and involved under S. 77 of the Contract Act, the transfer of the ownership of the goods from *A* to *B*'s firm 32 C 816 referred, 4 Q. B. D. 32, 24 C. 177 referred, 3 E. X. D. 171 dissented. *A*, further, contended that, assuming such transfer of ownership to have been established, the title of *B*'s firm to deal with the bills of lading was still incomplete and infirm, and that such infirmity of the title vitiated the pledge to *C*'s bank it was held that, by the above transfer of ownership, the firm acquired the right to dispose of the goods as owners and, in obtaining possession of the mate's receipts, obtained the means of exercising such rights and in procuring the bills of lading they simply exercised such right and held the bills as owners and pledged them in that capacity to the bank. The breach of trust or undertaking, on the part of the firm in having procured and parted with the bills of lading would be immaterial, so far as regards the defendant bank, who acted in good faith in their transactions with the firm. The pledge of the goods with the bank was, therefore, a valid and binding transaction and accordingly the suit as against the bank must be dismissed with costs. JUGGERNATH AUGURWALLAH v. E. A. SMITH. **33 C 547.**

314 S. 77, 83, 95, & 178—*Sale of unascertained goods—Appropriation—Conversion of mate's receipts into bills of lading—Pledge of bills of lading.*

The goods, which were the subject of sale, were not ascertained at the time of the contract, but were subsequently appropriated by the sellers, and were put alongside the exporting vessel and shipped at the request of

Sup: Govt. acts (IX of 1872) (*Contd.*)

the buyers, who subsequently obtained bills of lading in exchange for the mate's receipts. Held the goods must be taken to have been ascertained, and, conjointly under Ss. 77 and 83, Contract Act, the sale must be regarded as complete, involving the transfer of the ownership of the goods from the seller to the buyer. One of the terms of the contract provided :—"Terms of payment: Cash on delivery of mate's or dock receipts as provided in Cls. 8, 9 and 11. Should the said receipts or warrants be retained by the buyers for examination, they shall remain the property of the sellers and be held by the buyers in trust for and at the absolute disposal of the sellers, until payment has been made in cash in terms of this contract, and if payment be made by cheque, until such cheque has been cashed."

Held that this clause did not reserve to the sellers the right of disposing of the goods, nor did it render the appropriation conditional on payment of the price. The property in the goods having passed to the buyers, they were entitled to sell the goods or pledge them and, therefore, the pledge by the buyers of the bills of lading to a Bank, who acted *bona fide* in the matter, and without any notice of the above mentioned contract between the buyers and the sellers, was a perfectly valid pledge, and did not fall within the proviso to S. 178 of the Act.

Per GEIDT, J:—The object of the above clause was to enable the sellers to enforce their lien, even though the property in the goods had passed to the buyers. JUGGERNATH AUGURWALLAH *v.* E. A. SMITH, **34 C. 173.**

315. S. 78—*Sale of ascertained and unascertained goods—Passing of property in the goods sold—Insurable interest.*

A sued to recover money alleged to be due under policies of insurance granted to her by the defendant-company B in respect of certain cases of kerosine oil, which, after landing and while in the petroleum depot, were destroyed by fire. The suit related to two shipments, *viz.*, by the steamers "Haddon Hall" and "Crewe Hall." The question for decision was purely one of law, whether, at the time when the fire took place, the ownership in the oil had passed to A and whether A had an insurable interest in the oil sold her.

Held, that so far as the cases ex "Haddon Hall" were concerned, the property in the oil had passed to A at the time of the fire. Risk and property generally go together. In this case, the buyer was to take all risks of exchange, the goods were to be insured at her expense and the price of goods was to be paid by her even if the insurance money were not recovered. Apart from this, S. 78 of the Contract Act is conclusive on the point. Here, both the payment and delivery were postponed. The goods were ascertained. Consequently, the property in the goods passed to A as soon as the proposal for sale was accepted and she had an insurable interest in the goods sold her. The interest was covered by her policy and she was entitled to recover the amount assured.

Sup: Govt. acts (IX of 1872) (*Contd.*)

Held, that, so far as the shipment by "Crewe Hall" was concerned, there was no ascertainment or appropriation of any lot of cases to any particular buyer. It was clear, from the terms of the contract, that the buyers were to take delivery of the whole cargo from the ship's side or tackles at their own expense. But, owing to charge of rules of the Port Commissioners, until the actual delivery to any particular buyer, all the cases remained together in bulk in the godown, in which they were landed. Until delivery was actually made under a delivery order, there was no ascertainment or appropriation of any given lot of cases to any particular buyer. Until the fire took place, there was no ascertainment and actual delivery of goods to A. Consequently, the property in the oil per "Crewe Hall" did not pass to the plaintiff at the time of the fire and she had no insurable interest in it.

Per MACLEAN, C.J.—If, in a contract, there are certain terms from which when they exist, the Legislature says that certain consequences shall ensue, these consequences must ensue. BRIJ COOMAREE *v.* SALAMANDER FIRE INSURANCE COMPANY, **32 C. 816**

316. S. 78.—*See S. 62 and 78—27. M. 510. No. 290 supra.*

317. S. 83—*See S. 77, 83 and c.: 34 C. 173. No. 314 supra.*

318. S 94. See S. 46, 49, 94, 30 B. 167 No. 180 *supra.*

319. S. 95. See S. 62, 78, 95—27 M. 510 No. 316 *supra.*

320. S. 95. See S. 77, 83, 95 &c. 34 C. 173 No. 314 *supra.*

321 S. 106 & 108. Bona fine *holder of stolen currency note.*

A changed a currency note belonging to B. It afterwards turned out that the note was a stolen one. The Criminal Court, that tried the case of theft, directed the return of the note by A to the original owner, from whom it was alleged to have been originally stolen. Thereupon, A sued B for the value of the note. It was admitted that the B was a *bona fide* holder of the note.

Held, under the circumstances, that the Criminal Court was apparently wrong in directing the return of the note to the original owner; but this wrong order could not entitle the plaintiff to a decree against B his remedy lay in getting the order set aside by the proper authority or possibly in a suit against the complainant for the return of note or for recovery of its value 73 P R. 1878, 83 P. R. 1890, 3 C. 379 referred to.

Held, further, S. 106 & 108 of the Contract Act had no bearing on the case, for; the passing of the note for money could not be called a sale of the note. It was the ex-

Sup: Govt. acts (IX of 1872) *(Contd.)*

change of the money in one form, for money in another form. DASAUNDI *v.* IMAM-UD DIN. **18 P. R., 1905.**

321 S. 107. *Contract to sell—Breach of contract—Right of buyer to reject goods as being of inferior quality—Acceptance by buyer by directing delivery to a third person—Right of seller to re-sell the goods—Damages.*

If the goods tendered to the buyer under a contract to sell are not of the contract quality, the buyer has the option to reject the goods subject to the special provisions of the contract, and unless there is anything in the contract to the contrary, the buyer cannot be compelled to take the goods with an allowance for inferiority of quality.

Where the buyer did not exercise the right to reject the goods as being of an inferior quality, when the goods were tendered to him, but by directing delivery of the goods to be given to a third person, exercised a right of a proprietary character in respect of them, the goods in the meantime remaining in the possession of the sellers through their brokers.

Held, that the conduct of the buyer amounted to an acceptance of the goods, and inasmuch as the goods remained in the possession of the sellers through their brokers, the sellers had a lien on the goods for the purchase-money which entitled them to re-sell the same under section 107 of the Contract Act.

Held, also, that the sellers were entitled to recover from the buyer as damages the difference between the contract-price of the goods and the price obtained upon the re-sale. HARI DASS KHANDELWAL *v.* KALUMULL. **7 W. N. C. 562 = 30 C. 649.**

322. S. 107. *Sale-purchase money—Action for rescission of the contract.*

When by a contract of sale the ownership of the subject matter of the sale has passed to the purchaser, mere default in payment of the purchase money will not justify an action for the rescission of the contract, 11 A. 244, 8 C. P. L. R. 1, 1 S. L. J. 2 B. refd. to. SETH LUKHMI CHAND *v.* KISAN. **14 C. P. L. R. 1901, P. 57.**

S. 107. See S. 55, 107, U. B. R. 1905 P. 9 No. 187 *supra.*

323. S. 108. *Title conveyed by seller of goods to buyer—Re-sale of goods.*

Where *G* sold his horses first to *F* and afterwards to *M* and before the sale to *M* the horses had been allowed by *F* to remain in the possession of the vendor *G* without giving any notice of the sale to the public or *M*, *held* that *M*, and not *F*, was entitled to the horses under Section 108 of the Contract Act *M* naturally believed that title was still with the vendor, with whom the indicia of title were. 24 *Bom.*, 458; 11 *Bom.*, 704, *distinguished.* FRAMJEE *v.* McGREGOR. **81 P. L. R. 1902 = 27 P. R. 1902.**

324 S. 108—*Exception 3—Contract—Illegal contract—Sale—Voidable contract—Goods purchased by cheating—Election to avoid contract—Third person aquiring title from vendee.*

Sup: Govt. acts (IX of 1872) *(Contd.)*

Where the plaintiff from whom goods were obtained by defendants Nos. 2 and 3 by false pretences amounting to the offence of cheating sued and obtained a decree against them for the price of goods which had been sold by the latter to defendant No. 1—

Held, that the plaintiffs could not afterwards elect to avoid the contract and claim to recover the goods from defendant No. 1, for as the plaintiffs had exercised their right of election and had in effect affirmed the contract, their title to the goods ceased, and exception 3 to section 108 of the Contract Act would not enable them to recover from defendant No. 1 the goods, the subject-matter of the offence, after their title had thus ceased. THOLASIRAM *v.* DURAJI. **15 M. L. J. 375.**

325 S. 108—*Currency note—Legal tender—Bona fide transfer—Paper Currency Act (XX of 1882), Section 16.*

Under section 16 of the Paper Currency Act 1882 currency notes are legal tender within their circles of issue and cannot be treated as ordinary articles of moveable property.

Transfer of a currency note for money cannot be called a sale of the note within the meaning of the Contract Act.

Where the Criminal Court directed the plaintiff, a *Bona fide* holder of a currency note stolen from the complainant, to make over the same to him and the plaintiff sued the defendant who had passed the note to the plaintiff.

Held, that the defendant being a *bona fide* holder the suit did not lie. The order of the Criminal Court was wrong but it did not give a claim to the plaintiff which he did not possess. DASAUNDHI *v.* IMAM-UD-DIN. **115. P. L. R. 1904.**

326 Ss. 108, 178 and 179—*Bailment—Possession—Rights of pawnor and pawnee – Tort—Conversion.*

Per *Boddam J.*—The protection given to pledgees by section 178 of the Contract Act is similar to that given to buyers under Exception 1 to section 108 of the same Act and the possession intended is the same in both sections. In interpreting the section the English cases are of no assistance. The word 'possession' in the section is clearly not intended to cover all cases in which the goods, etc., are in the physical control of the pledgor because the 'possession' in the first part of the section is distinguished from "custody" of them in the last paragraph of the same section. Nor the possession intended is the possession of a person who has a limited interest, for that case is specially provided for in section 179. The pledgee of a jewel hired is therefore not protected.

Per *Subrahmania Aiyar J.*—Section 178 and 179 of the Contract Act contemplate

Sup: Govt. acts (IX of 1872) *(Contd).*

mutually exclusive cases. Section 179 refers to certain cases where the pawnor has possession which is necessarily traceable to, and is an incident of, a limited interest he has in the goods pledged. On the other hand, section 178 refers to cases where a pawnor has a document of title to goods or has possession of goods unconnected with, and independent of, any interest of his therein, though as one invested with the symbol or *indicia* of property, he may, notwithstanding the absence of any interest, make a valid transfer of the goods in certain circumstances.

The possession of the pawnor when traceable to, and incident of, his right as the hirer is not such a possession as is contemplated by section 158.

The language of section 179 assumes and secessarily implies that the limited interest contemplated herein is such as to make a pledge valid to some extent and not altogether invalid.

A pledge by the hirer after the termination of the period of hire is a conversion for which the owner may maintain an action against the hirer and the pledgee. NAGANADA DAVAY *v.* BAPPU CHETTIAR. **14. M. L. J., 1904, p. 69.=27. M. 424.**

327. s. 112 & 118 *Sale of goods by sample —Goods not equal to sample—Remedy.*

If goods delivered do not answer to the contract the buyer may return them; but he is not bound to do so; it is quite sufficient for him if he give clear notice that the goods are accepted and remain at the risk of the seller. But if he exercised any act of dominion over them, he is taken to have accepted them under the contract, subject to any breach of warranty. (4 B. & A., 387; 23 R. 313 L. R,, 10 C. P., 391 and (L. R. 1893, I. Q. B. D, 193 ref. to.— SUMER CHAND v. ARDESHIR. **A. W. N. 1908 P. 63 4 A. L. J. 249.**

328—S. 124.—*Surety Continuing guarantee.*

The mere fact of forbearance would not be a consideration for a person's becoming surety for a debt though a binding promise to forbear to sue or enter on property which results in an advantage to the principal is sufficient consideration for a surety bond. L. R. 5. Q.B. 449, L. R. 19. Q. C. 341 followed. 16. Ch. D. 290. (1902), 1 ch. 733, 29. C. 168 referred to. GAGAD INDRA NATH ROY *v.* CHANDRA NATH PADDA. **31. C. 242.**

329. S. 128. *Liability of surety.*

The liability of a surety can only be enforced according to the terms of the conract between himself and the creditor 6 Bom., A. C. J. 241, 4 Mad., H. C. R. 190, 4 Cal., L. R., 145, 8 L. J. C. P. 354 followed. CHHEKODI *v.* MT. GORI DULAYA. **16 C. P. L. R. 1903 P. 76**

330 S. 128. *Surety of guardian—Liability—Guardians and Wards Act (VIII of 1890) S. 35—Assignment of bond—Mistake and misrepresentation, if avoid bond—Minor—estopped.*

The bond executed by a surety on the appointment of the guardian of a minor's properties under Act VIII of 1890 did not impose any limits.

Held, that his liability extended to the guardian's dealings with properties other than those specified in the petition for the appointment of the guardian. Estoppel cannot be pleaded against a minor.

An administration bond is not invalidated by reason of mutual mistake on the part of the Court and the surety, or misrepresentation by Court 10 C. W. N. 673=33 C. 713, F.

The liability of the guardian extends to profits actually received, or profits which could have been received but for his gross and wilful default. He is not liable for the profits of property in the wrongful possession of a stranger.

The law does not require a written assignment by the District Judge of a guardian's bond. SARAT CHANDRA ROY CHOWDHURY *v.* RAJONI MOHAN ROY, **12 C. W. N. 481.**

331. S. 130.—*Discharge of surety—Administration bond.*

Where an application was made to the District Judge by a surety in an administration-bond to call upon the administratrix to furnish a new surety and to release him from the liability under the security-bond, on the ground of maladministration of the executrix *held*, that upon general equitable principles and under Section 130 of the Contract Act the surety, on proving his allegations, had the right to be discharged from his suretyship as regards future transactions.—*L. R., 13. Eq. Cas., 450; 19 Bom., 245, referred to.* RAJ NARAIN MOOKERJEE *v.* FUL KUMARY DEBI. **6 W. N., C., 7.=29. C. 68.**

332. S. 130.—*Notice—Surety denying his liability in a previous suit—C. P. C. Section 13*—Res Judicata.

Where the cause of action is the same and the plaintiff has had an opportunity in the former suit of recovering that which he seeks to recover in the second the former recovery is a bar to the latter action. To constitute such former recovery a bar however, it must be shown that the plaintiff had an opportunity of recovering and but for his own fault might have recovered in the former suit that which he seeks to recover in the second action.

Where a surety denies his liability in a previous suit for the purpose of pleading, such denial cannot be regarded as a notice putting an end to the contract under section 130 of the Contract Act. BHIKABHAI RATANCHAND *v.* BAI BHURI. **5 B. L. R. 396=27 B. 148.**

333 s. 130.—*Revocation of continuing guarantee—Charges of mismangement and waste against administratrix—Suit by sureties to be discharged from liability—*

First defendant was an administratrix of her husband's estate. Plaintiff stood surety under S. 78 of Act V of 1881. The plaintiff sued 1st defendant and the other co-

sureties, for discharge of his obligation from suretyship, as to future transactions of 1st defendant, on the ground that the 1st defendant mismanaged and wasted the properties, or in the alternative, that she might be ordered to discharge certain claims against the estate and complete the administration.

Held, that the surety to an administration-bond is not entitled to the relief of discharge from his liability, either by way of an application in the Probate Proceedings or by a separate suit, since the granting of such relief might defeat the object, for which an administrator is required to find sureties to an administration-bond.

Held, also, that the special contract of suretyship entered into by a surety to an administration-bond is not governed by S. 130 of the Contract Act, 29 C. 68 dissented—19 B. 245 SUBROYA CHETTY *v.* RAGAMMAL, **14 M. L. J. 482=28 M. 161**

334 S. 133—*Discharge of surety.*

Where a judgment debtor offers to come to terms, and the decree holder does not accept those terms within the time fixed by the judgment debtor for their acceptance, a surety is not discharged. The belated acceptance by the decree holder of the terms proposed by the judgment debtor does not amount to a variance which would go to discharge the surety under S. 133. BRINDABAN *v.* KANHIYA LAL. **1. A.L.J. 38.**

335 S. 134—*Claim against principal debtor barred by time—Effect on the liability of the sureties.*

A sued on a bond, by which his debtor, *B* undertook to repay a loan. By the same bond, two persons stood as surety, mortgaging certain property of theirs to further secure payment in the event of *B*'s default *A*'s claim was time-barred as against *B* but it was pressed on appeal that the lower Courts were wrong in holding that as against the sureties also, the plea of limitation must prevail. *Held* that the creditor's failure to sue his principal debtor, within the period of limitation allowed, has the effect of discharging the surety under S. 134 of the Indian Contract Act and the forbearance mentioned in S. 137 of the Act applies only to a forbearance during the period allowed by the law of limitation for suing the principal debtor—11. A. 310, 24, A, 504 followed, 5. B. 647, 12. C. 330, referred to. MAHOMED SHAREF *v.* CHAITU, **2 N.L.R. 42.** (*See No.* 339 *inferred)*

336 S. 134—*Discharge of principal—Discharge of surety.*

Where a plaintiff having brought a suit against both the principal debtor and his sureties, expressly revived his claim against the principal. *Held* that he, by his own act, brought about the dismissal of his suit against the principal. This brought the case under S. 134, which says "The surety is discharged by any act of the creditor, the legal consequence of which is the discharge of the pricipal debtor." MAUNG PYU THA *v.* KO MIN PYU. **1 L.B.R. 1900-02. P. 150.**

337 S. 135—*Execution of decree—Surety, discharge of, by giving time to principal debtors.*

Held, that, in a case where a decree is passed to the effect that, if it remained unsatisfied after execution had been taken out against the principal judgment-debtors, the appellant, who was a surety, would be responsible for the debt, the liability of the surety was not discharged by the decree-holder's giving time to the principal judgement-debtors to pay up the decretal amount, because S. 135 of the Act does not apply to claims which have been decreed. PARBHU DAYAL *v.* RAM RATAN, **9 O.C. 28.**

338 S. 135—*Agreement by surety against his discharge—Liability of females not Pardanashin—Single appeal by defendants having different defences.*

A surety is not discharged from liability by the creditor allowing time to the principal debtor when the surety has agreed that as between him and the creditor, he is to be considered as a principal-debtor to the creditor so that he shall not be discharged or exonerated by any dealings between the principal-debtor and the creditor whereby a surety is discharged.

Outside the class of Parda-nashin ladies it must depend in each case on the character and position of the individual woman whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary, and to prove that it was so in case of dispute.

Where defendants have different defences it is an irregular procedure for them to join in a single appeal. HODGES *v.* THE DELHI AND LONDON BANK LIMITED. **5. C.W.N.I.=23 A 137 P. C.**

339 S. 135—*Limitation barring suit against surety—Effect on principal.*

Where a suit is brought against a principal-debtor within time, the fact that it is barred by limitation against the surety can not operate as a discharge of the principal debtor. JAMBU RAMA SWAMI *v.* SUNDRA RAJA CHETTY. **25. M. 239.**

340 S. 135 & 137—*Principal and surety—Creditor allowing remedy against principal debtor to become barred by limitation—Discharge of surety.*

"Mere forbearance on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him" as these words are used in s. 137 of the Contract Act 1872, indicate a forbearance for a more or less limited period to exercise a subsisting right. The section does not cover such forbearance as results in the remedy of the creditor against the principal debtor becoming barred by limitation. Hence where a judgment-creditor allowed his judgment-debtor to enter into an agreement for the satisfaction of his decree by instalments,

Sup: Govt. acts (IX of 1872) *(Contd).*

certain persons becoming sureties for the due payment of such instalments, and, the judgment-debtor having made default in payment of the instalments, delayed taking out execution to the decree until execution had become time-barred, it was *held* that the creditor had forfeited his remedy against the sureties also. *Hazari Lal* v. *Chunni Lal*, (I. L. R., 8. All. 259) and *Radha* v. *Kinlock*, (I. L. R., 11 All. 310) followed. *Hajarimal* v. *Krishnaraw*, (I. L. R., 5 Bom. 647), dissented from. RANJIT SINGH *v.* NAUBAT. **A. W. N. 1902 P. 161=24 A. 504.**

341 s. 140 & 251—*Debt due from the firm —Liability of assignees of a partner on admission.*

A paid sums on a security bond, executed by him on behalf of a partnership firm, the assignees of a partner admitted into the partnership by the other partners would also be liable to re-imburse A although the creditor had not absolved the assignor or accepted the assignment.

It is not open to a partner in a firm, who is himself alone under a certain liability to an outsider, to engage on behalf of the whole firm that all its members shall be subject to that liability, unless he obtains authority from his partners so to engage 4. A. 337. refd to. NIHARKU *v.* MADHO. **107 P. R. 1907.**

342 Ss. 143 & 144—*See S. 20, 143 & 144—33. C. 713 No 69 Supra.*

343 s. 145—*Surety to be indemnified by the principal.*

A surety is entitled to recover from the debtor whatever sum he has paid to the creditor for the debtor. Mere execution of a pronote even if negotiable, accepted by the creditor as payment of the debt and not as a more collateral security, therefore, can not be treated as payment between the surety and the principal debtor. The expression "sum" in S. 145 will include not only coin, but also property of whatever kind which is parted with in lieu of money but not the incurring of a pecuniary obligation of the creditor in lieu or discharge of the debt owed to him. P. NARAINA MURTHI AYAR *v.* MARI MUTHU PILLAI **26 M. 222.**

344 S. 151, 152 & 161—*Care to be taken by bailee—See Railway Act S. 72—7. C. W. N. 370.*

345 s. 151 & 161—*Jewellery lost in transit through post office—Responsibility of bailee—Jurisdiction—Civil Procedure Code, s. 17—Bailee.*

The plaintiff was a jeweller of Lahore and the defendants, a firm carrying on a similar business in Calcutta. Their method of doing business was that the plaintiff took articles for repair from customers and sent them to defendant by post, uninsured, whereupon the defendant did the necessary work and returned the articles by V. P. P. to plaintiff uninsured, the sum to be recovered being the defendant's charge for repairs. The defendant despatched a parcel from Calcutta, according to practice, by V. P. P. uninsured, the sum to be recovered being the defendant's charge for work done on the articles contained in the parcel. The parcel arrived in Lahore and a postal peon took it to the plaintiff, who did not find convenient to pay then and take delivery, but told the peon that he would send for it to the Post Office later on. Two days after, the plaintiff sent an employee of his own for the parcel which however was found to be lost. On a suit by the plaintiff to recover from the defendant the value of the jewellery:—

Held that a part of the performance of the contract having consisted in the payment by the plaintiff of a sum of money to the Post Office at Lahore on behalf of the defendant, the Lahore Court had, under expl. 111. *(ii)* to s. 17 of the Civil Procedure Code, jurisdiction to entertain the suit.

Held also that at the time the parcel was lost, the Post Office was holding it as the agent of the plaintiff and not of the defendant. Hence the defendant was not liable for the loss.

Held further that the previous conduct of the plaintiff estopped him from urging that the defendant was liable on account of his neglect to insure the parcel on that particular occasion. BOSECK & Co. *v.* MANDLESTAN. **70 P. R. 1906,** *Civil.*

346 S. 152—*See S. 151, 152, 161—7. C. W. N. 370 No 344 Supra.*

347 s. 161—*See S. 151 and 152, 161—7. C. W. N. 370 and 70 P. R. 1906 Nos 344 and 345 Supra.*

348 S. 172 to 179—*Pawn broker—Taking in pawn—Chapter IX Contract Act.*

The Law relating to pawning and pawn brokers in this country is to be found in chapter IX Contract Act Ss. 172 to 179 Under the provisions of this chapter the receipt of goods as security for a loan constitutes a "taking in pawn" even though no fixed time be agreed on for the repayment of the loan.

A person cannot be held to be a pawn broker unless it is proved that he habitually carries on the business of lending money on the security of goods pledged with him, and that he holds himself out to lend money on such security. EMPEROR *v.* KANAPPA CHETTY. **4. L. B. L. 1907 P. 8=6 cr. L. J. 118.**

349 s. 176—*Pledgee's right of suit to sell pledged property. L. A. articles 57 & 120*

Held, per Subrahmania Aiyar and *Benson, J. J.*, that a pledgee is entitled to sue for sale of moveable property pledged to him, notwithstanding that he is also entitled under Section 176 of the Contract Act to sell the property without reference to the Court.

The claim to proceed against the property pledged is governed by Article 120, and the claim to proceed against the deb-

Sup: Govt. acts (IX of 1872) *(Contd')*

tor personally is governed by Article 57 of the seconed schedule of the Limitation Act.

Per Davies, J.—A suit by the pledgee for sale of the pledged goods becomes barred when tho right of suit for the debt is barred, the right to sell being only accessory to the right to recover the debt. MAHALINGA NADAR *v.* GANAPATI SUBBIEN AND KAVERI. **13. M. L. J. 445 = 27. M. 528.**

350. S. 176.—*Pawnor and pawnee—Suit to recover balance of debt after sale of articles pawned—Limitation Act (XV of 1877), Sch. II, Art. 57.*

Held that the limitation applicable to a suit brought by a pawnee to recover the balance of his debt after accounting for the proceeds of the sale of the articles pledged is that prescribed by Art. 57 of the second schedule to the Limitation Act 1877, namely, three years, and the *terminus quo* the date of the loan, *Madan Mohan Lal* v. *Kanhai Lal,* (I. L. R.. 17 All. 284), and *Ram Chandra* v. *Antaji* (Bom , P. J., 1886, p. 161), referred to.—SAIYAD ALI KHAN *v* DEBI PRASAD, **A. W. N. 1902. P. 43 = 24. A. 251.**

351. S. 176.—*Rights of pawnee—Company—Powers of Directors—Acts in excess of Powers—Ratification—Lien—*

The plaintiff Bank sued the defendant Company for recovery of a certain sum due in respect of money advanced by the Bank to the Company, for future interest and for a lien on all the raw materials and manufactured goods of the Company until satisfaction. It was contended on behalf of the defendant (1) that the borrowing by the Directors from the Bank was in excess of their powers; (2) that goods of the Company were wrongfully taken possession of by the Bank and sold for inadequate sums without reasonable notice to the Company, and that the inadequacy of the price exceeded the amount claimed, (3) that the remedy conferred by the agreement entered into by the parties on the 12th March 1899 was exhaustive and that a suit for the recovery of any balance due did not lie and (4) that the agreements of 1891 and 1900 did not create any lien on goods not in the possession of the Company at the dates of execution of the agreements.

Held, (1) that the borrowing by the Diretors in so far as it was in excess of their powers was impliedly ratified and sanctioned by the shareholders at general meetings. The passing of accounts and declaration of dividends constituted sanction and ratification of the borrowing in excess,

(2) That the company failed to prove their allegations on the second point.

(3) That under section 176 of the Contract Act the Company was liable to pay the balance when the proceeds of the goods pawned proved to be less than the amount due to the Bank, and

(4) That the Bank had by agreement and law a valid lien on all the goods in

Sup: Govt. acts (IX of 1872) *(Contd)*

the possession of the Company. The goods on which a lien was claimed were obviously *pro tanto* acquired by the Company by means of the over-draft allowed by the Bank, which was entitled to the benefit of the security claimed. THE NATIONAL BANK OF INDIA *v.* THE DELHI COTTON MILLS Co. LD. **106. P. L. R. 1902 = 57 P. R, 1902.**

352 S. 178—*Possession of hirers on the hire and purchase system—Civil Procedure Code, Section 617—Reference by Small Cause Court—Finding of fact—Chief Court's powers to go behind.*

In this case the terms of the contract between the owners and the hirer of a bicycle were that the hirer should hire the bicycle for the period of 12 1/2 months, for the sum of Rs 250, payble at Delhi in monthly instalments of Rs 20 on the first of each month, and should not part possession of the said bicycle to any one except the owners or their agent who were to recover possession on failure by the hirer to pay instalments punctually, the bicycle becoming the property of the hirer on full payment of the Rs 250 as hire, and 'one rupee for the purchase of the same.' It was found that the hirer pledged the bicycle after paying two monthly instalments and paid the third instalment on due date after pledging it, and the person to whom the bicycle was pledged acted in good faith under circumstances which were not such as to raise a reasonable presumption that the pawner was acting improperly.

On a reference by the Judge of the Small Cause Court, Delhi, *held,* that the possession of the hirer was the sort of possession contemplated in Section 178 of the Contract Act.

The Chief Court declined to go behind the finding of fact arrived at by the Small Cause Court, the issue having been decided on sufficient materials and the finding being not perverse or arrived at without careful consideration of the law applicable. ABDUL HASSAN KHAN *v.* RANGI LAL. **23 P.L.R., 1902. = 34. P.R. 1902.**

353 S. 178—*Pledge of goods received in pawn in good faith from person in possession—Question for Civil Court—Cr. Pro. Code S. 517 Order disposing pro.*

A entrusted some jewels to *B* to sell for him. *B* did not sell them, but gave them to her niece *C,* who pawned them to *D.* *B* was convicted of criminal breach of trust, and the Magistrate ordered the jewels to be returned to *A.* *Held,*—that the questions whether section 178, Indian Contract Act, applied in view of the fact that the jewels were pawned by *C* and not by *B,* and whether the circumstances where such as to bring the transaction within the first proviso to that section, were matters to be decided by a Civil Court. As *A* had given the jewels to *B* to be disposed of for money, and as they had been disposed of, he was not entitled to relief in a Criminal Court. The

Sup: Govt. acts (IX of 1872) (*Contd*).

Magistrate's order was set aside and the jewels were ordered to be returned to *D*. U. KYI *v*. MAUNG PE, Criminal Revision No. 1130 of 1905 (unreported); NAGANADA DAVAY *v*. BAPPU CHETTIAR, (1903) *I.L.R. 27 M., 424*; GREENWOOD *v*. HOLQUETTE, 12 Ben. L. R., 42; referred to. STEPHEN AVIET *v*. KING-EMPEROR and D. MANUAL. **4 L.B.R. 25.**

353 (a) S. 178—*Pawner and pawnee—Suit by owner for declaration of his title.*

A who had obtained possession of certain moveable property belonging to a minor in the capacity of a trustee, and who had been allowed to retain possession of such property after the minor came of age, pawned some of it to *B* who acted negligently perhaps but honestly and in good faith. *Held*, that the pledge was valid, but the owner was entitled to a declaration of his right to redeem the articles so pawned. SUNDAR DEO *v*. BHAGWAN DAS, **A.W.N. 1908, 57.**

354. S. 178—*Pledge of goods received in pawn in good faith from person in possession—Possession obtained by fraud—Indian Contract Ac, 1872, s. 178, proviso 2.—Cr. Pro. Code S. 517—Disposal of property, order.*

B asked *A* for some jewels promising to sell them for *A* or, if not sold, to return them the same evening. *A* was induced by this promise to hand the jewels to *B*. Instead of selling them, *B* pawned them the same day for about a third of their value, and then disappeared for four days. On being prosecuted she pleaded guilty to a charge of criminal breach of trust under section 406, Indian Penal Code, and stated that she had pawned the jewels because she was pressed for money by a creditor. The Magistrate at the close of the trial ordered the jewels to be returned to *A*. *Held*,—that the circumstances were sufficient to constitute at least a *prima facie* case of fraud within the meaning of the second proviso of section 178, Indian Contract Act, on the part of *B* in obtaining the jewels. The order of the Magistrate for the return of the jewels was therefore upheld. KONG LONE *v*. MA KAY. **4 L.B.R. 1907 P. 13.**

355. S. 178, 179, & 108—See S. 108, 178, 179—27, M. 424 No. 326 supra.

356 S. 179—See S. 108, 178, 179—27. M. 424 No. 326—supra.

357. S. 183. *Minor—Contract of agency on behalf of minors entered into by their guardian—Novation—Presumption.*

Where a father and natural guardian of his minor sons made an agreement of agency with the defendant company for the benefit of his sons, thinking that he was justified in so doing by his position as father, and the true state of facts was not only very clearly stated on the face of the agreement itself, but was clearly known to the directors and secretary of the company, and it was on the faith of the agreement and the terms contained in it, that the business of the defendant company was done by the firm of the minors.—

Sup: Govt. acts (IX of 1872) (*Contd*.)

Held, that the defendant company could not contend that the agreement having been made by the minors was void.

There is no necessary presumption that where a commission agent is employed under a certain agreement on certain terms and for a certain period, that when he is afterwards employed merely as a purchaser on certain terms carefully and elaborately reduced into writing that the terms of the previous agreement necessarily apply and continue to apply unless expressly cancelled or modified by the second agreement. MADAN GOPAL *v*. THE HINDU BISCUIT Co., LD. **4. B. L. R. 627.**

358. S. 187, 188—*Principal and Agent—Implied authority—Authority of agent to borrow—Liability of principal.*

The general provisions of s. 187 and 188 of the Contract Act would no doubt authorize an agent to borrow money, if necessary, but such provisions are subject to modifications in particular cases, specially where the transactions do not prove anything in favour of an implied authority to borrow. FERGUSON *v*. UM CHAND BOID. **I. L. R., 33 C. 343.**

359 S. 188, 189—*Principal and agent—Liability of principal to pay money borrowed by agent—Interest.*

A & B were neighbouring colliery owners. B left the management of his colliery entirely to a Manager, whom he never supplied with funds. The Manager borrowed money from time to time from A on a *hatchitta*. When occasionally B visited the colliery, he sanctioned the delivery of some coal in payment of the debt. The *hatchitta* stipulated payment of interest at 150 per cent *per annum*. A sued B and his Manager for the principal and interest. The Court of first instance gave a decree in full. On appeal, the District Judge reduced the rate of interest to 18 per cent.

Held, under S. 188 of the Contract Act, an agent has an implied authority to pledge the credit of his principal for what is necessary to the successful management of the business. In other words, every agent, who is authorized to conduct a particular business, has implied authority to do whatever is incidental to the ordinary conduct of such business and whatever is necessary for the proper and effective performance of his duties, but not to do anything outside the ordinary scope of his employment and duties. And under S. 189 of the Act, the agent has authority in any emergency to do all such acts for the purpose of protecting his principal from loss, as would be done by a person of ordinary prudence in his own case under similar circumstances. Applying these principles to the present case, in order to justify the lower Courts' decision, it must be distinctly found that the act of the agent was necessary for the purposes of the business, or was usual in the management of the colliery, or was justified by an emergency. The creditor, no

Sup: Govt. acts (IX of 1872) *(Contd.)*

doubt, would be entitled to a decree against the principal for such portion of the sums borrowed, though in excess of authority, as might have been actually spent by the agent for the benefit of the business 15 App case (1890) 357 followed. But if a portion of the money borrowed was applied by the agent for his own uses, it could not be debited as against the principal.

A principal would be bound by the contract of the agent to pay interest only if the contract was necessary or usual 2 Q. B 40 (1894) followed. Further, where an agent has implied authority to raise money by loan for the purpose of carrying on the business, the lender is not bound to enquire whether, in a particular instance, the emergency had arisen, but is entitled to recover from the principal, if he acted *bona fide* and without notice that the agent had exceeded his mandate. And there can be no valid ratification, by the principal, of the contract entered into by the agent in the absence of knowledge of all the circumstances, and the acts from which ratification has to be inferred should not be of an ambiguous character, as in this case consistent quite as much with an absolute ignorance as with full knowledge of the contract entered into by the agent. The District Judge did not expressly find that the rate of interest agreed upon was either unusual or unnecessary; it was immaterial that the rate was unconscionable merely because it was exorbitant. Suit remanded for re-consideration in the light of the above observations. HERAMBA CHANDRA PAL CHOWDHURY *v.* KASI NATH, SUKUL AND KASI NATH SUKUL *v.* HERAMBA CHANDRA PAL CHOWDHURY, **1 C.L.J. 199.**

359 (*a*) **S. 196**—*Ratification Champerty—Validity of assignment can not be questioned by a third party—Consideration made payable upon success of suit—Public policy.*

Here the agreement provided that out of the purchase money which was Rs 52,600, only Rs. 600 was to be paid down, and the balance when the property should be recovered upon success in the suit.

Held, that the agreement was generally of a champertous character but was not void on that account, nor was it opposed to public policy and void as such by reason of the stipulation relating to the payment of consideration (4 I. A. 23=2 C. 233, 20 I. A. 112, 9 C. W. N. 447=32 I. A. 113=27 A 271 followed).

An assignment cannot be questioned as unfair and unconscionable by a person who was not a party to the assignment.

Ratification in the proper sense of the term, as used with reference to the law of Agency, is applicable only to acts done on behalf of the ratifier; and this rule is recognised in S. 196 Contract Act. RAJA RAI BHAWAN DAYAL SINGH *v.* DEBI DAYAL SAHU **12 C. W. N. 393 (P. C.)**

Sup: Govt. acts (IX of 1872) *(Contd).*

360 S. 198, 211, 216. *Secret profits by the agent—Ratification—Two appeals from one decree Appeal from one decree in appeal—Res Judicata.*

B had entered into a contract for sale of merchandise with A on his behalf. B supplied his own goods in fulfilment of these contracts, but, when subsequently the goods consigned by A arrived, he sold the same to another merchant at a higher rate than the contract rate. A claimed the difference as profits and asked for a settlement of accounts.

The Court of first instance found a certain amount to be due to A and decreed the claim in part. Both parties appealed to the District Judge, who dismissed A's appeal, and allowed that of B. But the decrees that were drawn up in these appeals were exactly similar. A appealed from the decree passed in his appeal. A preliminary objection was taken that the decree in B's appeal having become final, A's appeal ought not to be heard.

Held, that there was in fact but one decree settling the accounts between the parties, and the decree in the case in which no appeal was preferred did not operate as *res Judicata* and perclude the hearing of the other appeal. 33 C 1101 & 29 M 333 referred to.

Held, further, that B being A's agent could not be permitted to make any profits out of the goods, and was liable to account to A for the sale of his goods at a higher rate. It is a well recognised principle of law that an agent is not entitled to make a secret profit by dealing in the business of the agency on his own account.

Duty of agent discussed.

So long as the relation of principal and agent subsists, the principal is entitled to the exercise of the disinterested skill, diligence and zeal of the agent for his exclusive benefit.

There can be no ratification, until the person ratifying comes to know all the material facts. Where the principal did not know, until after the institution of the suit, that the agents had sold to him their goods at a price which was in excess of the market price, he could repudiate the transaction after the institution of the suit. DAMODAR DAS *v.* SHEORAM DAS, **4 A. L. J. 587.**

361. S 199. *Principal and agent—Ratification—Possession of a part. Adverse possession—Payment of rent—Mistake.*

To constitute a title by adverse possession, the possession must be adequate, in continuity, in publicity and in extent, and it is displaced by evidence of partial possession by the party against whom the title by adverse possession is claimed. In order to constitute possession it must be complete possession exclusive of the possession of any other person.

Possession can be shown only by acts of enjoyment of the land itself, but it is impos-

Sup. Govt. acts (IX of 1872) (*Contd.*)

sible, in the nature of things, to confine the evidence to the precise spot on which the alleged trespass may have been committed, evidence may be given of acts done in other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did.

Where land is unenclosed, acts of ownership in one part may be presumed to be acts of ownership over the whole, unless there are circumstances rebutting that presumption.

When the defendant pleaded adverse possession but admitted his agents having paid rent for the land in dispute, *held*, that the defendant was bound to prove not merely that the payment of rent by his agents on his behalf had been made without his knowledge or consent but also that it had been made under ignorance of the fact that the land really belonged to the defendant, and the plaintiff had no right to it.

The defendant wishing to ratify the act of possession, must ratify the act of payment also. VITHALDAS KANJISHET *v.* THE SECRETARY OF STATE FOR INDIA **4 B. L. R., 28.=26. B. 410.**

362. S. 205.—*Principal and agent—Agency. Period of time for revocation of—Lease through broker—Direct intervention of principal—Agents' right for compensation for work and labour.*

The plaintiff sued the defendant for Rs. 1,200 alleged to be due in respect of a contract, in which the defendant promised to pay the plaintiff Rs. 1,200 as brokerage for letting some of his houses. The defendant denied that he was in any way liable to the plaintiff for the sum claimed, or any part thereof, inasmuch as the plaintiff was unable to, and did not, secure a tenant for those houses. It was admitted that lease was entered into with another broker. But it was contended on behalf of the plaintiff that he inserted some advertisements, wrote letters to several persons and saw others in connection with the houses; and that he was prevented from earning the brokerage by the wrongful act of the defendant and that he was therefore entitled to compensation for the work and labour done and incurred by him

Held, that the suit must be dismissed for ordinarily, in a contract of this kind, in the absence of any special stipulation an agent is not entitled to compensation for his trouble and expense, nor is any commission payable to him, unless the lease has been directly effected through his intervention.

That if under section 205 of the Contract Act there is no express contract that the agency should be continued for any fixed period of time, the question whether such a contract ought or ought not to be implied must depend upon the particular facts of

Sup. Govt. acts (IX of 1872) *Contd.)*

each case. JORDON *v.* RAM CHANDRA GUPTA. **8. C. W. N. 831.**

363. s. 208. Benamidar—*Right to sue—Revocation—Authority to register—Contract.*

In the Mofussil and generally in the Courts of this country, the *benamidar* is treated merely as a person in whose name any property stands without his having any legal or equitable title in the same; that being so, there is no reason for holding that a *benamidar* is entitled to maintain a suit for possesion of property of which he is a *benamidar*.

Where such a suit has been allowed to be brought by a *benamidar* the decree binds the beneficial owner.

Under the provisions of Sections 208 of the Contract Act revocation of authority to register a deed does not operate when the revocation is not made known to the Registration Officer or the person in whose favour the document is executed before the document is registered 5 C. W. N. 177 S. C. L. R. 28 I. A. 15 distinguished. MOHENDRA NATH MUKHOPADHYA *v.* SAMU BIBI. **7. C. W. N. 229=30 C. 265.**

364. s. 212. See S. 17 Ex; 3 Cl: 1 C. P. C. 27 M. 355 at 358—See S. 4, 5, 6—No. 14, Supra.

365. s. 213. *Contract—Suit for accounts Principal and Agent—Limitation Act (XV of 1877), Schedule II, Arts. 89, 90 and 120—Misconstruction of portion of documentary evidence—Question of fact—Second appeal. Ground of.*

For an action by a principal against his Agent claiming an account and the money found due on such account, the period of limitation is three years from the date of the termination of the agency as prescribed in Article 89 of schedule II of the Limitation Act The term "moveable property" in this Article includes money. 24 All., 27 (P. C.) referred to.

A suit for money found due from an agent on an account being taken, and a suit for rendering an account cannot be distinguished and the plaintiff cannot in his suit succeed in getting a decree for an account, when his claim for money due is barred. 1 Cal., L. J. 147, 8 W. N, Cal. 113 followed. 14 Cal., 147 (P. C.); 5 Cal., 910, 12 Cal., 357; 1 C. L. J., 211: distinguished. W. R.; 76; 56 L. J. Q. B., 511; S. C., 3 T. L. R. 89 referred to.

A finding of the lower Appellate Court as to a question of fact cannot be questioned on second appeal on the ground of an alleged misconstruction of a letter, written by one of the parties to the other, which is merely a portion of the evidence produced by the party to prove the fact in dispute. 20 Cal., 93 (P. C.) distinguished. 19 W. R, 222 followed. SHIB CHANDAR ROY *v.* CHANDAR NARAIN MUKERJEE. **1. C. L. J. 232=32. C. 719.**

Sup: Govt. acts (IX of 1872) (*Contd*)

366. S. 213—*Principal and Agent—Civil Procedure Code, S. 215 A—Suit for an account—Form of decree.*

In a suit by a principal against an agent for an account, on the fact of agency being established, it is the duty of the Court to direct an account to be taken of the defendant's dealings as agent. When once the plaintiff has shown that the defendant is an accounting party, it is then for the defendant to prove the amount of his receipts and disbursements. The decree should be in the form of an order directing the defendant to render an account of the agency business up to a certain date and to pass a decree for any sum which may be found due by the defendant to the plaintiff on the taking of such accounts. *Hurro Nath Roy Bahadoor* v. *Krishna Coomar Bukshi* (L. R., 13 I. A., 123), and *Ram Das* v. *Bhagwat Das*, (A. W. N. 1905, p. 1), referred to.—RAGHUNATH *v.* GANPATJI, **A. W. N. 1905, p. 3 = 1. A. L. J. 722 = 27. A. 374.** (*See Acccounts. col: 24*)

367. S. 213.—*See S. 30 and 213—46. P. R. 1901 No 16 3 supra.*

367 a. S. 213.—*Limitation Act 1 C. L. J. 232.*

368. S. 216.—*Agency—Solicitor's clerk and client—Fiduciary relationship—Profits made by agent.*

The practice whereby a Solicitor's clerk secures or attempts to secure to himself a share of the reward in the event of the client's success is objectionable.

The relation between the clerk and the client is a fiduciary one. An agent cannot, without the knowledge and consent of his principal, be allowed to make any profit out of the matter of his agency beyond his proper remuneration as agent. Such profits enure for the benefit of the Principal.

It is a well established principle that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits, which those others may have conferred upon them, unless they can show to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. The age or capacity of the person conferring the benefit or the nature of the benefit conferred does not affect this principle. HARIVALABH DAS HARIDAS *v.* BHAI JIBANJEE. **4. B. L. R. 469 = 26. B. 659.**

369. S. 217 & 218.—*Principal and Agent—Agent collecting illegal cesses—Suit by principal for recovery of the same.*

If a *gomashta* or any person acting in the character of an agent gets money into his hands, professing to receive it for his master, he is liable to account for it to his master. The fact that his master could not have enforced payment does not enable the agent to keep it for his own use.

Where an agent, employed to collect rent, collected *khurcha* from the tenants—an illegal cess—in addition to the rent, and the landlord brought a suit for the recovery of such sums against his agent—

Held, that the agent was liable to pay to the landlord any sum collected by him as *khurcha*, and that the suit by him for the recovery of such sums was maintainable. NAGENDRA BALA DASI *v.* GURUDOYAL MUKHOPADHYA, **7. C. W. N. 535.**

370. S. 219.—*Principal and Agent—Broker—Title—Brokerage.*

A contracted with a broker to negotiate for a loan of money on the first mortgage of properties, and agreed to pay brokerage. The broker brought a creditor who was willing to advance the amount, and actually placed money in the hands of the attorney. The attorney found certain defects in A's title, and the transaction fell through.

Held that the broker, having negotiated the loan and found a lender willing to lend the amount, was entitled to his brokerage, although the trasaction was not complete by reason of the inability of A to satisfy the attorney as to the title.

Held further, that, regard being had to the terms of the agreement, the broker was not bound to prove some real defect in the title in order to recover the remuneration claimed.—ELIAS *v.* GOVIND CHUNDEE KHATICK. **7 C. W. N. 267 = 30. C. 202.**

371. s. 221.—*Lein—S. 49, Indian Companies Act, scope of—Effect of winding up order.*

Held, that, in the absence of anything in the agreement between a company and its agent to exclude the operation of S. 221 of the Contract Act, in so far as the expenditure incurred before a winding up order came within that section, the agent was entitled to a lien, that S. 149 of the Indian Companies Act does not authorise the Court to deprive a secured creditor of possession of his security, and that, where the agent was entitled to remain in possession by virtue of a lien under S. 221 of the Contract Act, the making of the winding up order would not affect his right to remain in possession and continue to make the necessary disbursements. CHIDAMBARAM CHETTIAR *v.* THE TINNEVELLY SARANGAPANI SUGAR MILLS Co., Ld., **3 M. L. T. 247. = 31. M. 123.**

372. S. 229—*Limitation Act (XV of 1877), Schedule II, Articles* 91 *and* 120—*Suit for cancellation of an instrument—Knowledge of agent of plaintiff—Oudh Rent Act (XXII of* 1886*)—Specific Relief Act* (*I of* 1877), *Sections* 39 *and* 42—*Findings of fact.*

Under the provisions of the Oudh Rent Act, 1886, a Civil Court has no jurisdiction to entertain a suit by a landlord for recovery of possession, or for a declaration that the defendant is liable to be ejected.

Where the object of the suit was to get rid of a cloud on the plaintiff's title occasioned by the defendant's claim under an instrument, either by cancellation of the in-

strument, or by a declaration that it was not the plaintiff's deed, and had not by any act of his become binding upon him.

Held, that the suit was maintainable in the Civil Court, notwithstanding that the object was on the plaint made to look as much like a suit for recovery of land as possible, and an order for ejectment in the Revenue Court might be consequential on a decree in the plaintiff's favour. The suit was different from a case in which the substantial relief sought is recovery of land, and the setting aside an instrument is merely ancillary or incidental to that relief. In the present suit the cancellation of the instrument, or declaration of its invalidity as against the plaintiff, was the substantial relief sought, and the only relief which the Court had jurisdiction to give. The suit came within section 39 or section 42 of the Specific Relief Act.

Held, also, that either Article 91 or Article 120 of the second Schedule of the Limitation Act would be applicable to the case.

It is not a mere question of constructive notice or inference of fact but a rule of law, which imputes the knowledge of the agent to the principal; the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings conducted by the agent for his principal.

The Court of first instance and of first appeal both found that the plaintiff came to know of the existence of the instrument sought to be cancelled only on the 24th June 1891, but the Judicial Commissioner held that the plaintiff had notice through his *Mukhtar* in the year 1883. It was contended that the finding being one of fact, the Judicial Commissioner, on second appeal, had no jurisdiction to reverse it.

Held, that the Judicial commissioner in holding that the plaintiff had notice through his *Mukhtar* did not reverse any finding of fact by the Courts below, but merely applied a well-known and universal rule of law to the facts before him. (RAJA) RAMPAL SINGH *v.* BALBHADDUR SINGH. **6 W. N., C. 849,=4 B., L. R., 882,=9. I. A. 208=25 A.I. (P. C).**

373 S. 229—*Agent's knowledge is principal's knowledge.*

An agent fully represents his principal in dealing with other persons, and knowledge acquired by him while acting within the scope of his agency must be held to be the knowledge of his principal. BALBHADER SINGH *v* RAMPAL SINGH. **3 O. C. 55.**

374 S. 230—*Principal and agent—Agency coupled with an interest—Suit by agent in his own name on contract not entered into by him as agent—Maintainability of suit.*

A document was executed in favour of plaintiff by the members of a Malabar *devasom*, whereby, in consideration of advances made by plaintiff, all the properties of the *devasom* were given over to him on lease for eighteen years. Plaintiff was given authority

to sign, conduct suits and do other acts on behalf of the executants; and the document was held to be an authority coupled with an interest and irrevocable. Plaintiff now sued in his own name to recover certain property belonging to the *devasom* and which had been demised on *kanom* prior to the date of plaintiff's authority: *Held* that plaintiff was not entitled to recover. Where an agent enters into a contract as such, if he has an interest in the contract, he may sue in his own name. Unless the contract, for the breach of which the action is brought, is one made by the agent, he has no cause of action, because there is no privity. SUBRAMANIA PATTAR *v.* NARAYANAN NAYAR, **I. L. R., 61 M. 100.**

375 S. 230—*Hindu Law—Joint family business, suit by manager of—Contract Act (IX of 1872), s. 230—Parties.*

This was a suit by the manager of a joint family business for price of goods sold and delivered to the defendants. It was contended on behalf of the defendants that the business of the plaintiff's being an ancestral one and there being other members of the family interested in it, who were not parties to the suit, the suit must fail. *Held* that the plaintiffs were justified in suing alone inasmuch as they really acted in the transaction as agents for the members of the partnership who were not parties to the suit. *Bungsee Singh* v. *Soalist Lall* (I. L. R., 7 C. L. 739) followed.—GOPAL DAS *v.* BADRI NATH, **2 A. L. J. 3=A. W. N. 1904. P. 282=67. A. 361.**

376—S. 230. *Contract by Agent—Principal resident abroad—Presumption of personal liability of agent—Rebutted where contract made in name of principal.*

Plaintiff telegraphed to P. & Co. (who were the managing agents of a company having its registered office in England but carrying on business in India) for a quotation as to the price of Sugar. P. & Co. replied in their own name, merely quoting the rate, and plaintiff accepted the offer and forwarded a deposit. On the following day, P. & Co. addressed a letter to plaintiff with which was enclosed a memorandum of sale, which contained all the terms of the contract. The letter and the memorandum bore the name of the company printed at the top and P. & Co. signed both as "managing agents." Delay having occurred in the delivery of the sugar, plaintiff instituted the present suit against P. & Co. for the return of the deposit and for damages. P. & Co. in their written statement, pleaded that the suit was not maintainable against them inasmuch as they were merely agents: *Held* (1) that the contract, for the alleged breach of which the suit was brought, was that which had been formally reduced to writing in the memorandum of sale; (2) that the company was resident abroad, and that a presumption, in consequence, arose under s. 230 of the Contract Act that the defendants, though the agents of that Company, were personally liable under

Sup: Govt. acts (IX of 1872) *(Contd')*

the contract; (3) that this presumption of law is one which can be rebutted, and is rebutted when the foreign principal is, in writing, made the contracting party, and the contract is made directly in his name.—TUTIKA BASAVARAJU *v.* PARRY & Co., **I. L. R., 27 M. 315.**

377.—S. 230—*Suit by agent—Wrong person as plaintiff—Substitution of plaintiff—Appeal—Principal's right of appeal—Code of Civil Procedure, s. 27—Indian Contract Act, s. 230.*

A suit was instituted by one Sallapa Chetty, under the style of A. L. S. P. S. Sellappa Chetty. The plaint did not show that Sellappa was not himself the principal, but it transpired in evidence that he was merely the agent of Soobramonien Chetty, and that the letters A. L. S. P. S. were part of the latter's name. The suit was dismissed on the ground that Sellappa, being merely an agent, could not sue in his own name. Soobramonien appealed to the Chief Court.

Held, that as the suit had been filed in the name of the wrong person by *bona-fide* mistake, and as the substitution of the proper plaintiff was necessary for the determination of the real matter in dispute, the lower Court should have substituted Soobramonien as plaintiff under section 27 of the Code of Civil Procedure; and that as action under that section might have been taken at the instance of Soobramonien, he had a right to appeal against the order dismissing the suit. The case was remanded for substitution of the proper plaintiff and for decision on the merits. *Abdul Karim* v. *Pana Mustan*, 1. L. B. R., 191; *Chokalingam Chetty* v. *Maung Aung Baw*. I. L. B. R., 350: distinguished. *Carter* v. *Misree Lal*, (1870) 2 N. W. P., H. C, 179; *Sardarmal Jagonath* v. *Aranvayal S. Moodaliar*, (1896) 1. L. R. 21 Bom., 205; *Seshamma* v *Chennappa*, (1897) I. L. R. 20 Mad., 467; *Juggannath Pershad Dutt* v. *Hogg*, (1869) 122 W. R., 117: referred to. A. L. S. P. S. SOOBRAMOONIEN CHETTY v. MYAT THA U. **4, L. B. R. 1907. p. 95.**

378—S. 230, 231 & 236—*Principal untruly representing himself to be the agent of another person—S. 236 applicable and S. 230, 231 inapplicable.*

A sued B for the price of a precious stone. B denied having bought any stone from A but alleged that he bought one from C for Rs. 60 and that A was only the broker and that when a day or two later Rs. 600/ were falsely demanded, he returned the stone to A. A stated that he was the owner and represented himself as such to B and that C was the broker and assisted in arranging the sale. C stated that A represented himself to be a broker and C the owner and that B told A to bargain for him so that a price might be fixed that would be fair to both parties. The Lower Court believed C's statement and dismissed A's suit holding that under S. 236 he was not entitled to sue.

Held that S. 236 fitted the present case. S. 231 applies to the case of one person who is in fact acting as agent of another person and not to a case like the present, where a principal untruly represents himself to be the agent of another person when he is in fact the principal. S. 230 upon which B's Advocate was content to base his case, deals with contracts entered into by one person who is in fact an agent on behalf of another person who is in fact his principal. The Lower Court judgment was therefore upheld. MAUNG SHWE U *v.* MAUNG H KUN. **U. B. R. 1901 P. 43.**

379 S. 230 (I)—*Principal and Agent—Commission agents. Liability of—Acceptance of indent by merchant residing abroad.*

Where the plaintiffs' indent was not accepted by the defendants, commission agents, but by a merchatn residing abroad and the defendants did not undertake any primary liability.

Held, that section 230 (1) of Contract Act was not applicable to the case and the plaintiffs were not entitled to sue the defendants for any claim regarding their indent. PURAN CHAND *v.* TARA SINGH. **138 P. L. R. 1905.**

380 S. 231—*Principal and agent—Contract by agent with third parties where principal is undisclosed—"Disclose himself" C. P. C. S. 586—Second Appeal—Small cause—Character of suit.*

A. sued *B.* for specific performance of a contract of sale and for possession of the bungalow in suit, in case specific performance was refused, for a sum of Rs. 400 as damages for breach of contract. The plaintiff was in fact acting on behalf of one Ganpatdas, and the broker, agent of the plaintiff, had before the completion of the contract admitted to the defendant that the real purchaser was Ganpatdas. The Subordinate Judge rejected the prayer for specific performance, but awarded plaintiff Rs. 400 as damages. On appeal the District Judge dismissed the plaintiff's claim entirely.

On second appeal objection was taken that no second appeal lay in the case, for the suit should be regarded on second appeal as a suit cognizable by a Court of Small Causes, the value of the subject matter being not exceeding Rs. 500 and that the claim was rightly dismissed.

Held, that the objection was not valid for section 586 of the Civil Procedure Code contemplated rather the original character of the suit than the character which it may subsequently assume by operation of the finding of the Courts.

That Section 231 clause (b) of the Indian Contract Act, should be read as governed by clause (a) which is restricted to cases where "an agent makes a contract with a person who neither knows nor has reason to suspect that he is an agent."

That the words that the principal shall "disclose himself" in the above section must be interpreted strictly and that Ganpatdas not having disclosed himself as the real purchaser, the defendant was not entitled to

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refuse to fulfil the contract. LAKSHUMANDAS *v.* ANNA R. LANE. **6. B. L. R. 731.**

381. S. 231 and 232.—*See S. 55, 231, 232—6. C. L. J. 682 No. 168 supra.*

382. S. 235.—*See S. 30 and 235—17. C. P. L. R. 67. No. 162 supra.*

383. S. 236.—*Principal and Agent—Undisclosed principal—Broker acting as principal without knowledge of other party, if can maintain action as principal.*

Plaintiff's suit to recover Rs. 2,500 in respect of breach of three contracts for the purchase and sale of jute. The Court found as a fact that, in the transaction in suit, the plaintiff purported to act as broker to the defendant, but really acted as principal, and that this was without the knowledge and consent of the defendant.

Held, that S. 236 of the Contract Act was a bar to plaintiff's action 2 Dow and C. 188, 192; 5 Bli N. S. 165; 30 P. R. 147 H. L. (1831); L. R. 7 H. L. 802=44 L. J. C. P. 302 (1874), *followed.* SEWDUT ROY MASKARA *v.* MESROP MARTYROSE NAHAPIET. **11 C. W. N. 609.=34. C. 629.**

384. S. 237.—*See S. 199—4. B. L. R. 28=26 B. 410 No. 361 supra.*

385. S. 29, 238 *Partnership—Agency—Broker—Participation in profits—Scope of authority—Negligence—Loss—Innocent Parties—Hindu Law—Kurta—Powers of—*

A right to participate in profits is a test, and sometimes a strong test of partnership, but whether or not the relation of partners does or does not exist depends on the real intention and agreement of the parties, and not upon the mere fact of participation in profits.—*I Ch.*, 393 *referred* to.

Held, that the defendant, assistant in the firm of brokers, could not be considered a partner in the firm by reason of his receiving a share in the profits in addition to his pay, and by occasionally signing, with the knowledge of the firm, delivery orders, which came from buyers, in favour of the firm, and letters dealing with mere matters of detail, making firm offers to buyers and sellers, and initialling alterations in some contracts.

A broker is an agent employed to make bargains and contracts between other parties for a compensation commonly called brokerage. An undertaking to refund advances made to constituents and the giving of guarantees for the re-payment of advances with profits is outside the scope of the ordinary business of a broker. No member of a firm of brokers is responsible for the giving of such a guarantee by a copartner, unless he was an assenting party to or subsequently ratified the act.—L. R. 7 Q. B., 616 and 623, *referred to.*

Generally a principal is liable for the wrongs of his agent committed within the scope of the authority, and purporting to be for the benefit of the principal, though no express order of the principal can be

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shown. No sensible distinction can be drawn between the case of fraud and the case of any other wrong.

There is no duty incumbent upon mercantile men any more than upon other people to anticipate and to take precautions against the possibility of a theft of letters or of forgery being committed.—*27 L. T., 849 referred to.*

Whenever one of two innocent persons must suffer by the act of a third person, he who has enabled such person to occasion the loss, must sustain it. The neglect must be on the transaction itself. and be the proximate cause of the loss itself.

The power of a *kurta* of a Hindu family, to carry on a family trade, necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade. Other members of the family are not bound by advances made by the *kurta*, not in the course of the ordinary transactions of the ancestral business, nor for the benefit of the joint family.—1 Bom. H. C. C. W. App., 51, *referred to.* D. MCLAREN MORRISON *v.* S. VERSYCHOLE. **6 C. W. N. 429**

386. S. 239. *Partnership, Elements of—Participation of profits.*

From the mere fact that certain persons are members of a joint family it does not necessarily follow that they are partners in a firm which only one of them says is his, unless it was set up with the help of family funds.

Participation in the profits of a business is one of the tests for determining whether a person is a partner. It is very cogent evidence but is capable of being controlled by the surrounding circumstances.

The right to control the property, the right to receive the profits, and the liability to share in losses are the elements of partnership. VADILAL LALLUBAI *v.* SHAH KHUSHAL DALPATRAM. **27 B. 157=B. L. R., 968.**

387. S. 239—See S. 23 and 239—3. B. L. R. 164 No 81 supra.

S. 239.—*Partnership—Hindu Family firm:—*

A family firm is not a partnership within the meaning of S. 239, because such an association requires the individual assent of all the members to it.—HAJI NOOR MAHOMED *v.* MACLEOD. (RUSSELL, J.) **9 B. L. R. 274.**

388. S. 239.—*Property acquired during marriage under Mahommadan Law not regarded as partnership property—Essentials of partnership as defined in the Contract Act.*

A and B were husband and wife (Zairbudhi Mohammadans). A died and soon afterwards his wife B died. The maternal uncle and aunt of A are the plaintiffs respondents and B's mother is the defendant appellant. The suit concerns the estate of A. The Lower court decreed ¾ of the property in favour of the plaintiffs. The defendant's appeal on the following grounds (1) That

B was in her own right the owner of the half of the property possessed by her husband and herself and that only the other half should have been divided according to Mahommadan Law in heritance. (2) That the jewellery was the separate and exclusive property of B. The Lower Court found that property was jointly acquired by A and B during their marriage, and that A and B were in partnership and constituted a firm under S. 239 contract Act.

Held, after referring to all the leading text books on Mahommahan Law that property acquired during marriage can not be regarded as partnership property.

Held also that there was no partnership as defined in Contract Act between A and B. MAKO *v.* MAUNG MAUNG AND MA NYUM. **U. B. R. 1902. P. 1** *(Mohammadan Law.)*

389. S. 239, 253.—*Hindu Law—Joint Family—Contract—Mitakshara doctrine of joint family property—Limitation Act (XV of 1877), sch. II, art. 106—Partnership.*

V and his five sons constituted an undivided Hindu family. V and his three elder sons lived apart from the two youngest sons and were in possession of some ancestral property. The two youngest sons were plaintiff and first defendant respectively in this suit. Plaintiff sued this brother for an account and for partition of certain property which he alleged to be the property of a joint family consisting of the first defendant and himself. The property had, as plaintiff alleged, been acquired from the funds of a business which had been carried on jointly by him and first defendant until 1894, and continued by the first defendant until the institution of the suit. It was alleged that although there had not been an express agreement of partnership, in the circumstances of the case an agreement under which plaintiff had become jointly interested in the business ought to be inferred.

Held that plaintiff had not a joint interest in the contract business and was not entitled to claim a share in it:

Held also, that even if such an interest had existed, plaintiff's claim was barred by limitation. *Moung Tha Hnyin* v. *Mah Thein Myah*, (L. R., 27 I. A., 189; I. L. R., 28 Cal 53) distinguished. *Per Bhashyam Ayyangar, J.*—It was impossible to regard plaintiff and first defendant as forming in themselves an undivided family owning joint family property as a corporate body. *Sham Narain* v. *Court of Wards.* (20 W. R. Cr. 197), commented on. The origin and nature of the Mitakshara doctrine of joint family property discussed. *Peddayya* v. *Ramalingam*, (I. L. R., 11 Mad. 406), referred to. *Radha Churn Das* v. *Kripa Sindhu Dass*, (I. L. R., 5 Cal. 474 at p. 477), considered. *Rampershad Tewary* v. *Sheochurn Dass*, (10 M. I. A., 490), distinguished.—SUDARSANAM MAISTRI *v.* NARASIMHULU MAISTRI, **11, M. L. J. 353 = 25. M. 149.**

390 S. 240—*Mere remuneration does not create partnership.*

Held that when one person advances money to another to enable him to take contracts, the fact that the former is remunerated by a share of the profits does not of itself constitute a parternership. 4. A. 74, U. B. R., 1901. P. 11 (Execution) referred to. KALLURAM *v.* E. M. A. VENKATECHELLUM CHETTY. **U. B. R. 1903. P. 10.** *(Contract.)*

391 S. 240 *and* **245**—*Tests of partnership—Lender taking profits and active interest and representing himself a partner to others. Estoppel—Evidence Act S. 115.*

The participation in profits, although strong evidence is not conclusive evidence of a partnership and the question of partnership must be decided by the intention of parties to be ascertained from the contents of the written instruments, if any, and the conduct of the parties.

Held, that neither the fact of a person's participating in the profits nor that he took an active interest in the business were inconsistent with his position as a lender alone. 10 B.L.R. 312, 38 ch. D. 238. Followed.

Where the question was as to whether a person, though not in fact a partner, did by his acts and conduct held himself out to strangers as such, so as to become liable by estoppel;

Held, that to establish such liability, it was not essential to show that he acted fraudulently or negligently. Even want of knowledge on his part of the effects of his acts and conduct would not absolve him from liability, if his acts and conduct were such as would induce a reasonable man to believe that he was a partner and to act upon such belief. 19 I. A. 203, 4 H. and N. 549, L. R. 10. C. P. 316 and 10 B. and C 128 referred to. COLONEL A. R. PORTER *v.* W. INCELL, **10 C. W. N. 313.**

392 S. 242—*See S. 237. 6. C. W. N. 429 at 438 No. 385 supra.*

393 S. 245—*Retiring partner's liability.*

If a person is a member of a firm, and is known to be such, persons dealing with the firm may be influenced by his credit, and unless he takes proper steps to make his retirement from the firm known to others he will be held responsible to them who knew of his partnership and might have been influenced by the fact even if a transaction with the firm takes place after his retirement. But it is definite personal knowledge which is required, not the vague impression that, because a firm once belonged to a joint Hindu family, all members of that family, which may exist, although not personally known to the customer to exist, will for ever be liable, unless they take definite steps to disabuse him of his vague impression. (78 P.R. 1903 referred to.) It cannot be held as a principle that when a person has dealings with a man who was once a member of a joint Hindu family and competent to pledge the resources of that family, such person can

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hold all the members, who once constituted a joint Hindu family, responsible, unless they have taken the precaution publicly to proclaim their partition.

If it be shown that the father of a minor son had notice of a fact, such minor cannot say that he had no notice. MIAN AMAR SINGH *v.* SETH CHAND MA, **137 P.L.R. 1908.**

393 (a) S. 245—*See S. 240 & 245* 10. *C.W.N.* 313, *No. 391 supra.*

394 S. 247 & 248—*See Ss. 10, 11, 68, 247, 248—11. C.W.N. 135. No. 23 supra.*

395. S. 251.—*Accounts settled by a partner bind the partnership, L. A. Article 64—Reciprocal demands—*

In order to bring a case under article 64 of the Limitation Act, it is not necessary that there should be reciprocal demands between the parties.—*23 All., 502; 22 Bom., 513, referred to.*

Under section 251 of the Contract Act a partner is bound by the act of another partner in settling the account between the partnership and a stranger. MANJUNATHA KAMTI *v.* DEVAMMA, **26 M. 186 = M. L. J., 1902, p. 444.**

396. S. 251. *How far a partner's act binds the firm—Speculative transaction.*

In a partnership the acts of one partner bind the firm only when they are done in relationship to the firm business and are done for carrying on the business in the usual way and not otherwise. D. MCLAREN MORRISON *v.* VERSEHOYLE. **6. C. W. N. 459.**

397. S. 251.—*Can a Partner draw hundis.*

A partner in a trading firm may draw, endorse, etc.; hundies for the purpose of the partnership. 6 M. P. C., C. 193 foll. HAJI NOOR MAHOMED *v.* MACLEOD. (RESSELL J.) **9 B. L. R. 274.**

398. S. 251 and 264.—*Partnership—Dissolution of partnership—Notice—Acknowledgment of debt by one partner—Limitation Act (XV of 1877), S. 21.*

The two defendants carried on business under the firm of Kalidas Sankhalchand. They owned two printing presses, one at Ahmedabad and one at Bombay. They had had dealings with the plaintiffs since 1878, and the accounts between them had been adjusted from time to time and signed by one or other of the defendants on behalf of their firm acknowledging the amount due to the plaintiffs. The last adjustment was signed in December 1894, and this suit was filed in 1897 for Rs. 1,023 then admitted to be due. The first defendant admitted the claim. It appeared that in 1892 the defendants had quarrelled, and by arbitration the presses were divided, the Ahmedabad press being given to the first defendant and the Bombay press to the second defendant. At the time of this suit the books and outstanding still remained to be divided. The second defendant now alleged that the part-

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nership had been dissolved in 1892 to the plaintiff's knowledge and contended that he was not bound by the acknowledgment signed in 1894 by the first defendant and that the claim as against him was therefore barred by limitation under S. 21 of the Limitation Act (XV of 1877). The lower appellate Court held that the claim against the second defendant was barred on the ground that at the date of acknowledgment in 1894 the partnership had ceased to be a "going concern" and that the partners no longer continued to be agents for each other

Held (reversing the decree and remanding the case) that the questions to be decided by the Court were the following:—1. Whether the partnership between the two defendants had been dissolved before the date of the acknowledgment in 1894. 2. Whether (if it was then subsisting) that acknowledgment was or was not an act necessary for or usually done in carrying on the business of the partnership (S. 251 of the Contract Act, 1872). 3. If the partnership had been dissolved at the date of the acknowledgment then, whether notice of such dissolution had been given or whether as a matter of fact the plaintiff had notice of such dissolution. *Premji Ludha* v. *Dossa Doongersey* (I. L. R., 10 Bom. 358) distinguished.—DALSUKHRAM NAGINDAS *v.* KALIDAS SANKHALCHAND, **I. L. R., 26 B. 42.**

399. s. 253 *Distribution of assets—Contribution to losses.*

Under S. 253 of the Contract Act, the share of each partner in the partnership property is the value of his original contribution, and partners must contribute equally to losses sustained by the partnership. In the absence of a contract to the contrary, the share of loss or profit is ascertained by dividing the total loss or profit by the number of partners. The rule laid down is, that, if the assets of the partnership will not suffice to pay the amount of capital to be credited to each partner the deficiency is a loss of capital, and is to be borne or made good by the partners 26 C. 281,12 A. C. (1887) 160 *referred to.* NAM RAJ *v.* GOKAL CHAND. **40 P. R. 1908.**

400. s. 253 *See S. 239 25. M. 149 No. 389 Supra.*

400 (a) S. 253 (7) *One partner expelled by others—Dissolution.*

In India a partner can be expelled only by an order of the Court. There is no dissolution when one partner expels the other. DWARKADAS *v.* CHUNILAL. **12 C. W. N. 455.**

401. s. 650 cl: (10) *Burden of proof.*

S. 253 cl. 10 is subject to express contract. It is for the remaining members of the firm, who are the persons having special means of knowledge, to show that there was no contract to the contrary. THE SECRETARY OF STATE FOR INDIA

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IN COUNCIL *v.* JAGAT MOHINIDASI. 28 C. 540.

402 s. 257 *See S. 23 and 257 U. B. R. 1903 P. 4 No. 126 Supra*

403 s. 257 & 258 *Partnership—Accounts Suit*

During the continuance of the partnership, one partner may sue another for accounts without paying for its dissolution, if there are circumstances which allow a departure from the general rule that in a suit account and dissolution should be asked for together. What those circumstances are will depend upon the facts of each case. RAGHBUR DIAL *v.* SHEO RAM DAS. **1 A. L. J. 94.**

404 S. 260—*Guarantee, revocation of - Surety—Liability of surety to a firm which has undergone change in its constitution—Cause of action—Surety bond.*

The defendants *B* and *R* on December 6 1895, executed a security bond, the condition of which was that *B* should duly and faithfully discharge his duties while employed as cash-keeper to the firm of "N. C. Mookerjee," *R* standing as *B*'s surety to the firm. In July 1896 there being a change in the constitution of the firm, it came to be styled and designated as "N. Mookerjee & Son." Defalcations on the part of *B* were discovered between January 1897 and May 1900 *i. e.*, while *B* was in the service of N. Mookerjee & Son, a firm, which came into existence in the year following that in which the bond was executed. The members of the present firm of N. Mookerjee and Son sued the defendants on the bond. An objection by way of demurrer to the plaintiff's claim—that no cause of action was shown to exist against the defendants—having been taken: *Held* that there being a change in the constitution of the firm before the alleged defalcations took place, the guarantee given by *R* would be taken as revoked by virtue of s. 260 of the Contract Act; and the alleged embezzlements having been committed by *B*, while in the service of the new firm of N. Mookerjee and Son, and not that of N. C. Mookerjee, there was no breach of the conditions of the bond; the objection taken by the defendants must, therefore, prevail, and the suit be dismissed.—NEEL COMUL MOOKERJEE *v.* BIPRO DAS MOOKERJEE, **I. L. R. 28 C., 597.**

405 S. 261—*Partnership—Death of a partner—Liability of his estate—Heir not liable unless he assents and substitutes himself in the place of the deceased—Minor heir—Construction of partnership deed.*

Prima facie, death involves a dissolution of the partnership.

Under S. 261 of the Indian Contract Act, 1872, even if a partnership continues after the death of a partner, the estate of the deceased is not liable in respect of subsequent obligation, in the absence of an express agreement.

Held, on a construction of a clause in the deed of partnership that it was a provision entitling the heirs of a deceased partner to come into the partnership in place of the deceased partner, under whom they claimed as heirs, and that it did not impose an obligation on the estate.

If and so far as it becomes operative, it makes the heirs partners, and as such personally liable. But liability cannot be imposed upon an heir unless he assents to it. So that in order to render any heir of a deceased partner liable towards the other partners, it is necessary to establish that the heir had come in and become a partner, or in other words, had in circumstances of the case, taken an advantage of the liberty reserved in his favour of joining the partnership in the place of the partner dying.

The heirs of one of the deceased partners being minors, *held*, that it had been impossible for them to take upon themselves the liability of the partnership. MULCHAND NAROTAM *v.* MANECKCHAND HARJIVAN, **8 B. L.R. 8.**

406. S. 263. *Managing member of the partnership presenting a plaint—Non-joinder of necessary parties—C. P. C. S. 27.—*

Though, under S. 263, Contract Act, the rights and obligations of partners continue, after the dissolution of the partnership, in all things necessary for the winding up of the business, yet it is only agents of a special kind that are recognised by the C. P. C., as having authority to make an appearance, or application, or do an act, on behalf of a party to the suit. No ordinary agent is recognised, nor has a partner, as such, any power to act for, or represent, a co-partner, except for the purpose of accepting service of summons (S. 74, C. P. C.).

Hence, a plaint, which purports to be in the individual names of the partners, but is signed and verified by one of them as managing partner, and which is presented by a pleader having a *vakalatnama* from him, after the dissolution of the partnership, is not duly filed or presented. Such a presentation is not mere irregularity which can be cured by an amendment. S. 27, C. P. C., only applies where a suit has been instituted in the name of the wrong person as plaintiff, or, where it is doubtful whether it has been instituted in the name of the right plaintiff, and it is not intended to cover the case of the non-joinder of necessary party.

Where a claim is time barred at the time a necessary party expresses his willingness to be joined as a party, or comes forward to repudiate his interest in the claim, the suit must be dismissed. RELUMAL DEVLARAM *v.* CHELLARAM JODHARAM, **1 S. L. R. 191.**

407. s. 264. *Partnership—Acknowledgment by one of the partners—Duty of Court on second appeal.*

It is solely the province of the High Court to state the law applicable to such facts as may be found, and if the lower Appellate Court has misundersood the law,

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to correct the mistake and remand the appeal that it may be disposed of according to law.

When a firm has stopped all trading, the business being closed, and the partnership is at end, the agency which would be presumed as an ordinary rule in a going mercantile concern does not exist, and it is necessary to show that in point of fact the partner who signs an acknowledgment is authorized by the other partners to do so.

Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution. —*10 Bom., 358, distinguished*; *P. J., Bombay, 1886, 147, followed.* DALSUKHRAM NAGINDAS *v.* KALIDAS SANKAL CHAND. **1 B. L. R. 484.**

408. s. 264. *Dormant partner—No[t]ic[e] of dissolution.*

This section applies only to cases where a pariteular man was none to the parties to have been a partner. This Section does not apply to a dormant partner whom the party did not know that he was a partner. GREAVES *v.* PUMSHOTTAM. **5 B.L.R. 663.**

409. s. 264. *Partnership--Several firms —Common partner—Money lent by partner to his own firm—Practice—Parties Same party cannot be plaintiff and defendant in one suit —Debtor and creditor—Death of plaintiff pending appeal—Defendant becoming plaintiff—Power of Court of appeal to vary decree on grounds arising subsequently to decree Partnership accounts—Contract Act (IX. of 1872) s. 264—Guarantee—Liability of surety—Right of surety to indemni[t]y.*

Where an individual is a common partner in two houses of trade, no action can be brought by one house against the other house upon any transaction between them while such individual is a common partner. This doctrine is founded on the rule that the same individual, even in two capacities, cannot be both a plaintiff and a defendant to one and the same action. One partner cannot sue for money lent by him to a firm of which he is a member. The advance is but an item in the partnership account. It is open to the Court of appeal, to vary a decree under appeal, not only for error, but also on grounds which have come into existence since it was passed —*Sukharam* v. *Hari* (I. L. R., 6 Bom., 113). The plaintiff Purshotamdas Chaturdas and his son Nagindas were members of a joint Hindu family and were the owners of, and equally interested in, the firm of Gordhandas Bhagwandas. The son Nagindas was also a partner in another firm carrying on business in the name of Pathal Sanghavi and Company. The plaintiff Purshotamdas brought this suit against the latter firm which consisted of four partners, including his son Nagindas (defendant 2), to recover Rs. 61,419-3-1 in respect of advances made by the firm of Gordhandas Bhagwandas to the defendants' firm. The fifth defendant was sued as a surety for one of the partners (defendant 4) in the defendants' firm. The lower Court passed a decree for the amount claimed against all the defendants. One of the partners (defendant 4) and the surety (defendant 5) appealed. Pending the appeal, the plaintiff died and his son Nagindas (defendant 2) became sole owner of the family firm and was substituted for his father on the record thus becoming both plaintiff and defendant in the suit.

Held (1) that although Nagindas (defendant 2) was partly interested both as creditor and debtor and could not have sued for his share, nevertheless all parties interested being before the Court either as plaintiff or defendants, the Court would adjust and determine their rights in accordance with the rule of justice, equity, and good conscience. (2) That Purshotamdas and Nagindas being equally interested in the plaintiffs' firm, the lower Court should have made a declaration that they were entitled to the amount advanced in equal shares, and have passed a decree that one moiety thereof should be paid to Purshotamdas and the other moiety treated as an item to the credit of Nagindas in the partnership accounts. (3) That although on Purshotamdas' death pending the appeal, Nagindas, as his heir, had become sole plaintiff the Court of appeal would not pass a decree in his favour even in respect of Purshotamdas' half share, but would only declare that for this amount also Nagindas was entitled to credit in the partnership accounts. Under the circumstances Nagindas could only get such relief as would have been permissible had he occupied the position of plaintiff at the institution of the suit. (4) That Nagindas was entitled to credit in the partnership accounts as against those who actually were his partners from time to time. S. 264 of the Contract Act (IX. of 1872) only operates in favour of strangers to the partnership. As to the liability of defendant 5 as surety, the Court *held* on the evidence that defendant 5 had become a surety for the partnership debt. The partners were the principal debtors. But the liability of the surety is co-extensive with that of the principal debtor; therefore no decree could be now passed against defendant 5. Further, Nagindas, now the beneficial owner of the debt, was one of the principal debtors, and as such was bound to indemnify his surety and to repay any sum paid under the guarantee. He therefore could not be entitled to any relief against his surety.—RUSTOMJI *v.* SHETH PURSHOTAMDAS, **25 B. 603.**

410 S. 264. See S. 251 and 3[5]4—26 B. 42 No. 398 *supra*.

33 Act VIII of 1873 (Northern Indian Canal and Drainage Act.)

1 s. 21, 22, 24, and 65 *Suit for restraining one permitted under the Act to construct water channel—Jurisdiction.*

A Civil Court can not grant a perpetual injunction restraining one to whom permission has been granted under the

Sup: Govt. acts (VIII of 1873) *(Contd).*

Act to construct a water channel through the land of another, from constructing that channel, provided that the procedure provided by the Act has been followed. 56 P. R. 1897, 46 P. R. 1897, 144 P. R. 1894, 71 P. R. 1888, t14 P. R. 1888, 14 C. 648 *referred to*) MOHKAM DIN *v.* MANSABDAR **73 P. R. 1907=16 P. L. R. 1968.**

2 s 45 *Land Revenue—N.W.P. Land Revenue Act (XIX of 1873) s, 241 cl (i) -Suit to recover excess canal dues paid by mistake —Claim arising out of collection of revenue or for sum realizable as revenue.*

A suit to recover canal dues alleged to have been paid by mistake is a claim arising under s. 241, cl. (i) of the North-Western Provinces Land Revenue Act of 1873, and under that provision read with s. 45 of the Northern India Canal and drainage Act 1873, a Civil Court has no Jurisdiction to entertain it.—BALWANT SINGH *v.* SECRETARY OF STATE FOR INDIA, **I. L. R. 25 A. 527 P. C.=8 C. W. N. 121.**

34. Acts X of 1873 (Oaths Act.)

1 S. 5. In order that a person making a statement to a Revenue Officer may be legally bound to speak the truth it is necessary that the Revenue Officer should be acting in the discharge of some duty or in the exercise of some power imposed or conferred on him by law.

A Revenue Officer to whom an application for a grant of land is made and who enquires into matters not specified in Rule 3 or Rule 46 of the Rules under the (Lower) Burma Land and Revenue Act; or a Revenue Officer enquiring into an objection to the issue of an order of eviction under Rule 52 of these Rules, is not proceeding in the discharge of a duty imposed, or in the exercise of a power conferred, by law; and a charge of giving false evidence in respect of statements made in such enquiries will therefore not lie.

Meaning of "witness," "evidence," considered with reference to section 3 of the Indian Evidence Act and section 5 of the Indian Oaths Act.

"Rules" and "Directions" under the (Lower) Burma Land and Revenue Act distinguished. KING-EMPEROR *v.* PAKIRI. **2. L. B. R. 1904.=P. 272.**

2. S. 6. *Oath by Muhammadan witness —Penal Code (Act XLV of 1860), Section 178—Criminal Procedure Code (Act V of 1898), Section 480.*

Upon proceedings taken under section 480 of the Criminal Procedure Code, the District Magistrate convicted the accused, a Muhammadan, of the offence under section 178, I. P. C., for not taking oath by repeating the complete *kalma.*

Held, that the accused could not be required to repeat the *kalma*, even though it was a part of the form of oath current conviction was in his district, and that the conviction was illegal.

Sup: Govt. acts (X of 1873) *(Contd.)*

Section 6 of the Oaths Act exempts witnesses, jurors and interpretors who are Muhammadans from taking an oath.

The form of oath to be administered to Muhammdan witnesses, prescribed by the Chief Court does not require the repetition of *kalma.* BHAI KHAN *v.* THE EMPEROR. **20. P. R. 1902 Cr:=47 P. L. R. 1902.**

3 S. 8.—*Promissory note—Fraudulent assignment—Oath as to consideration.*

A sued *B* on a promissory note executed by *B* in favour of *A*'s endorser. *B* contended that there was no consideration for the note and that the assignment was fradulent. In the course of the suit *B* offered to abide by the oath of *A*'s third witness. This man took oath. *Held* that the oath was not conclusive as to the suit, but only as to the facts deposed to in the oath, and that *B* was entitled to a distinct finding by the Court as to whether the assignment was fraudulent or not.

Held, also, that where the plaintiff sues as the endorsee of a pro-note, and it is found that the endorsement was fraudulent and was not in fact made, the plaintiff would not be entitled to a decree on the note. 2 M. 356 and 22 M. 234 referred to. JATTANNA PAKKALA *v.* BALA SHEKA, **3 M.L.T. 162.**

4 S. 8, 9—*Oath—Kalma.*

There is no authority for a Magistrate requiring a witness to take *Kalma* oath when the witness does not volunteer to do so. NUR DIN *Alias* KADA *v.* THE EMPEROR. **27. P.R. 1903 Cr.=21 P L.R., 1904.**

5 S. 8, 9, 12—*Plaintiff's failure to take oath after agreeing to take it—Procedure.*

In a suit, by the agreement of the parties, the plaintiff agreed to take an oath and that on his failing to do so his suit should be dismissed.

Held, on his default in taking the oath, that the agreement could not be regarded as an adjustment of the suit and that the Court should have proceeded on with the case. (*2 M. 356. followed—17 M.L.J. 99 Distinguished.*)

Per White C. J.—S. 12 of the Oaths Act directs the Court to record as part of the proceeding the nature of the oath proposed, the fact that the party was asked to take the oath and refused, together with any reasons assigned for the refusal. The section seems to contemplate that the Court shall give such weight as it may think fit to the fact that a party has offered to take an oath, and has afterwards refused to take it, whilst it negatives the view that the refusal to take the oath is, in itself, a ground for dismissing the suit or giving a plaintiff a decree, as the case may be.

Per Miller J.—It may be doubted whether Section 12 of the Act was intended to apply to a case, in which the parties have arrived at an agreement that one of them shall take an oath; but whether that be so or not, it is not right to compel a

Sup: Govt. acts (X of 1873) *(Cont'd)*

man against his will to take an oath, by which he is to allege the existence of particular facts. MAJAN v. PATHU KUTTI. **17 M. L. J. 545=3 M. L. T. 98.**

6. S. 8 and 12—*A party agreeing to be bound by the oath of a person can not afterwards be allowed to withdraw therefrom.*

Where the parties in a suit made a joint application to the Court praying that the case should be decided according to the statement on oath of a certain person, and the plaintiff subsequently alleged that that person had colluded with the defendant and asked permission to withdraw from the reference; but he could not prove the collusion: Held that he could not be allowed to withdraw from it. (4 A 302 approved—and 18 A 46 referred to) CHIDDU v. KUARSEN, **A. W. N. 1906. P 280= 3. A. L. J. 654=29. A. 49.**

7. S. 9—*One party abiding by the oath of the other—Court's procedure.*

Where questions of Law and facts were involved in a case and one of the parties agreed to be bound by the opposite party's oath [the Court's record must show what questions were to be decided acccording to the oath. RAMLAL SAHU v. SALTANAT BEG, **8 O. C. 11.**

8. S. 9—*Agreement to abide by on oath—Preventing oath being taken power to retract.*

A party, who, under Section 9 of the Oaths Act, has agreed to abide by the oath of the other party, can not be allowed to retract therefrom. (22, M. 234, 18, A 46 and 22, B 281 referred to.)

An agreement to abide by an oath is tentamount to an agreement to treat the statement given on oath as the only evidence in the case. If the party agreeing to be bound by oath prevents such oath being taken, the other party is entitled to a decree, and if the preventer is the plaintiff his suit fails for want of evidence supporting his claim. UMAYAMMAI v. MUTHIAH NADAR—**17 M. L. J. 99.**

9. S. 9—*See S. 8, 9, 12—17 M. L. J. 545 =3. M. L. T. 98 No 5 supra.*

10. S. 11—*Agent's power to bind his principal by the opposite party's oath—Principal's power to withdraw from the oath.*

Where an agent was specifically empowered to appear in Court, and to take all kinds of proceedings in a case, to effect a compromise, or settlement, and to refer the suit to arbitration.

Held that he was empowered to bind his principal by the oath of the other party and his principal could not, in the absence of exceptional reasons, withdraw from the oath after the opposite party had expressed his willingness to make it. (63, P. R. 1881, 72, P. R. 1874, 5, P. R. 1903=37, P. L. R. 1903. 75, P. R. 1900, 4, A 303, 18 A 46, 14. B. 455. 22 B. 281. referred to) GANGA BISHAN v. MATNA ETC. **143 P. L. R. 1903=85 P. R. 1903.**

Sup: Govt. acts (X of 1873) *(Contd.)*

11. S. 11. *Whether oath taken in a previous proceeding is a conclusive evidence in a subsequent one.*

When an oath was taken under the Oath's Act in a previous proceeding under Section 144 of the Criminal Procedure Code, and the statement was given on oath:

Held, it was not binding as conclusive evidence in any proceeding other than that in which the oath was taken, there being nothing to indicate that it was intended to bind the person abiding by it, conclusively in any other subsequent proceeding (14, A 141 followed 13, B 389 referred to.) BADIUDDIN AHMAD v. NIZAMUDDIN HAIDER **10 C.W.N. 501=33 C. 386.**

12 S. 11—*Decree upheld in appeal on oath—Whether Resjudicata.*

In a suit for rent in 1898, the Munsiff's decree was affirmed on appeal on the strength of an oath taken under the Oath's Act, in the Appellate Court. In 1899 the plaintiffs brought another suit for rent and possession of the same land: Held, after overruling objections, that the Court which had tried the former case was competent to try the present suit, and that the suit of 1898, having been affirmed on appeal on the strength of an oath, was a confirmation of the original decree and such decree based on oath was a final adjudication and served as Resjudicata. (17 M 273, 28, C 78, followed) AHMAD v. MOIDIN—**24 M. 244.**

13 S. 11—*Conclusive Proof. Oath.*

The expression "conclusive proof" in Section 11 is used in the same sense in which it is defined in Section 4 of the Evidence Act I of 1872. Therefore a statement by a witness on oath, that a particular party holds the possession of a certain property, is admissible in evidence regarding the fact of the possession and is under Section 11 a conclusive proof of the fact so deposed to. *(4. B. L. R 97. (F. B.) followed*—VITHUGOVIND v. RAMJI VELLUJI—**1. M. L. T. 63 =8. B. L. R. 19.**—JENKINS AND RUSSELL J.J.

14 S. 12—*Plaintiff agreed to abide by defendant's oath as to his debt—His power to withdraw from the oath when defendant was willing to take it—Procedure.*

Plaintiff agreed to abide by defendant's oath as to his indebtedness in the account books of the plaintiff, the defendant accepted the offer and the plaintiff being given time to produce his account books failed to do so. The Court dismissed his suit finding that the defendant must be held to have taken an oath that nothing was due to the plaintiff. It was contended that either under Section 158, C. P. C. (as the plaintiff had failed to do an act for which time was granted to him) or under Section 136 C. P. C. (the plaintiff having failed to produce a document ordered by the Court to be produced) his suit was rightly dismissed: Held that plaintiff's failure to produce the account books amounted to his refusal to be bound by the oath, and that neither Section 136 nor

Sup: Govt. acts (X of 1873) *(Contd)*

Section 158 applied to the case. All that the Oath's Act of 1873 provides for the contingency of a party first agreeing to be bound by the oath of the other party and then retracting therefrom and preventing the other party from taking the oath, is that the Court should record these facts and also the reasons which may be assigned for the withdrawal, and the Court should hear and decide the case on the merits, giving proper weight to the presumption against the plaintiff for his failure to produce the account books and after fully considering his reasons assigned for such refusal. *63, P. R. 1881, 31, P. R. 1888, 18, A 46 & 18 P. R. 98 referred to)* —AMIR CHAND *v.* GOVIND SAHAI—**37. P. L. R. 1903=5, P. R. 1903.**

15. s, 12. See S. 8, 9, 12—17. M. L. J. 545 3. M. L. J. 98. No. 5 *Supra.*

16. s. 13. *& C. P. C. S. 387—399 Commissioner.*

A commission was issued by the High Court for the evidence of an attesting witness of a will who lived in Chandernagar (French Territory); Held that the commission was rightly issued and executed under Section 387-399 C. P. C. Held also that an affirmation (as required by the commission) having been administered and the evidence duly recorded, the Commission was correctly executed, and that Section 13 of the Oath's Act had no application and the evidence so taken could be read in the case. KADAMBINI DASSI *v.* KUMUDINI DASSI. **7. C. W. N. 806=30, C. 934.**—*(See C. P. C. Section 387-399).*

17. s. 13. *Evidence Act* (I *of 1872), Section 118—Child witness.*

When a witness of tender years appears before a judge, he is bound first to ascertain by questioning the witness whether the child is by tender years prevented from understanding the questions put or from giving rational answers to those questions. Then, if the judge elects to take the statement of the child as evidence he should proceed to administer the affirmation, but if he delibarately refrains from so doing, on the ground that the child could not understand the nature of a solemn affirmation, under Section 13 of the Oaths Act, the deposition of the child would be admissible. The ignorance of a child on such a matter as the nature of a solemn affirmation is not necessarily equivalent to an inability to understand ordinary questions and give rational answers. EMPEROR *v.* KUSHA YAMAJI SUTAR. **5. B. L. R 551.**

18. s. 13. *Administering of, to child witness—Indian Oaths Act, section 13.*

The deposition of a girl aged 8 was objected to on the ground that the Magistrate had not administered an oath to her nor placed her on solemn affirmation.

Sup: Govt. acts (X of 1873) *(Contd.)*

Held,—that when a Judge or Magistrate has elected to take the statements of a person as evidence, he has no option but to administer either the oath or affirmation to such a person as the case may require. *Queen-Empress* v. *Maru and another,* (1888) I. L. R., 10 All., 207; cited.

Queen v. *Sewa Bhogta,* (1874 14 B. L. R. 294, *Queen-Empress* v. *Shava and another,* (1891) I. L. R. 16 Bom., 359; dissented from. PWA NYUN *v.* KING-EMPEROR. **2. L. B. R.=1904. P. 322.**

35. Act II of 1874 (Administrator General's Act.)

1. s. 17. *See Act V of 1881 S. 31 and 32—10. C. W. N. 241.*

2. s. 18. *Administrator-General's position What payments can be made by him.*

The Administrator-General holding an estate under S. 18 of the Act is in no better position than a private administrator. Before the grant of letters of administration, he can only make payments for the benefit of or for the preservation of the assets of the estate, and none to the prejudice of the estate 8. Exch. Rep 30 2 at P. 307. R. In the goods of HARI DAS DUTT. **11 C. W. N. 193.**

36. Act III of 1874—(Married Women's property Act.)

s. 8.—*Decree against separate property of married women—Attachment—Income of property subject to restraint upon anticipation.*

S. 8 of the Married Women's Property Act does not affect the operation of the doctrine of restraint upon anticipation, by rendering property so restrained liable on contracts made by a married woman, as to her separate estate. 11 B 348, 13 B. L. R. 383 referred. 18 M. 19 followed; 12 C. 522 Diss. Restraint upon anticipation is an exception, established by equity in favour of married woman, to the general rule of law, which regards conditions in transfers of property restraining alienation as null and void. 11 ch. D 648 referred. This general rule is given in the first part of S. 10 of the Transfer of Property Act, while the exception in favour of married women appears in the proviso. Decrees passed in accordance with S. 8 of the Married Women's Property Act, against the separate property, if any, of the married woman, in respect of a contract entered into by her, cannot be considered as passed against property, which she is restrained from anticipating. (1905) Ac 98 referred.

Income of property subject to restraint upon anticipation, accruing due after the date of the judgment, cannot be attached in execution of a decree against the separate property of married women. (2 Q. B. 589 (1894), and 2 Q. B. 48 (1896), and 1896 A. C. 174 Referred). G. GOUDOIN *v.* P. A.

YENKATESA MUDALI, **17 M. L. J. 363 =2. M. L. T. 322=38. M. 378.**

37. Act XIV of 1874 (Sheduled Districts Act.)

Scheduled Districts Act (XIV of 1874), S. 6 —Rules under—Hearing the appeal, meaning. of—Rule 8, power of the High Court under.

Rule 6 of the rules framed under section 6 of the Scheduled Districts Act provides that, in appeals from Munsif's or Assistant's decisions, it shall not be necessary to summon the respondents in the first instance, but the original records shall be called for 'and if' after perusing the records, etc., the officer "hearing the appeal" shall see no reason to alter the decision appealed from, he may dismiss the same. Where the Government Agent, to whom the appeal was preferred, sent for and perused the appeal petition and dismissed the same endorsing the order of dismissal on the petition, without fixing a day and hearing the appellant:

Held, by the High Court on revision under rule 8, that the words "hearing the appeal" necessarily imply that the appellant must be given an opportunity of being heard in support of his appeal and that he has a right to be so heard if he appears, and that the Agent's order of dismissal must be set aside.—YANDAMURI JAGANNADHAM *v.* YANDAMURI SESHACHELAM, **28 M. 404.**

38. Act IX of 1875. (Indian Majority Act).

1. S. 2, 3,—*10 O. C. 247 See Limitation Act Art: 120.*

2. S. 3—*Appointment of guardian—Certificate of guardianship—Minority, period—Act XX of 1864 (Bombay).*

For S. 3 of the Majority Act, 1875, it is enough that a person has obtained an order for a certificate of guardianship of a minor, under Act XX of 1864; it is not necessary that any formal certificate in persuance of such order should be obtained. A minor under such a guardianship must, therefore, be deemed to have attained his majority, when he shall have completed his age of twenty-one years. (5 B. L. R. 708, 13 B 285, & 16 I. A. 195 Referred). SHIVRAM KONDO KULKARNI *v* KRISHNABAI KASHINATH, **—8 B. L. R. 897=31 B. 80.**

3. S. 3—*Guardian—Appointment of guardian of property of minor member—Alienation by such guardian without sanction of Court—Necessity—Karta of a joint Hindu family.*

The *Karta* of an undivided *Mitakshara* family, with the concurrence of the adult members of the family can mortgage family property for family purposes in case of necessity, so as to charge the property as against all the members of the family. Where necessity is not established he is personally liable for the debts contracted by him.

A guardian of the property of an infant cannot properly be appointed in respect of the infant's interests in the property of an undivided *Mitakshara* family, for the interest of a member of such a family is not individual property at all. A guardian, if appointed at all, would have nothing to do with the family property and his appointment does not render invalid merely for want of sanction of Court a transfer made by the *karta* of the family. GHARIB-UL-LAH *v.* KHALAK SINGH,—**5 B. L. R., 478 (P. C.) 7 W. N. C. 631 (P. C.)=25 A. 407=30 I. A. 165 (P. C.)**

4. S. 3—*Grant of Letters of Administration to defacto guardian of a minor—Act VIII of 1890, S. 7 (1), 52—Declaration of guardianship.*

By merely granting Letters of Administration, under S. 13 of Act V of 1881, to the *de facto* guardian of a minor, in respect of an estate, to which the minor is an heir, the Court does not appoint or declare him a guardian to the person or property of the minor within the meaning of S. 7 (1) of Act VIII of 1890. Such grant of Letters of Administration does not, therefore, bring the minor under the provisions of S. 3 of Act IX of 1875. GANESHI LAL *v.* SURAJ MAL, **89 P. R. 1906.**

5. S. 3—*10 O. C. 1. See Mohammadan Law (Guardianship.)*

6. S. 3—*1 C. L. J. 112. See Act VIII of 1890 S. 7 and 34.*

(39.) Act XIII of 1875 (Probate & administration Act.) *See Act V. of 1881.*

40. Act XVIII of 1875 (Indian Law Reports Act).

S. 3.—*Evidence Act (Act I of 1872), Section 92—Oral evidence to contradict a document—Indian Law Reports Act (Act XVIII of 1875), Section 3.*

Oral evidence is not admissible to show that a *kabala* was not intended, as it purported to be an out and out sale, but only a *kut kabala* or mortgage; the evidence as to the acts and conduct of the parties is however admissible,

4. C. W. N. 153, *S. C. L. R.* 27 *I. A.* 58, 2 *C. W. N.* 562, *S. C. I. L. R.* 25 *Cal*, 603, *followed.*

A judgment of the High Court is none the less an authority because it has not been reported. 4. *C. W. N.* 732, *dissented from.* MOHAMED ALIHOSSEIN *v.* MIR NAZAR ALI.—**5 W. N. C. p. 326.=23. C. 289.**

41. Act XI of 1876 (Presidency Banks Act.)

Bank of Bombay—Shareholder's Right to examine the Register of share-holders—Object of the search Corporation—Member of the Corporation - Common law right of the members to inspect books of the Corporation.

Sup: Govt. acts (XI of 1876) *(Contd).*

A share-holder of the Bank of Bombay, sued to be allowed to inspect the register of share-holders of the Bank. He desired inspection of "the register of the present share-holders, so as to enable him to communicate with the other share-holders, and, if possible, obtain their assent to certain proposed resolutions for the better management of the affairs of the said Bank and for the removal of some of the existing Directors, which he intended to bring before a general meeting of the share-holders."

Held, that A's claim was reasonable, that a share-holder of a Bank can inspect its Registers to communicate with other co-sharers for a concerted action.

Every member of a Corporation has the right, under common law, to inspect its books and records. The right does not cease, merely because a Corporation is created by a statute, which does not confer the right, unless the statute expressly excludes it.

A member of a Corporation is entitled to inspect any of its books, provided he has a definite object or specified purpose, in which he is interested, and provided also that an inspection of the book, which he requires, is necessary for that purpose. He must see inspection, not from mere idle curiosity or from some speculative purpose, but that he must have some reasonable and definite object, in which he is interested, and for which the inspection is required; whether that definite object concerns or not any subject then actually in controversy or discussion (1795) 2 stra 1221, & (1831) 2 B & Ad 115 followed. SOOLLEMAN SOMJI *v.* THE BANK OF BOMBAY, **9 B. L. R. 165.**

42 Act 1 of 1877 (Specific Relief Act).

1 S. 9—*Decree for possession—Order in execution proceedings—Appeal.*

Where a decree for possession of land has been passed in a suit brought under s. 9 of the Specific Relief Act, and an order is passed in proceedings in execution of that decree, no appeal lies against that order. For s. 9 provides that "no appeal shall lie from any order or decree passed in any suit" under that section, and, by the explanation to s. 647 of the Code of Civil Procedure, applications for the execution of decrees are proceedings in suits.—THOMAS SOUZA *v.* GULAM MOIDIN BEARI, **I. L. R., 26 M. 438.**

2 S. 9.—*Tenant holding over dispossessed—His suit for possession—Due course of law.*

A tenant holding over is a tennant on sufference, but he is not liable to be evicted by the landlord of his own authority. His possession is judicial and not 'wrongful.' He may maintain a suit against the landlord under this section. The words 'due course of law' mean the regular, normal process and effect of the law. RUDRAPPA *v.* NARASINGRAO, **7 B. L. R. 12=29. B. 213.**

Sup: Govt acts (I of 1877) *(Contd).*

3 S. 9.—*Applicability of—Suit to recover possession against trespasser—Limitation Act, art. 142, applicability of—Cause of action, accrual of.*

S. 9 provides that a person dispossessed, without his consent, of immoveable property, otherwise than in due course of law, can institute a suit for the recovery of possession within six months from the date of dispossession. But this section is inapplicable to the case of a person, who, although he cannot show a better title to the property, is dispossessed by a trespasser, who has no title at all to the property. In such a case, the plaintiff must prove his possession prior to the time when he was admittedly dispossessed by the trespasser and the suit to recover possession is governed by art. 142 of the Limitation Act, the cause of action arising from the date of dispossession. (8 B 371; 6 B. 215, *folld.* 2 L.B.R. 56; 16 C. 473; (1878) 1 Q.B.D. 127; 7 I. A. 73, *referred to.* 17 C. 256, *diss. from.*) WA THA *v.* RE HLAW. **3 L.B.R. 27.**

4 S. 9—*Summary suit for possession by a lessee restored to possession.*

One Lachmi Narain died possessed of certain immoveable property. He left him surviving a widow, Mukhta Kunwar. Narain Das obtained possession of some portion of the said immoveable property, as he alleged, under a lease from Mukhta Kunwar and held possession, at any rate, for some months, down to the 27th of November 1897. After the death of Mukhta Kunwar, one Sheo Kumar, who claimed to be the adopted son of Mukhta Kunwar, by some means other than legal process, dispossessed Narain Das. Narain Das thereupon instituted a suit under s. 9 of the Specific Relief Act. Held that the first issue was whether the defendant was the true owner of the property, the burden of proving which was on him; and, secondly, if the defendant established his title, whether the plaintiff had such an interest in the property, under the lease set up by him or otherwise, as would entitle him to remain in possession as against the defendant. SHEO KUMAR *v.* NARAIN DAS, **A.W.N. 1902. P. 139=24. A. 501.**

5 S. 9—*Tenant, dispossessed by third party—Suit by landlord.*

Where a tenant in possession was wrongfully dispossessed soon before the termination of his tenancy by a third party, a landlord holding possession through that tenant could bring a suit under S. 9. of the Act. (C. R. P. No. 643 of 1893) (unreported) (followed). JAGANNATHA CHARRY *v.* RAMA RAYER. **28 M. 238.**

6. S. 9. *Hat—Suit to recover possession of a hat—Delivery of possession—Incorporeal right—Illegal dispossession.*

A *hat* the possession of which is held by collecting tolls or rents is not an "immovable property" within the meaning of s 9 of the Specific Relief Act, and a suit to recover its possession is not therefore

Sup: Govt. acts (I of 1877) (*Contd.*)

maintainable under that section. *Fadu Jhali* v. *Gour Mohun Jhala*, (I. L. R., 19 Cal 544) relied upon—FUZLUR RAHMAN v. KRISHNA PRASAD. **29 C. 614.**

7 S. 9—*Suit by person dispossessed of immovable property—Physical possession—Constructive possession—Tenant. Dispossession of —Collusion between tenant and stranger—Cause of action.*

The plaintiff was in constructive possession of the land in suit through the defendant No. 2, his tenant. The tenant was dispossessed by the defendant No. 1. The plaintiff brought the suit to recover possession of the property under section 9 of the Specific Relief Act.

Held, that section 9 of the Specific Relief Act contemplates the case of a person who being in physical possession of a property is dispossessed. The plaintiff was not in such physical possession, and, therefore, when the defendant No. 2 was dispossessed, it was no dispossession of the plaintiff, such as would entitle him to bring a suit under the said section.

Held, further, that anything which might have occurred subsequent to the dispossession complained of could not give the plaintiff a cause of action which he did not acquire when such dispossession took place. SONATON SHOME v. SHEIKH HELIM, **6 C. W. N. 616.**

8. S. 9—*Possession as title against all but true owner—Effect of Specific Relief Act even where suit is brought more than six months after dispossession.*

Possession is, under the Indian, as under the English, law, good title against all but the true owner. S. 9 of the Specific Relief Act is in no way inconsistent with the position that as against a wrong-doer, prior possession of the plaintiff, in an action of ejectment, is sufficient title, even if the suit be brought more than six months after the act of dispossession complained of and that the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third person. The only effect of S. 9 of the Specific Relief Act is that a person who has been dispossessed otherwise than in due course of law and who brings a summary suit within the time prescribed by that section, is entitled to be reinstated even if the defendant by whom he was dispossessed be the true owner or a person authorized by or claiming under him. But a decree passed in such a suit will not have the force of *res judicata* on the question of title. *Nisa Chand Gaita* v. *Kanchiram Bagani*, (I. L. R., 26 Cal. 579), dissented from.—NARAYANA ROW v DHARMACHAR,—**13 M. L. J. 146—26 M. 514.**

9. S. 9.—*Possession—Declaration of title—Suit by person in possession for declaration of title—Burden of proof—Effect of plaintiffs possession—Presumption of title—Evidence Act (I. of 1872) S. 110.*

The plaintiffs brought this suit in 1898 for a declaration that certain land in the

Sup: Govt. acts (I. of 1877) (*Contd*).

village of S. belonged to them, and that they might be confirmed in possession. They alleged that they purchased the land in July 1888, from the *patel* of the village, and had been in possession ever since, and that their vendor had previously been in possession. They now sued because their possession had been threatened by the orders of Government officials. It was admitted that the plaintiffs had been in actual possession since 1888. The District Judge held that the burden of proof of title to the land lay upon the plaintiffs. He was of opinion that they had failed to prove it, and he dismissed the suit.

Held per JENKINS, C. J., and RANADE, J. (WHITWORTH, J., dissenting), that the plaintiff's being in possession (not shown to have wrongfully originated) such possession was good against the whole world except a person who could show better title; that the burden of proving such title lay therefore upon the defendant; that he had failed to prove it; and that therefore the plaintiffs were entitled to the declaration sued for.

Per WHITWORTH, J.:—That the evidence did not show such possession in the plaintiffs as under S. 110 of the Evidence Act (I. of 1872) shifted the burden of proof upon the defendant; that prior to the alleged sale to the plaintiffs in 1888, the defendant had been in the position of an absentee owner of the land in question represented partly by the village officers and partly also by the village community, and that he might be said to be in possession; that the sale to the plaintiffs in 1888 by the *patel* of the village, who should have protected the defendant's interests, was a wrongful act; that the plaintiffs were therefore not relieved from the burden of proving their title, and that they have not proved it.

Per RANADE. J.:—When a person in possession of land has been dispossessed and sues to recover it, the fact of his previous possession will not entitle him to a decree unless he sues under S. 9 of the Specific Relief Act (I. of 1877) within six months of the date of dispossession. If he sues after the six months have expired, he must prove a *prima facie* title. In such a case he is entitled to a decree unless a superior title is proved on the other side. It is in reference to such cases that it has been held that possession is evidence of title, and that the plaintiff, who proves such possession and subsequent disturbance, shifts the burden of proof on the defendant when the *prima facie* title is made out. When no such *prima facie* title is made out by the plaintiff who asks for a declaratory decree, he cannot obtain that decree on the mere ground that he was in possession and the defendant had no title. Mere wrongful possession is insufficient to shift the burden of proof. HANMANTRAV v. SECRETARY OF STATE, **2. B. L. R. 1121=25 B. 287.**

Sup: Govt. acts (I of 1877) *(Contd).*

10. S. 9.—*Limitation Act (XV of 1877), sch. II, arts. 120, 142—Suit—Possession—Non-occupancy raiyat—Bengal Tenancy Act (VIII of 1885), S. 3—*

Held by the full Bench (Prinsep J. dissenting) that the period of limitation applicable to the case of a non-occupancy raiyat, who has been dispossessed from his holding, otherwise than in execution of a decree, is either six or twelve years as provided for in art. 120 or art. 142 of the Limitation Act (XV of 1877). The remedy indicated in S. 9 of the Specific Relief Act (I of 1877) is not the only remedy which the Legislature has provided for a non-occupancy raiyat, who has been dispossessed otherwise than in due course of law. *Bhagabati Charan Roy* v. *Luton Mundal*, (7. C. W. N. 218) over-ruled.—TAMIZUDDIN *v.* ASHRUB ALI, **I. L. R., 31 C. 647; 8 C. W. N. 446; F. B.**

11. S. 9.—*Ouster of a trespasser—Decree obtained by trespasser—Suit for title by owner—Limitation Act (XV of 1877), Sch. II, Art. 142.*

Where a rightful owner of lands who had, without recourse to law, dispossessed a trespasser, and continued in possession, until dispossessed under a decree obtained by the trespasser under S. 9 of the Specific Relief Act.

Held,—That possession so obtained by the rightful owner was possession within the meaning of Art. 142, Sch. II, Limitation Act (2 C. L. J. I, 9 C. W. N. 10 61 followed). JONAB SHEIKH *v.* MAHARAJA SURAYA KANT ACHARYYA, **10 C. W. N. 1081=33 C. 821.** *(See No. 19 infra)*

12. S. 9. *Possession. Suit for—Burden of proof—Finding of fact—Power of High Court on second appeal.*

Held, that the plaintiff was bound to prove his own title and could not succeed on the weakness of the defendant's case: and the fact that the defendant might have set up an exaggerated statement of his own claims, would not affect the duty of the plaintiff to prove that his own claim was not overstated; that if it appeared that both parties had overstated their rights, that would be no reason for making the defendant alone suffer and for giving the plaintiff more than he had proved himself entitled to.

Held, also, that the prior possession was certainly a ground on which, as *primâ facie* evidence of title, a plaintiff might recover possession in the absence of title set up by the defendant, even though his suit did not fall within section 9 of the Specific Relief Act; but it must be found not only that the plaintiff's prior possession was within twelve years of suit, but also that it was a juridical possession of the property claimed. If the possession were joint it could not be held juridical possession of the whole was against the person with whom it was jointly held.

Sup: Govt. acts (I of 1877) *(Contd.)*

When the lower Appellate Court attaches erroneous legal inferences to findings of pure facts, they are open to correction in second appeal. RAJARAM TULJARAM *v.* NANCHAND TULJARAM. **5 B. L. R. 225.**

13. S. 9. *Suit for land based on title—Claim of title set up in defence—Suit treated by Court partly as summary suit for possession under S. 9 and partly as a suit based on title—Rights of parties to have question of title tried and decided.*

Plaintiff sued to eject defendants from certain land, claiming title to it by purchase, and alleging that he had been forcibly dispossessed by defendants. The defendants denied both plaintiff's title and possession and set up title in themselves and alleged that they had long been in possession. The District Judge found that plaintiff had failed to prove a title by purchase, but had shown that he had been dispossessed otherwise than by due course of law, by defendants, within six months prior to the institution of the suit. He considered that s. 9 of the Specific Relief Act applied and declared plaintiff entitled to possession, but dismissed the suit in so far as it claimed to have plaintiff's title established.

Held, that inasmuch as the suit had not been brought under the special provisions of the Specific Relief Act, but was based on plaintiff's superior title, a claim to title being also set up in defence, the issue concerning title should have been tried. The suit ought not to have been treated partly as a suit under s. 9 and partly as based on plaintiff's title. *Ram Harakh Rai* v. *Sheodhial Joti*, (I. L. R. 15 All. 384), not followed. RAMASAMI CHETTI *v.* PARAMAN CHETTI. **11 M. L. J. 403=25 M. 448.**

14. S. 9. *S. 375 C. P. C.—Compromise need not be in writing—Oral evidence of its terms under S. 91, Evidence Act.*

S. 375 of the Code does not require that the agreement or compromise itself shall be reduced to writing but olny that its terms shall be recorded in the suit, *i. e*, a note of its terms should be made in the proceedings. If the Court did not record the terms of it, S. 91, Evidence Act, is no bar to a suit being brought on the terms of the compromise Moreover, S. 375 only allows the decree to be final, so far as relates to the subject-matter of the suit. So when an agreement or compromise is made in a suit under S. 9, Specific Relief Act, the Court's decree under S. 375 does not bar any person from suing to establish his title to property and recover possession thereof. BI YA *v.* ON GAING. **3 L. B. R. 243.**

15. S. 9—*Suit on title—Dispossession within six months before suit.*

The plaintiff sued in a Civil Court for possession as usufructuary mortgagee of an occupancy holding within 6 months from his being wrongfully dispossessed by the Defendant. The plaintiff never pleaded S. 9 of the Specific Relief Act in the Courts below which

Sup: Govt. acts (I of 1877) (*Contd.*)

dismissed the suit. The plaintiff appealed to the High Court.

Held, that the plaintiff was under S. 9 S. R. A. entitled to be put back into possession of the fields in suit. (A. W. N. 1893 P. 163 15 A. 384 and A. W. N. 1897 P. 145 followed). PARBHU LAL *v* RAM CHARAN,—**4 A. L. J. 603 = A. W. N. 1907 P. 244.**

16. S. 9.—*Possession—Suit for possession based on possessory title of plaintiffs' predecessor—Plaintiffs never themselves in possession—Cause of action.*

Mussammat Wazir Jan, the owner of certain *zamindari* property, died on the 18th of December 1889, leaving no direct heirs. After her death the property was taken possession of by the four nephews of *Mussammat* Wazir Jan's deceased husband. One of these nephews, Bisharat, died on the 7th of August 1890, whereupon the share of which he had been in possession was appropriated by his son, Kasim, to the exclusion of Kasim's two sisters Ayesha Begam and Kudrat Begam. While in Kasim's possession the property, or part of it, was sold in execution of a decree against Kasim and purchased by Shi Gopal and others. On the 7th of August 1902, Kasim's sisters sued to recover their shares of the property as heirs of Bisharat.

Held by *Knox, J. (dissentiente Aikman, J.)* that inasmuch as the plaintiffs had never at any time been in possession of the property claimed by them, their suit would not lie. *L. R., 1 Q. B., 1, 24 All., 157, 26 Mad., 514, 27 All., 169, 12 All., 51, 20 Cal., 834 distinguished. L. R., 7 Exch., 55 7 B. and C., 399 referred to.*

Aikman, J. Contra.—The plaintiffs' father Bisharat, having held a possessory title—heritable and transferable—good as against all except the true owner, there was nothing to prevent his heirs bringing the present suit. *13 All., 537, 24 All., 157, L. R., 1 Q. B. 1, 8 C. and P., 99, 27 All., 169; Weekly Notes, All., 1906 p. 184, 26 Mad., 514, 12 All., 51 referred to* SHI GOPAL *v* AYESHA BEGAM,—**A. W. N. 1906 P. 264 = 3 A. L. J., 775.**

17. S. 9—*Suit for possession against trespasser based merely on possession—Civil Procedure Code (Act XIV of 1882), Section 43—Splitting of claim—Distinct causes of action—Previous suit for profits—Subsequent suit for possession—Suit for possession against trespasser.*

Where a person has been dispossessed of land by another, who has come upon the land when the harvest was lying cut and ready for division between landlord and tenants, and has taken the landlord's share of the produce, and the person so dispossessed has sued only for the money-value of that share of the produce, Section 43 of the Civil Procedure Code does not bar a subsequent suit by him for possession of the land.

A plaintiff who has been forcibly dispossessed of immovable property by a person having no title, can sue for possession simply on the strength of the possession which he had before he was dispossessed: provided he

Sup: Govt. acts (I of 1877) (*Contd.*)

sues within twelve years' period allowed by Article 142 of the Second Schedule of the Limitation Act. In such a suit, unless defendant proves title, plaintiff should succeed without being asked to prove his own title to ownership: and even if the defendant proves that he (plaintiff) has no such title, Section 9 of the Specific Relief Act does not expressly take away this remedy, and was not intended to do so. ABDUL HAMID *v.* SARBULAND KHAN. **137. P. L. R. 1902 = 78, P. R., 1902.**

18—S. 9=*Suit for possession—Criminal Proceedings—Decision.*

Criminal proceedings, under S. 145 of the Crim. Pro. Code in no way bar the plaintiff's right under S. 9 Specific Relief Act, which accrued to him as soon as his possession was interfered with by the defendant.

The High Court will not interfere in revision where other remedies are open to the aggrieved party 10 A 119 Refd to. JWALA *v.* GANGA PRASAD. **5 A. L. J. 297.**

19. S. 9, *Possession under effect of—Wrongful dispossession by rightful owner—Limitation Act (1877) art 142.*

A, the rightful owner of certain lands, was wrongfully kept out of possession for less than 12 years and regained and held possession without the help of the law, till evicted by B under a decree under S. 9 of the Specific Relief Act;

Held, that the cause of action accrued to A on the date of dispossession under the decree and as suit brought within 12 years from that date, was within time, and that the period between the regaining of possession by the plaintiff and his dispossession under the Specific Relief Act should enure to the benefit of the rightful owner and not of the trespasser 12 W. R. 9; 22 W. R. 259: 12 C L. R. 486, Distd, 29 I. A. 104 (P. C.) = 22 C 518, Refd to. MANTAZUUDIN *v.* BARKATULLA—**2 C. L. J. 1.**

20—S. 9—*Suit by tenant of judgment-debtor against auction-purchaser—Delivery of possession—Civ. Pro. Code (1882), Ss. 318 and 319. Due course of law.*

An auction purchaser on obtaining delivery of possession of immoveable property under S. 318 of the Code of Civil Procedure, dispossessed a tenant of the judgment-debtor, *held*, that the auction-purchaser, not having proceeded under S. 319 of the Code, the dispossession was not in due course of law, and the tenant could sue under S. 9, Specific Relief Act, MULUK PATOONI *v.* BHARAT CHANDRA DAS, **12 C. W. N. 694.**

21. S. 9—*Possession. Suit for recovery of—Right of suit.*

Possession on the strength of which a suit is brought for recovery of immoveable property after dispossession by the defendant where the suit is not of the nature contemplated in section 9 of the Specific Relief Act must be of proprietary character and of long standing. A mere temporary squatting is not such possession.

Sup: Govt. acts (I of 1877) (*Contd.*)

Section 110 of the Evidence Act speaks of actual possession—not the mere right to possession.

The remedy given by section 9 of the Specific Relief Act should be deemed to be exhaustive so far as the right of recovery based on possession of a temporary character is concerned. TULLA *v.* GOPI. **51. P. R. 1904.**

22 S. 9—*Possession—Title—Suit based on possession—Specific Relief Act (1 of 1877) Section 9.*

If a Court after examining witnesses of the party on whom the burden of proof rests considering it unnecessary to record the evidence of the adverse party decides the matter against him and the appellate Court upsets the finding of the original Court, objection cannot be taken in the High Court by the adverse party that his evidence should have been recorded before the finding of the original Court could be upset by the appellate Court when the attention of the appellate Court was not called to that circumsftance—13 B. 336 *followed.*

A plaintiff who provés that while in peaceable possession he was dispossessed by the defendant wrongfully is entitled to recover because his previous possession is tantamount to his title as against a wrong doer.

L. R. 20 I. A. 99, 3 B. L. R. 246; 23 M. 179 followed.

A person in possession has a good title as against every stranger and that one who dispossesses him, having no title himself is a wrong doer and cannot defend himself by showing that the title is in some third person. In such cases proof of previous possession is without more, evidence of the plaintiff's title to recover from the defendants who are proved to be wrong doers. There is a difference between such a suit and a suit under section 9 of the Specific Relief Act. In the former the Court awards the claim only when it finds that the plaintiff had peaceable possession before dispossession and that the defendant haa no title and is a wrong doer, the plaintiff's previous possession being in law sufficient proof of his title, in the latter, the Court can only go into the question of dispossession with six mouths before suit and cannot enquire into the defendant's title. ALI *valad* BHAUDIN *v.* PACHUBIBI. **5. B L.R. 264.**

23 S. 9—*Suit for possession by a tenant—Jurisdiction.*

A Civil Court is barred from taking cognizance of a suit by a tenant under S. 9 Specific Relief Act to recover posseesaion of land of which he has been dispossessed. Such a suit must under S. 92 C. P. Tenancy Act be brought in a Revenue Court 6 C.P.L.R. 101 referred to. BALAJI BARAI *v.* SAKHARAM. **16 C.P.L.R. 1903. P. 41.**

24 S. 9—*Tenant ejected by a third party—Landlord's suit for possession.*

Sup: Govt. acts (I of 1877) (*Contd.*)

Where a tenant had been ejected by a third party the landlord is not competent to bring a suit for possession under S. 9 of the Specific Relief Act. 14, C. 649, 10. W.R. 15, 13. C. 101, 2. M. 226, 18. B. 51, 20. B. 260, 5. B. 208 and 212, 12. C. P. L. R. 52, referred to. DIN KARSH \ BAPU *v.* ANANT SHAH BAPU. **16. C.P.L.R. 1903. P. 154.**

25. s. 9 & 39. *Civil Procedure Code, S. 43—Suit for possession—Subsequent suit for cancellation of deed on which defendant based his claim.*

The plaintiff brought a suit, under s. 9 of the Specific Relief Act, for the recovery of possession of immoveable property. During the pendency of this suit, he commenced another suit under s. 39 of the same Act for declaration that the deed of gift, on the basis of which the defendant claimed the property, was null and void, as against him.

Held, that s. 43 of the Civil Procedure Code was no bar to the second suit, as there had been no splittiug up of the cause of action. JAI GOPAL MUKERJEE *v.* LALIT MOHAN. **I. L. R., A. W. N., 1904, p. 7=26 A 236.**

26. s. 12. See Contract Act S. 29 and 22 No. 67—7 B. L. R. 319.

27. s. 12 (d) *Arbitration—Award—Suit for specific enforcement of award—Case in which compensation in money considered impossibte to assess.*

The defendant leased a village to the plaintiff for a term of five years. In the second year of the lease, disputes arose between the parties, which they agreed to submit to arbitration. On the questions submitted to him, the arbitrator delivered an award, which was to the effect: (1) that the lessee should surrender possession at a fixed time within the term of the lease; (2) that the lessee should pay the sum of Rs. 800 to the lessor; and (3) that as to arrears of rent due from the tenants, the lessee should obtain decrees and execute a conveyance of them to the lessor, who was to pay to the lessee the aggregate amount of the decrees. The other terms of the award having been performed the lessee sued for specific performance of the remainder. He filed with his plaint a number of decrees obtained by him against the tenants together with a sale-deed conveying those decrees to the defendant, and paid that the defendant might be ordered to accept the conveyance and pay the amounts of the decrees.

Held, that even if the award were bad, the defendant having acted on it and accepted the benefits it gave him, had precluded himself from impeaching it; also that the case was not one in which it was possible to assess compensation in money for the breach of the particular condition in the award, and that the plaintiff was entitled to specific performance of the award, and this was directed in terms of the order made in the case of *Bell* v. *Denver.* (54 Law Times

Reports 729). BRIJ MOHAN LAL *v.* SHIAM SINGH. **I. L. R., 24 A. 164 = A. W. N. 1901 P. 208.**

28. s. 12 & 21 (a) *Suit for recovery of property acquired under the mortgage-deed, not a suit for specific performance—Money compensation of adequate relief.*

Under a mortgage-deed interest was to be paid half-yearly, and in case of default, the mortgagee was entitled to take possession of the property and hold it for 15 years. Default being made in the payment of interest the mortgagee sued for possession. The mortgagor contended that the suit for possession should be regarded as a suit for specific performance of a "contract for non-performance of which compensation in money was an adequate relief" within the meaning of S. 21 (*a*) Specific Relief Act.

Held, that a suit like this was not a suit for specific performance of a contract F. C. A. No. 46 of 1903, Followed and C. A. No. 239 of 1890, 5 O C. 148, 6 O. C. 167, Refd. to.

Held, further, that the suit was not a suit to enforce a contract to transfer immoveable property within the meaning of S. 12 Specific Relief Act, but that it was a suit for recovery of immoveable property, based on a title acquired by the mortgagee under the terms of the mortgage-deed. 2 O.C. 24, *Diss*: 16 Eq. 433, L. R. 13 App. Cas. 523, 13 B.L.R. 312, 6 A. 231, 11 A. 27, 26 A. 497, 2 A. 718, 23 M. 593, 23 A. 285, referred to. KALKA SINGH *v.* HIMAYAT ALI, **10 O C. 218.**

29 S. 18—*Agreement to lease—Subsequent lease to third party taking in good faith without notice of agreement—Specific performance.*

S agreed to lease certain immoveable property to W for a term of fifteen years and to execute and register the lease on a certain specified day. Before the day fixed for executing the lease arrived, S executed a lease of the same property for two years in favour of N and others, who had no knowledge of the agreement to lease to W. W thereupon sued S and his lessees, claiming cancellation of the two year's lease to N and his co-lessees, and specific performance of the agreement to lease to him for fifteen years. *Held* that S was, having regard to s. 18 of the Specific Relief Act, in the position of a person who had agreed to lease "having an imperfect title," and who had subsequently acquired such an interest in the property as enabled him to carry out his agreement, and that, although the lease to N and others could not, under the circumstances, be set aside, the plaintiff was entitled to a decree for "specific performance" of the agreement to lease to him, to take effect after the determination of the lease which had been granted to N and others.—SARJU PRASAD SINGH *v.* WAZIR ALI, **23 A. 119. A.W.N. 1901. P 11.**

30. s. 18.—*Contract to sell—Subsequent vendee with notice of previous contract—Suit for possession—*

One who has entered into a contract for the purchase of a certain property can sue for possession of the property and specific performance of the contract, although it is subsequently sold to another who had notice of the previous contract.

The stipulation of a penalty for the nonpeformance of the contract to sell *per se*, does not avoid a suit for specific performance under S. 18 of the Specific Relief Act. 10 C. 710, 2 C. 468, 6 C. 534, 31 P. R. 1897, 2 P. R. 1885 referred to. HUKAM CHAND *v.* NIKKA SINGH, **27. P. W. R. 1908 = 97. P. L. R 1908 = 15. P. R. 1908.** (*See No. 32 infra*).

31. s. 18.—*Specific performance of contract of purchase—Doubtful title.—Hindu Law—Widow—Right to represent estate.*

The plaintiff a Hindu sued for specific performance by the defendant of an agreement for the purchase by the defendant of a house as to which the plaintiffs ought a declaration that he had established his title. The house in dispute was admittedly the joint property of the plaintiff and his brother. The plaintiff's brother left a widow who shortly after her husband's death gave birth to a posthumous and only son and set up the contention that her husband and the plaintiff had been divided in interest and claimed one moiety thereof. The dispute was referred to arbitration and the award of the arbitrators declared the brothers to have been undivided and a consent decree between the plaintiff and his brother's widow was passed where under the plaintiff on payment of a certain sum to the widow for the maintenance of herself and her infant and the marriage expenses of the latter was to become absolute owner free from all charge. That sum was admittedly paid to the widow. The defendant contended that the plaintiff had not established a marketable title in himself and the suit should be dismissed.

Held that the contention was valid. It would be unsafe to treat anything short of a decree contested to the end as coming within the ruling in the Shivaganga case. Moreover if the consent decree was a correct one it followed therefrom that the widow had only a right to maintenance, in such a case she could not be held to represent the estate.

Before a title could be forced on an unwilling purchaser there must be something more than a very probable ground for believing that the title will prove unavailable. JERAM LALJEE *v.* VEERBAI. **5. B. L. R. 885.**

32. s. 18.—*Vendor and purchaser—Vendee purchasing property with notice of a prior agreement to sell the same.*

When a person by a conveyance purchases property with notice of a prior agreement to sell the same between his vendor and a stranger, the stranger can recover the property from the vendee and is entitled to a decree directing the vendee to

Sup: Govt. acts (I of 1877) *(Contd.)*

execute to him a proper conveyance of the property, besides a declaratory decree that the vendee holds the property for his benefit to the extent necessary to give effect to the agreement of sale. GAFUR *v.* BHIKAJI GOVIND, **3 B. L. R., 596.**

33. s. 18. *T. P. A. S. 43—Mother contracting to sell as guardian can not be compelled to sell as an heir.*

B the mother and guardian of her infant son contracted to sell some land to A. undertaking to obtain a c rtificate of guardianship and permission to sell from D. J. within five months, and in default to refund the earnest money. The son died within the five months before the certificate was applied for, and B succeeded as an heir and refused to sell the land. A sued B for specific performance of the contract, held no decree could be passed against B for specific performance of the contract for sale. S. 18 Specific Relief Act does not apply where the defendant does not contract to sell the property as if it were his own, nor does S. 43 T.P.A. apply where no errorneous representation was made by the defendant. RASHMONI DASI *v.* SURJA KANTA ROY. **2. C.L.J. 6=9. C.W.N. 1019=32. C. 832.**

34—s. 18 (C) *T. P. A. S. 55 (1), 55 (1) (g), 55, (5) (b) and 57.*

A contracted to sell a piece of land to B without disclosing a previous mortgage on it. A failed to furnish particulars sufficient to enable B to prepare a conveyance. B sued A to compel him to execute a conveyance or, in the alternative, for damages for breach of contract.

Held that under S. 18 (c) Specific Relief Act B was entitled to a decree for specific performance of the contract of sale, and that if A did not pay off the mortgage before executing the conveyance, B was entitled under S. 55 (5) (b) P. R. A. to retain out of the purchase money the amount payable to the mortgage. 11 Bur. L. R. 257 referred to.—BA PE *v.* MA MA.—**4 L. B. R. 1907. P. 86.**

35—s. 18. cl (c)—*Right of the purchaser of a mortgage—Decree to compel the vendor to pay off incumbrance thereon.*

A mortgage decree was sold free from incombrances. Held the purchaser has a right under S. 18 (c) to compel the vendor to pay off any incumbrance upon the decree and make over the decree to him free of such incombrance. 15 W. R. 545 Ref. KHETSIDAS AGARWALA *v.* SHIB NARAYAN MURDA **9. C. W. N. 178.**

36 s 19 & 21 (G)—*See Contract Act S 2 (d) No. 7—28 P. L. R. 1905=49 P. R. 1905.*

37 s. 19 & 21—*Arbitration—Civil Procedure Code, s. 523—Agreement to refer to arbitration made pending a suit—Such agreement a bar to the continuance of the suit.*

Where parties to a suit agreed to refer the matters in dispute between them in such suit to arbitration, such an agreement ousts the jurisdiction of the Court to proceed with the suit, whether it is filed in Court under the provisions of [illegible] of the Code of Civil Procedure or not. *Salig Ram v. Jhunna Kuar*, (I. L. R., 4 All. 546); *Sheoambar v. Deodat*, (I. L. R., 9 All. 168) and *Shib Lal v. Hira Lal*, (A. W. Notes, 1888, p. 133) followed.—SHEO DAT *v.* SHEO SHANKER SINGH. **A. W. N. 1904 P. 160 =27. A. 53.**

Sup: Govt. acts (I of 1877) *(Contd.)*

38 s. 21—*Reference to arbitration out of Court during pendency of suit.*

An agreement to refer to arbitration matters in dispute between the parties is a bar to the hearing of the suit relating to those matters irrespective of the fact whether such reference had or had not been filed in Court. *W. N. All.*, 1888, p. 133 *followed.* 23 *Cal.*, 956 *dissented from.* SHEO SHANKAR SINGH *v.* SHEO DAT. **A. W. N. 1904. P. 9.**

39 S. 21—*Suit for damages for breach of contract—Agreement to refer to arbitration any dispute arising under the contract.*

A sued B for damages for breach of a contract. B contended that the suit was unsustainable, as there was a stipulation in the contract in question, to refer the dispute arising thereunder to arbitration, and that A ought not to have sued in the face of that stipulation. There was no evidence to show, either that B proposed to refer to arbitration before the suit was brought or that A refused to proceed to arbitration.

Held, that S. 2 of the Specific Relief Act can be relied on as bar to a suit on a contract, only in case of a refusal by the plaintiff to refer the dispute to artibration, and that, in this case, no such refusal on the part of the plaintiff having been proved, the defence was unsustionable. 5 C. 498 and C. L. R. 284 followed, RALLI *v.* WALAITI RAM, **80 P. R. 1906.**

40. S. 21.—*Reference to arbitration—Refusal necessary under S. 21 to bar the suit.*

In a case on the 16th of April 1900 the parties entered into a contract to refer the matter to arbitration. On the 17th, the arbitrators, after examining the parties, were to give judgment An award bearing that date was written but not signed. The plaintiff did not receive the award, but went to Court on the 18th of April (the date fixed in the case) and the hearing proceeded. The defendant raised the point of the agreement to arbitrate as a bar to the suit. But the Court of 1st instance ignored it and gave the plaintiff a decree. On appeal the case was remanded to the original Court to take evidence as to whether there was an agreement to arbitrate and whether plaintiff refused to perform it. The Court found for the defendant on these points and dismissed the plaintiff's suit under S. 2 Specific Relief Act.

Held that the award was made and the plaintiff's remedy was to sue to have it set aside. If the award had not been made the circumstances would have justified the plaintiff in refusing to go on with the reference.

Sup. Govt. acts (I of 1877) *(Contd.)*

Held also that the mere existence of a contract to refer to arbitration does not bar a suit without regard to refusal; Refusal is essential to bring a case within S. 21 Specific Relief Act. 5. C. 500, 8, A. 60, 11. B. 199, 17. C. 200, U. B. R. 1899. P. 15. referred to. MAUNG SHWE NYO *v.* MAUNG AUNG HMO, **U. B. R. 1901. P. 17 (Specific Relief).**

41 S. 21—*Reference to arbitration without Court's intervention after bringing suit.—Decree in accordance with award—Revocation of reference—C. P. C. S. 506, 522 and 523.*

Where after the institution of a suit the matter in dispute was referred by the parties to private arbitration, held that S. 21 Specific Relief Act did not bar the suit, as the agreement to arbitrate was not in existence when the suit was instituted. The Section refers to an agreement entered into between the parties before the institution of the suit.

Held, also that when on such a private reference a valid award has been made, a decree can and should be made in accordance with the award. RAZA ALI *v.* FIDA ALI. **4. O. C. 17.**

42 S. 21—*Reference to arbitration—Suit withdrawn with leave to file a fresh suit.*

A Court made an order of reference to arbitration but the award was not filed on the day fixed for its delivery, and the plaintiff withdrew his suit under S. 373 C. P. C. without notice to the other side, with leave to bring a fresh suit.

Held that the reference had been superseded in effect by the Court's order to the arbitrator to return the record and that the plaintiff could bring a fresh suit 9. A. 168, distinguished. KASHI BAI *v.* RAM KRISHNA. **1. A. L. J. 257.**

43 S 21. (a)—*Contract to lend money on mortgage—Suit for Specific performance—Suit for breach of contract.*

A's property was subject to a mortgage. It was agreed between A and B that A would mortgage the property to B for a certain sum, that B would retain some money to pay off the mortgage and would pay A the remaining consideration in cash. A mortgaged-deed of these terms was given to B. B did not pay off the mortgage or the remaining amount to A as agreed upon, A sued for the recovery of the amount agreed to be paid to him. *Held*, that the suit, viewed as one for specific performance of a contract to lend money, was opposed to S. 21 (a) Specific Relief Act and was not maintainable (L.R. 5 P.C. 316 referred to.) *Held*, also, that, viewed as a suit for compensation for breach of contract, the suit failed because there was no evidence of any damage to the plaintiff.

Held, further, that a mere recital in a deed that the consideration had been paid could not be construed as a contract in writing to pay the consideration-money. 24 M. 233: 25 M. 55; 25 M. 587; L.R. 1892. 1 Ch. 271; L.R. 1897, 1 Q.B. 692, *referred to.*

Sup. Govt. acts (I of 1877) *(Contd.)*

13 A. 200, *dissented from.* RAMANAND *v.* NARCHED **8 O.C. 5.**

44 S. 21 (a)—*See S. 12 & 21 (a)—10 O.C. 218 No. 28 supra.*

45 S. 21 (J)—*See Contract Act 2. (d) No. 7. 49. P.R 1905.*

S. 21 & 30—*Suit to recover money due on an award—Specific performance—Damages.*

In a suit for the recovery of a certain sum of money with interest due on an award and on the failure of the defendant to pay, for the recovery of the same from the defendant's property, it was contended that the plaintiff was not entitled to the relief sought, having regard to ss. 21, 30 of the Specific Relief Act (1 of 1877). *Held* disallowing the contention, that the suit was not for specific performance. It was a suit for the recovery of money and for relief incidental thereto — FARDUNJI EDALJI *v.* JAMSETJI EDALJI, **I. L. R, 28 B. 1; 5 B L. R 705.**

46 S. 22, 54, 56, 57—*Injunction—Civil Procedure Code, s. 493—Temporary injunction—Breach of negative covenant.*

Plaintiffs advanced money to the defendants for the purpose of carrying on work in certain mica mines, in pursuance of an agreement by which defendants undertook, in consideration of the advance, to send all the mica produced from the mines to plaintiffs and bound themselves not to send any of it to any firm other than plaintiffs, or keep any in stock. Plaintiffs now complained that defendants had, in breach of their agreement, arranged to consign and had already made consignments of mica to another firm and were keeping mica in stock. Plaintiffs filed this suit for specific performance and for an injunction restraining defendants from acting in violation of the terms of the agreement; a temporary injunction was subsequently applied for and obtained. Upon an appeal being preferred by defendants against the order granting the temporary injunction; *Held* that the injunction was rightly granted. The granting of such an injunction under s. 493 of the Code of Civil Procedure, is a matter of judicial discretion.—SUBBA NAIDU *v.* HAJI BADSHA SAHIB, **13 M. L J. 13=26. M. 168.**

47—S. 22—*Mistake of law or fact—Delay in seeking performance—Discretion.*

The delay of either party to a contract in not prosecuting his right to the interference of the Court by the institution of a suit may constitute such laches as will disentitle him to the aid of the court. Undue delay may amount to an abandonment of the contract by an aggrieved party. A party cannot call upon a Court of Equity for specific performance unless he has shown himself ready, desirous, prompt and eager. 5 ves 720 n appl 12 R. R. 285 & 3 ch D 351 refd to. The rule is specially applicable when the subject-matter of the contract is of a speculative or fluctuating value.

Where a provision of a contract is invalid, *e. g*, a power to sell to be exercised by a simple mortgagee without the intervention of

Sup: Govt. acts (I of 1877) *(Contd).*

the Court, due to a common mistake of law and not of fact: *held* that a Court of Equity will not, in general, relieve against a mistake in a contract which was a mistake of law; but there are cases in which the Court does not hold itself strictly bound by this rule, but relieves against a mistake of law if there be any equitable ground, which makes it, under the particular facts of the case, inequitable that a party benefited by the mistake should retain that benefit. NAWAB BEGAM *v.* A. H. CREET. **A. W. N. (1905), 147 = 2 A. L. J. 405. = 27. A. 678.**

48—S. 22. *Lease—Specific performance, suit for—Covenant for renewal of lease—Construction of document—Time, whether or not of the essence of the contract.*

The plaintiff sued for specific performance of a covenant for renewal contained in a lease, the material clause of which was as follows:—"After the expiration of the said term, if the lessee shall so desire, the executant shall have no objection whatever to renew the lease for a further term of twenty years on the terms and in consideration of payment of the rent mentioned in the lease." There was nothing in the lease to indicate that notice of intention to renew was to be given before its expiration. *Held* on a construction of the lease that time was not of the essence of the contract, and that the plaintiff had not forfeited his right to have the lease renewed by reason of having allowed some months to elapse after the expiration of the original term before he gave notice to the defendants of his intention to take advantage of the covenant for renewal.—JAGGI LAL *v.* SIR W. E. COOPER, **A.W.N. 1905. P. 154 = 27. A. 696.**

49 S. 22—*Claim for specific performance—Effect of laches.*

Only such persons are entitled to specific performance who show themselves "ready, desirous, prompt and eager." If time is not the essence of the contract, delay or laches could not operate to the prejudice of the plaintiff unless the other party called upon him to perform his part of the contract. MOHENDRA NATH *v.* KALI PROSAD. **7. C.W.N. 229 = 30. C. 265.**

50. S. 22—*Agreement among certain persons not to bid at Court auction sale against each other not unlawful and specifically enforceable.*

A and B contracted together not to bid against each other at a Court sale and after the bid by B and purchase by him he would convey two-thirds of the property to A. A sued for the specific performance of this contract. *Held* that there being no suggestion in this case that the property was sold for an inadequate price or that the sale was tainted by fraud the agreement was not unlawful under S. 23 Contract Act and was therefore enforceable in a Court of Equity. Even if it were otherwise, the plaintiff would be entitled to relief on the ground that the defendant was a trustee on his behalf in making the purchase at the auction sale. 16 C. 194, 13 C. L. R. 1, 18. B. 342, 23. M. 227, and 19. M. 315 referred to. GOBINDA CHANDRA JHA *v* SHIAM LAL JHA,—**1 C. L. J. 85.**

Sup: Govt. acts (I of 1877) *(Contd.)*

51. S. 22—*(1) and 23 (b)—Where personal quality of a party a material ingredient.*

Where the lease provided that the lessee would redeem the property from the mortgagee and upon revovery of possession would pay rent at the stipulated rate—

Held, upon construction of the deed, that it was not operative in affecting a present transfer of the property but was only a contract to be performed in future.

Held, also, that as personal quality of the party with whom the contract was made, was a material ingredient in the contract, his representative after his death was not entitled to enforce specific performance of the contract. MOHANDRA NATH *v.* KALI PROSAD. **7 C. W. N. 229 = 30. C. 265.**

52. S. 22. 2—*Specific performance—Discretion of Court—Purchase at Court-sale—Purchase suject to subsisting equities—Right, title and interest of judgment-debtor.*

The plaintiff sued for specific performance of an agreement whereby the father of the first defendant and the husband of the second defendant agreed to sell to the plaintiff 500 square yards of land forming part of a property consisting of a *chawt* and vacant land. The agreement was dated the 29th of June 1901, and the suit was filed on the 30th November, 1903. The third defendant purchased the entire property at a Court-sale in execution of a money-decree obtained by the creditors of the original vendor against his state. He had notice of the plaintiff's claim.

Held that, even if a purchaser at a Court-sale purchases without notice, he can only buy what the Court could sell, *i. e.*, the right, title and interest of the judgment-debtor, as they existed at the date of the sale and as they could have been honestly disposed of by the judgment-debtor himself. *Sobhagchand* v. *Bhaichand* (I. L. R., 6 Bom. 193), followed.

Held, further that the purchase by the third defendant was subject to the equity in favour of the plaintiff to compel specific performance, unless that had been lost by the plaintiff. The third defendant did not plead delay as a defence or raise a specific issue on the point.

Held that the purpose of a general issue is certainly not that lease should be allowed under it which are not clearly included in the other issues, but only to determine the kind of relief to which a plaintiff is entitled as the result of the findings on the issues preceding it. When, however, a decree for specific performance is sought, it is the duty of the Court to see, whether having regard to the judical discretion vested in it under S. 22 of the Specific Relief Act (I of 1877) it ought to be granted. The proper issue to be raised in such a case is—"Whether the plaintiff's

Sup: Govt. acts (I of 1877) *(Contd.)*

delay has been such as to show that he had lost his right by waiver, abandonment or acquiescence?" Laches to bar the plaintiff's right must amount to waiver, abandonment, or acquiescence and to raise the presumption of any of these, the evidence of conduct must be plain and unambiguous.—PEER MAHOMED *v.* MAHOMED EBRAHIM, **6. B. L. R 1013=29. B. 234.**

53. S 22 *(2)—Custom—Alienation—Sale—Acquiescence—Necessity—Burden of proof.*

The plaintiffs as reversioners sued in 1891 for possession of ancestral lands after the deaths of the last male-holders, who were three sonless brothers. The owners, by means of sales effected in 1863 and 1864, had transferred their whole landed estate to the ancestor of the defendants. The Original Court found that the sales were for consideration and necessity, and that the plaintiffs and their elders had unreservedly accepted the fact of the sales not to be questioned and dismissed the suit.

Held, that the defendants had sufficiently proved acquiescence by (1) the very long time during which plaintiffs gave out not the smallest intimation, that they intended to object to the sales; (2) the plaintiffs' total silence on the subject in 1867 when a partition was proceeding, and (3) plaintiffs' taking some land in suit as tenants from the vendee without warning him of their own prospective claims.

Held, further, that as regards 'necessity' the sales took place so many years ago and there was so complete an absence of all intimation that vendee would some day have to defend his position, that nothing more should be required of defendants in the way of proof than the deeds and his own solemn affirmation on the point. RODA *v.* HARNAM SINGH **102. P. R. 1902=19 P.L.R., 1903.**

54 S. 22. *(2).—Specific performance of a contract—Sale—Ejectment.*

A defendant who is not in a position to maintain a suit for specific performance of a contract of sale cannot, in a suit for ejectment brought against him, set up such contract as a plea in bar. 16. A. 344, 21 M. 291, 13. C. P. L. R. 163 referred to. JEYRAM *v.* GANPATI. **17 C.P.L.R 1904 P. 19.**

55 S. 23 *(b)—Sale—Mortgage—Contract to resell.*

Where land is sold with an agreement to repurchase the same within a certain number of years. Held that such agreement does not operate to constitute a mortgage of such land.

Although such agreement may not contain an express reservation of the right of repurchase to the vendor's heirs, yet in the case of the vendor's death his representatives in interest can claim specific performance of the contract to resell under S. 23 (b) Specific Relief Act. 10. C. 30 distinguished. VERAPPA UDIAN *v.* MAZAN. **L. B.R. 1900-02. P. 257.**

Sup: Govt. acts (I of 1877) *(Contd.)*

55 (a) S. 23 (b)—*See 30 C. 265 Supra No 1.*

56 S 23, *(c)—Suit by plaintiff beneficially entitled under a compromise to which he was no party to enforce the terms of the compromise.*

Under section 23 (*c*) of the Specific Relief Act a member of a family who is beneficially interested under a compromise of doubtful rights can bring a suit to enforce its terms, although he was not a party to the compromise. PROTAP NARAIN MUKERJEE *v.* SARAT KUMARI DEBI. **5 W.N., C., p. 386.**

57 S. 23. *(c)—Partition deed advantageous to minor members of family—His right to sue on deed.*

A partition executed by the adult members of a joint Hindu family, provided that a certain minor member of the family, represented in the execution of the deed by his father, should receive a certain share in a particular village "by right of primogeniture," that he had been put into possession of the share allotted to him, and that the other members of the family would be responsible for the payment of the mortgage debts charged on those villages and would indemnify the minor if proceedings were taken against such property for satisfaction of the mortgage debts.

The minor (after attaining majority) sued to compell reimbursement by the other members of the family. Held that the partition deed was enforceable in favour of the plaintiff, just as much as, if just and equitable, it would have been binding upon him, and that the plaintiff was entitled to sue for any benefit which the deed purported to secure to him.

Held, also, on a construction of the partition deed that the plaintiff was also entitled to sue under section 23 (c) of the Specific Relief Act, 1877. 30 I.A. 220 referred to. AWADH SARUJ PRASAD SINGH *v.* SITARAM SINGH, **A.W.N. (1906), 261 =3 A. L. J. 785=29 A. 37.**

58. S. 24, cl. (b) *Suit by mortgagee to recover mortgage money not a suit for specific performance—Undue influence—Void or voidable contract—Damages.*

A mortgagee sued to recover his mortgage money, according to the terms of his mortgage bond. It was found that he had not paid a portion of the mortgage-money to a prior mortagee as agreed in the bond. The defendants, mortgagors, contended that the suit was one for specific performance under S. 24 cl. (*b*) of the Specific Relief Act, that, as the plaintiff mortgagee had failed to perform his part of the contract by not paying off the prior mortgage, the defendants were not bound to perform their part of the contract, that the plaintiff was entitled to recover only the balance of the principal amount found to be acually due and such interest as the Court might consider fair, and that the provision as to compound interest was

Sup: Govt. acts (I of 1877) (*Contd.*)

unenforceable as it was obtained by undue influence.

Held, that this was only a suit for recovery of money, based on a mortgage bond, and could not be regarded as one for specific performance under S. 24 (b) of the Specific Relief Act.

Held, *further*, that there was no evidence of undue influence and the deed was not shown to be either void or voidable. The provision to pay compound interest according to terms of the deed must be enforced.

Held, *also* that the defendants could, in a separate suit; sue the plaintiff mortgagee for recovery of such damages as may have accrued to them owing to the mortgagee not having paid off the prior mortgage. 8 O. C. 5. and 18 M. 226 referred to. RANI RAGHUBANS KUAR *v.* RAUNAK ALI,—**10 C. 69.**

59. S. 29.—*Specific performance of sale—Conveyance by vendor to third parties after agreement of sale with plaintiff—Parties.*

The plaintiffs sued defendants Nos. 3 to 7 for specific performance of an agreement of sale of the property in dispute, and obtained a decree against them for the enforcement of the said contract. The defendants had, previous to the suit, transferred the property in dispute to third parties after obtaining the decree the plaintiff was resisted by the transferees from taking possession of the property.

Held, that the plaintiffs' subsequent suit against the transferees was not barred under Sections 13 and 43 of C. C. P. The causes of action are different.

The plaintiff was not bound to have included in the previous suit his claim for recovery of possession as against the principal defendants. According to Section 27 of the Specific Relief Act, it was sufficient that the specific performance of the contract was enforced against the defendants Nos. 3 to 7 only. "The word "may" in this section does not mean "must." ABDUL MAJID *v.* BOIDA NATH DHUR. **6. C. W. N. 314.**

60. S. 27—*Joint* Mitakshara *family, suit against father—Breach of trust—Legal necessity.*

In a suit brought against the father of a joint *Mitakshara* family, having sons, for the specific performance of a contract to sell land, the Court would not ordinarily decree specific performance of the contract with full knowledge that the vendor's powers of alienation are limited and can be exercised, only when there exists a legal necessity sufficient to justify the transfer, in the absence of which the sons might at any moment interdict the sale.

In such a case, the Court would ordinarily require the plaintiff to give some proof of the necessity for the sale. 5 M. 337, 4 M. L. J. 9 and (1805) 2 Sch. and Lef. 553. F. BAIKUNTHA BARIK *v* SHIB DASS,—**2 C. L. J. 321.**

Sup: Govt. acts (I of 1877) (*Contd.*)

61. S. 27—*Hindu Law—Joint Hindu family—Powers of manager—Father's powers—Son's liability—Alienation—Creditor's duty—Necessity*—Onus.

The primary and general rule is that no member of a co-parcenary can alienate or encumber more than his own share unless (*a*) justifying necessity, material or spiritual, be shown, or (*b*) unless all the co-parceners to be affected give express or implied consent.

If however family necessity exist, the ordinary manager has power to do what is best, and when so acting, his power cannot be defeated by any individual member withholding his consent.

A father as head of the family might have greater powers, but could not have less.

There is no presumption in favour of the manager that moneys borrowed by him are for family purposes, and the father is not in a more favourable position as regards the condition as to the existence of justifying necessity. In both cases the following principles apply when consent is not given:—

(a) The power must be exercised only in case of need.

(b) The matters to be considered are: (i) the existence of pressure, (ii) the means of averting it, (iii) the benefit to be conferred.

(c) If the lender or purchaser be a party to mismanagement, he cannot take advantage of his own wrong.

(d) The lender or purchaser, however, unless he acts *mala fide*, is not affected though better management might have preserved the estate from debt.

(*e*) The lender or purchaser is bound to enquire, but

(f) If he does enquire and acts honestly, the real existence of necessity is not a condition precedent to the validity of the transaction, provided the necessity alleged is sufficient and reasonably credited.

(g) The lender or purchaser is not bound to see to the application of the money advanced.

The question on whom does the *onus* lie is one not capable of a general and inflexible answer.

But though the father cannot alienate without either justifying necessity or consent yet the alienation will not be set aside, if the alienee had reasonable ground for supposing that justifying family necessity existed.

The circumstance which renders an alienation by a father of his son's interest unimpeachable save on the ground of immorality, is not the form or mode of the transfer, but the existence of a morally unimpeachable debt contracted by the father and antecedent to that trausfer. And if such antecedent debt existed and the alienation purported to extend the son's interest, then it was immaterial what was the particular mode by which the alienation was effected, whether by sale in execution of a money or mortgage decree or by private conveyance, for the antecedent debt being a family obli-

Sup: Govt. acts (I of 1877) *(Contd.)*

gation the alienation on account of it could only be disputed on the ground of the immorality of the antecedent debt. It could not be disputed on the ground either that the debt was not incurred for the benefit of the family, or on the ground that the alienation had been made in a particular way either in *invitum* on a money decree or a mortgage decree, or by private conveyance, or on the ground that the son had not been a consenting party to the transaction by which his interest was alleged to have passed. NATHAJI DURGAJI *v.* SITA RAM NARAYEN, **4 B.L.R. 587.**

62. S. 27—*Hindu Law—Minor—Contract by father to sell ancestral property—Specific performance of such contract—Circumstances justifying sale—Debts of father—Burden of proof of justifying circumstances.*

By a written agreement dated 9th March 1900, the first and second defendants (a son and his mother) contracted to sell to the plaintiff certain land which was ancestral property. The plaintiff stated that he subsequently discovered that the first defendant had a minor son, whom he made a defendant in the suit (defendant 3), and he used all three defendants for specific peformance of the agreement, contending that the minor's interest was bound, inasmuch as the property was sold in order to pay family debts. *Held* that no decree could be made against the minor defendant (defendant 3). No doubt, in order to satisfy such of his debts as would be binding on his heirs, a Hindu father can sell the entirety of the family property so as to pass even his son's interest therein, but in this case there was no evidence of debts that justified the sale. It lies on him who seeks to bind the infant to prove justifying circumstances, and this the plaintiff had failed to do. JAMSETJI N. TATA *v* KASHINATH,—**26 B 326 3 B L R 898.**

63. S. 27.—*See S. 18—32. C. 832. No 33 supra.*

64. S. 27.—*Mortgage with right of pre-emption in favour of mortgage—Assignment of equity of redemption—Assignee's suit to redeem—Mortgagee's plea of pre-emption after over 20 years—*

A mortgaged certain landwith possession to B with a stipulation that B will have a right of pre-emption whenever A would wish to sell the land. A sold his equity of redemption to C in 1873. C's interest was in 1893 sold in execution of a decree against him and bought by D. In 1897 D sued B's representative for redemption, who set up the pre-emption condition of the mortgage in bar of the suit, contending that under that condition the assignment to C and the subsequent purchase of his interest by D were invalid.

Held that D was entitled to redeem. B's right could be no other than a right to specific performance under S. 27 Specific Relief Act against a transferee who had taken with notice o the covenant. D had no such notice and the time for the performance of the pre-emption contract had long passed without any thing being done and the natural inference was that the right had been waived or otherwise discharged. Assuming that the contract was valid and there was notice of it, defendant could not be allowed to use it as an answer to plaintiff's suit in as much as no suit could now be brought to enforce the contract. The cause of action arose in 1873 and the right to enforce the pre-emption was now barred. 20. M. 305 and 18 M. 454 referred to. RAMA SAMI PATTER *v.* CHINNAN ASARI, **24. M. 449.**

65. S. 27.—*Specific performance—Sale. Contract of—Powers of managing members.*

The plaint alleged that the first defendant, as managing member of the undivided family consisting of the three defendants, entered into a contract to convey the lands mentioned in the plaint, but there was no allegation that the second and third defendants were paties to the contract, or that they had authorized or ratified the same.

Held, that the plaint disclosed no cause of action against the second and third defendants for specific performance of the first defendant's contract and the suit against them should have been dismissed on the first hearing. The plaintiff was found entitled to decree against the first defendant without determining whether the sale by him would bind the interests of the second and third defendants in the property agreed to be sold. (KOSURI) RAMARAJU *v.* (IALURY) RAMALINGAM. **12 M. L. J., 1902. p. 400.=26 M. 74.**

66. S 27. *Vendor and Purchaser—Agreement to sell to A—Subsequent sale of same land to B under registered conveyance—Notice of prior agreement—Priority—Trust Act (II of 1882), s. 91.*

On 25th June 1895, the first defendant entered into an agreement to sell certain land to the plaintiff, and six months later (19th December 1895), he sold the same land to the second defendant and conveyed it to him by a registered deed. In 1896, the plaintiff sued the first defendant for specific performance of his agreement and on the 8th March 1897, obtained a decree, in execution of which a conveyance of the land was executed to him by the Court under s. 261 of the Civil Procedure Code (XIV of 1882). The plaintiff then attempted to take possession, but was resisted by the second defendant. He thereupon filed this suit. It was found that the second defendant bought in December 1895, with notice of the earlier agreement with the plaintiff of June 1895.

Held that the plaintiff was entitled to possession. The second defendant having bought with notice of the plaintiff's contract, he held the property for the benefit of the plaintiff to the extent necessary to give effect to that contract.

Held, also that the form of the decree

Sup: Govt. acts (I of 1877) *(Contd).*

should be as follows :—There should be a declaration that the second defendant holds the property for the benefit of the plaintiff to the extent necessary to give effect to the contract of the 25th June 1895; there should be a decree that the second defendant do execute to the plaintiff a proper conveyance of the *thikan*; and a decree for possession. GAFFUR *v.* BHIKAJI **I. L. R., 26 B. 159.**

67. S. 27.—*Specific performance—Penalty—Damages.*

Where the contract is that a certain act shall be done and a sum is annexed therewith by way of penalty or damage to secure its performance, specific performance thereof may be decreed, but where the contract leaves it to the option of the undertaker to do a certain act or to pay a certain sum as damages such contract is satisfied by the payment of the sum and the contractor can not be compelled for specific performance. RAM DHAN *v.* MOHAN LAL. **A. L. J. 688.** (*See Contract Act S.* 74. *No 305*).

68. S. 27. (b)—*Specific performance.*

A claim for specific performance of a contract for sale of land may be enforced not only against the vendor but, under certain circumstances mentioned in S. 27 (b), against a subsequent purchaser also. The Court can make the subsequent purchaser a party to the suit under S. 32, C. P. C. MAUNG TUN WA *v.* MAUNG THA KADO. **1. L. B. R., 1900 02. P. 252.**

69 S. 27 (b)—*Registered deed of sale—Prior verbal sale to another person—Notice—S. 48, Registration Act.*

A sold his land to B verbally and afterwards he sold it to C by registered deed, and the subsequent purchaser had actual notice of the prior sale, *held* that the equitable doctrines of notice applied, notwithstanding the provisions of S. 48, Registration Act (4 B 126, 10 C 250, 10 C 710 refd to).

The prior purchaser is entitled, under S. 27 *(b)* Specific Relief Act, to a decree for specific performance of the sale to him, as against both his vendor and the subsequent purchaser, who had notice of the prior sale. TUN ZAN *v.* MAUNG NYUN. **4 L. B. R. 26.**

70 S. 30—*Award—On an arbitration held without Court's intervention.*

When an award has been made in arbitration proceedings, held without the intervention of a Court of justice during the pendency of a suit or appeal a party can bring a regular suit to enforce it under S. 30 Specific Relief Act, even though the existence of the award was not brought to the notice of the Court before the suit or appeal was decided. 24. W. R. 41, 4, Mad. H. C. R. 119, 15. M. 99, 19. M. 290, 20. M. 490 referred to. U. WATHAWA *v.* NGA PO. **U. B. R. 1906 P. 3. (Specific Relief).**

71 S. 31—*Mistake—Rectification of deed for Discretion.*

Sup: Govt acts (I of 1877) *(Contd)*

The jurisdiction to rectify an instrument is discretionary and equitable.

In the exercise of sound discretion the court will only act on parol evidence when satisfied that there is no existing writing which contains the original instructions or contract.

In order to procure the rectification of a contract the proof must be clear, irrefragable and the strongest possible. As the point to be proved is that the concurrent intention of all the parties to the contract was different from that expressed by the written contract the Court will attentively regard the admission or denial of the defendant as one of the parties.

In matters of mistake, the court undoubtedly has jurisdiction, and though this jurisdiction is to be exercised with great caution and care, still it is to be exercised in all cases where a deed, as executed, is not according to the real agreement between the parties. In all cases the real agreement must be established by evidence whether parol or written; if there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly: if ambiguous, parol evidence may be used to express it, in the same manner as in other cases where parol evidence is admitted to explain ambiguities in a written instrument.

In the case of "a previous agreement in writing which is unambiguous" the Court cannot admit parol evidence to rectify the final instrument executed in accordance with such agreement any more than it could allow the party to maintain a suit, while the agreement was yet executory, first to rectify the agreement by parol evidence and then execute it as rectified. For this would be to "reform (the instrument), by that evidence, which if (the instrument) rested *in fieri* would be inadmissible to aid in carrying it into execution."

If there be no previous agreement in writing, the modern rule is that a deed may be rectified on oral evidence of what was the real intention of the parties at the time, if clear and uncontradicted.

But if the alleged mistake is positively denied by any party to the instrument, parol evidence alone is inadmissible to prove it.

When the plaintiff sued for rectification of a policy of fire insurance obtained through an agent after the goods were destroyed by fire.

Held, that if the plaintiff gave the agent an ambiguous order, which the agent construed in a way in which it was open to him so to do the plaintiff was disentitled to relief against the defendant.

Held, further, that parol evidence as to what happened before the covering note was signed was inadmissible for the covering note was the original instructions or contract so far as the defendant company was concerned. JIWRAJ SINGHJI *v.* THE NORWICH ASSURANCE Co, **5. B. L. R. 853.**

72. S. 31—*Whether a document may be rectified in respect of terms intentionally omitted by parties from insertion.*

Sup: Govt. acts (I of 1877) *(Contd.)*

The parties to a contract deliberately omitted certain terms of it, from the deed under the mistake that those terms could be enforced. Held that subsequent resiling by one of the parties does not entitle the other to rectification of the deed. S. 31, of the Act, S. 92, Indian Evidence Act, and the presumption that every one is supposed to be acquainted with the law support this view and bar the rectification. There can be no rectification, if by the intention of the parties the written instrument did not comprise all the terms of the actual agreement, since that party, who delibaratcly and gratuitously ran the risk involved in trusting to the other's honour must continue to abide by such previous determination. The Court cannot interfere for the rectification of such an instrument by the introduction, into it, of the intentionally omitted terms because what is done purposely is evidently not done by mistake. LATCHMAN RAO *v.* GANPAT RAO, **2 N.L.R. 49.**

73. S. 31—*Rectification of sale-deed upon which plaintiff's title rests—Respondent's objections against a non-appellant.*

A respondant can not file objections against a party who is not an appellant in the case and whose interest is entirely distinct from those of the appellants.

The plaintiff sued for possession of certain plots upon a sale-deed. Those plots did not appear in the deed, but it was said that, by mistake, other numbers were inserted. Another sale-deed was subsequently executed by the defendant in favour of the plaintiff to rectify the mistake in the first deed, but the numbers in suit did not appear in the second deed.

Held, that the deed, upon which the plaintiff's claim rested, not having been rectified in accordance with the provisions of S. 31 of the Specific Relief Act, the plaintiff's suit was not maintainable 23 A 93, 30 C. 655 followed. SAJJAD HUSAIN *v* BAKAR ALI, **11 O. C. 93.**

74. S. 31.—*Relief for mistake—Mutual mistake—Rectification.*

For a right to claim rectification of a document it is necessary to show that there has been either fraud or mutual mistake.

Under the terms of S. 31 of the Act, it is necessary that the Court should find it clearly proved that there was a matual mistake.

A person, who seeks to rectify a deed upon the ground of mistake, must establish, clearly and satisfactorily that the alleged intention, to which the deed is desired to conform, continued concurrently in the minds of all parties down to the time of its execution, and also must show exactly and precisely the form to which the deed ought to be brought. There is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case one can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement. MADHAVJI

Sup: Govt. acts (I of 1877) *(Contd.)*

BHANJI *v.* RAMNATH DADOBA. **8. B. L. R. 354=30 B. 457.**

75 S. 31—*One sided mistake—Rectification, proper remedy.*

A sued B for the rectification of a mortgage-bond, on the ground that the share mortgaged has been wrongly described.

Held the suit could not be maintained as the mistake was only unilateral and not mutual. A mistake on one side may be a ground of defence or a ground for rescinding, but not for correcting or rectifying an instrument. To rectify a contract, where the mistake was unilateral and not mutual is, in effect, to make for one party a new contract different from what he intended. Where the mistake is only unilateral, a suit for specific performance would be the proper remedy. (WELLS, A. J. C. doubting). THAKUR JAWAHIR SINGH *v.* ARJUN SINGH. **8 O. C. 1.**

76 s. 38, 41—*Court may order return of money*

Under S. 38 & 41 the court may order return of money in cases where it decrees rescission of a contract or cancellation of a document. But where one gave money to a minor knowing him to be so. Their Lordships refused to make an order for the return of money. It is not equitable to compel a person to pay moneys in a transaction which is void as against that person A. C. 1903. P. 6 P. C. followed. MOHONI BIBEE *v.* DHARMO DAS GHOSE. **5 B. L. R. 421=30 I. A. 114=7. C. W. N. 441 -30 C. 539.** *(See also 5. B. L. R. 916 under S. 41).*

77 S. 38 & 41—*Refund of money where property sold is minor's and the vendee knows it.*

Where a person enters into a transaction with a minor knowing fully that he is a minor, the Court of equity will not compel the minor to return to him the money advanced by him so as to put the parties in the place in which they were before the contract, for the transaction is wholly void against the minor. 7. C. W. N. 441, 30. C. 539 P. C. L. R. I. Ch. 1902 P. 1 followed. INDAR SINGH *v.* NARINDAR SINGH. **33 P. R. 1904.**

78 S. 39—*Limitation—To suits brought under S. 39 Act 91 of Limitation Act (1877) applies—See L. Act Art. 91—5 B.L.R. 533= 27 B 56.*

79 Do.—*See Limitation Art 91—15 M.L.J. 228—See also No. 88 infra.*

80 S. 39—*Pending suit—Another suit barred on the defence in the first suit—Cancellation of instrument.*

On the 16th March, 1899, the firm of Chhaganlal Haribhai brought Suit No. 96 of 1899 against Dhondu and Baba to recover a sum due on a bond passed by them to the firm. The defence pleaded that the bond was void, being passed for the balance due on wagering transactions. While this suit was pending, on the 13th June, 1899, Dhondu (one of the defendants in the suit) brought Suit No. 167 of 1899, to have the above-

mentioned bond cancelled and delivered up to him, under s. 39 of the Specific Relief Act. The Subordinate Judge decided both the suits together; he dismissed the first suit and allowed plaintiff's claim in the second. *Held* that the form of specific relief provided for by s. 39 of the Specific Relief Act was founded upon the administration of protective justice for fear (*quia timet*); and that there could be no fear, in the second suit, that the plaintiff would suffer serious injury if he did not bring the suit, for the plea, which was the foundation of the second suit, was raised by him in the defence to the previous suit.—CHHAGAN LAL *v.* DHONDU, **5. B. L. R. 575 = 27. B. 607.**

81 S. 39—*Award made otherwise than on a reference under C.P.C.—Suit to set aside such an award.*

Held, that a suit to set aside an award made otherwise than on a reference under Chap. XXXVII of the Code is entertainable by a Civil Court in Lower Burma under S. 39 of the Specific Relief Act. LU THA *v.* MA SHWE ME, **3. L.B.R. 4.**

Reference.—(1898) P.J.L.B. 480, overruled.

82 S. 39—*Court Fees—6 B.L.R. 1125 = 29 B 207 See Court Fees Act (1870) No. 12. Col 101 Ante.*

83 s. 39—*Right of reversioner's to the cancellation of a deed.*

By a deed of gift executed by a Hindu female heiress a cloud is thrown on the rights of reversioners and they have a cause of action under S. 39, Specific Relief Act, to have the deed declared null and void as against them.—BALBHADRA *v.* MUSSTT BHAWANI. **11 C.W. N. 957 = 6C. L.J. 233, = 34 C. 853.**

84. s. 39.—*Concellation of an executed conveyance—Suit for non-payment of consideration—Misrepresentation—Fraud.*

To entitle a party to the rescission of a conveyance after its completion, he must make out a case of misrepresentation and fraud, or he must prove an error *in substantialibus* sufficient to annul the whole contract.

Where a party has a right to possession the Court will not treat him as a wrongdoer. All that the Court can do is to compel him to pay the money which is due if he wishes to retain his possession. BASLINGAPAPA *bin* BASAPA *v.* VIRUPAXAPA RUDRAPA. **5. B. L. R. 392.**

85. s. 39.—*Fraudulent Assignment—Suit by creditor to set aside—Suit by creditor on his own behalf and also on behalf of all creditors—Civil Procedure Code (XIV of 1882), S. 30—Misjoinder—Notice of assignment—Mahomedan Law—Mushaa—Assignment of undivided share.*

The plaintiff A obtained a decree against C in July 1898 and in execution attached a one-third share of the interest of C accruing upon certain moneys in the hands of the Accountant General of Bombay. The said one-third share was thereupon claimed by B. the wife of C who alleged that it had been assigned to her by her husband by a deed of assignment executed by him on the 15th October 1886. A now sued to have that assignment set aside; contending that it was a sham and colourable transaction; that the share had remained the property of C and was liable to attachment as such.

Held A's suit for himself and on behalf of other creditors was maintainable, even though other creditors were not parties thereto and no sanction under S. 30 C. P. C. had been obtained, because all of them had one cause of action against the deed. EBRAHIMBHAI RAHIMBHAI *v.* FULBAI AND KARMALLI, **B. 577 4. B. L. R. 180 = 26.**

86—s. 39. *Suit to set aside an award—Exercise of Court's discretion.*

Held, that in a suit under section 39 Specific Relief Act 1877, to cancel an award three points must be made good by the plaintiffs: 1st, that the award is void or voidable, 2ndly, that they have reasonable apprehension that such instrument if left outstanding may cause them serious injury; and thirdly, that the Court ought under the circumstances of the case in the exercise of its discretion to adjudge the award void or voidable and order it to be delivered up and cancelled.

Held, on evidence that the award was not void for any coercion having been exercised by the defendants on the plaintiffs to make the reference to arbitration. Without deciding other objections to the validity of the award the Court decline to pass a decree cancelling it as the plaintiffs failed to show that they had any reasonable apprehension that the award if left outstanding would cause them serious injury and the conduct of the plaintiffs had not been such as to call for an exercise of the Court's discretion under section 39, Specific Relief Act, in their favor.

When the exercise of the Court's discretion under Chapter V of Specific Relief Act, (I of 1877) is invoked it is obviously material to see whether the plaintiffs have acted with promptness, whether any delay on their part has altered the position of the defendants, as well as to consider what is the nature of their claim 15 East, 209, distinguished. VULLEY MAHOMED *v.* DATTUBHOY. **25. B. 10.**

87. s. 39.—*See S. 9 and 39 26. A. 236. No 25 supra.*

88. s. 39.—*As to Limitation See Articles 91 and 144 Limitation Act 74 P. R. 1904 = 2 P. L. R. 1905 See also Nos. 78 and 79 supra*

89. s. 39.—*Civil Procedure, 15, 244.*

A suit by a party to execution proceedings to have a Court sale set aside on the ground of fraud will lie when the decree has ceased to be capable of execution, and it is no longer open to the plaintiff to apply under section 244 to the Court executing the decree—where a Subdivisional Court having jurisdiction under section 10, Upper Burma Civil Courts Regulation, entertains,

Sup: Govt. acts (I of 1877) *(Contd.)*

in contravention of section 15, Civil Procedure Code, a suit which should have been instituted in a Township Court, this is a mere irregularity which does not vitiate the proceedings—Limitation, II, 12, 91, 95 178—Specific Relief—39 22. B. 267, 10. C. 538, 19. C. 683, 25. C. 718, 20. M. 349, 16. W. R. Civil, 269 referred to. NGA SA GYI *v.* NGA YE BAN AND NGA TUN MAUNG. **U. B. R. 1905. P. 1.** *(C. P. C. page 36).*

90. s. 39, 42—*Construction of lease–Grant "as a zamindari village"—Form of suit—Jurisdiction of Civil and Revenue Courts—Oudh Rent Act—Limitation Act, sch. II, art. 91, 120—*

A lease granting land to the defendant "as a zamindari village" was held not to make him a mere tenant subject to ejectment, but to create a perpetual under-proprietary right in the subject of the lease. The relief sought by the plaint in a suit in the Civil Court was possession of the village with mesne profits, and, alternatively, a declaration that the defendant had no right under the lease beyond that of a mere lessee, and was liable to ejectment; and also other relief.

Held, that (the Civil Court having, with regard to the provisions of the Oudh Rent Act, 1886, no jurisdiction to decree possession of the village or to make such a declaration as prayed in the plaint) the suit was one under S. 39 or S. 42 of the Specific Relief Act to which art. 91 or art. 120 of sch. II of the Limitation Act would apply; the cancellation of the lease or a declaration of its invalidity being the substantial relief sought and the only relief which the Civil Court had jurisdiction to give.—RAMPAL SINGH *v.* BALBHADDAR SINGH **6. C. W. N. 849 = 29. I. A. 203 = 25. A. 1. (P. C.)**

91. s. 39 and 42.—*Declaration—Hindu widow—Will—Relief.*

A sued B, a Hindu widow, for a declaration that the will of her deceased husband executed in her favour was invalid as against him. B pleaded possession under the will, and not as an heir as a Hindu widow. The will gave B full proprietary rights, besides a restricted power to adopt.

Held, that the case did not fall within the meaning of section 42 of the Specific Relief Act but that the prayer of the plaint came under section 39 of the Act which empowers the Court at its discretion and without application by plaintiff, to order the impugned instrument to be delivered up to be cancelled.—JADU NATH SINGH *v.* BHAGWANT KUAR, **1 O. C., Sup, 4.**

92 s. 39, and 42—*Cancellation of lease—Rights of mortgagee in possession—Secondary Evidence.*

A mortgaged by conditional sale certain property to B., and afterwards executed a perpetual lease and an agreement supplementing the lease of a portion thereof in favour of C. B. sued A. and C for cancellation of the lease and the agreement and

Sup. Govt. acts (I of 1877) *(Contd.)*

declaration that they were inoperative and void against him. A. admitted the mortgage and its conditions but contended that he had authority to execute the lease and the agreement. C also admitted the fact of B.'s mortgage but alleged that he was not aware of its conditions and that A. had authority to execute the lease and the agreement. B. did not produce the original mortgage-deed, but a certified copy of it.

Held, that, there was no admissible evidence on record in proof of the contents of the mortgage;

Held, also, that having failed to prove the conditions of the mortgage, which according to the plaint entitle him to a decree for cancellation under S. 39, Act I of 1877, B. was not entitled to a mere declaratory decree under S 42 of that Act, based solely on his admitted *status* as mortgagee *irrespective* of the conditions and terms of the mortgage.—NAWAB SYED ASGHAR HUSAIN *v.* DURGA, **1, O. C., 18.**

93 s. 39 and 42—*Court Fees Act (VII of 1870), sch. II, art 17—Specific Relief Act (I of 1877), s. 39—Declaratory Suit.*

Held, that plaints in suits (which are in their nature simple declaratory) under s. 39 of the Specific Relief Act are chargeable with Court Fees under sch. II art. 17 (iii) of the Court Fees Act and not *advalorem* under s. 7 (iv) of the same Act. DURGA BUX *v.* MIRZA MOHAMMAD ALI BEG. **1 O. C., 123.**

94 s. 41—*Contract with minor void—Refund of money.*

The decision in *Mohori Bibee* v. *Dharmodas Ghose*, (I. L. R., 30 Cal. 539), is to the effect that a contract by a minor, such as a mortgage, is void and that a money lender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money on a decree being made declaring the mortgage invalid. That decision, however, is also an authority for the proposition that the circumstances of a particular case may be such that having regard to s. 41 of the Specific Relief Act (I of 1877), the Court may, on adjudging the cancellation of an instrument, require the party to whom such relief is granted to make any compensation to the other which justice may require. DATTARAM *v.* VINAYAK. **5 B. R., 916 = 23 B 131.**

94 (a) s. 41—*Contract Act (IX of 1872), ss. 10, 11, 64, 65—Minor, contract by.*

Ss. 64, 65 of the Contract Act deal only with contracts entered into by parties competent to contract and do not apply to cases where there is not and could not have been any contract at all. *Mohori Bibee* v. *Dharmodas Ghosh*, (I. L. R., 30 Cal. 539) followed. A mortgage entered into by a minor is void *ab initio*. KAMTA PRASAD *v.* SHEO GOPAL LALL. **A. W. N., 1904, p. 41 = 26 A 342.**

95 s. 41 *See S. 38 and 41 30. C. 5?? No 76 Supra and 33 P. R. 1904 No. 77 supra.*

Sup: Govt. acts (I of 1877) *(Contd.)*

96. s. 42—*Trust—Civil Procedure Code, s. 539—Suit for declaration that the defendants were not dharmakartas of certain temples and for the appointment of trustees—Maintainability.*

A suit for the appointment of new trustees to a temple on the ground that the defendants are not the lawful trustees and that the trusteeships are therefore vacant, is a suit under s. 539 *(a)* of the Code of Civil Procedure, being comprised in the words "whenever the direction of the Court is deemed necessary for the administration of such trust." *Bishen Chand Basawut* v. *Syed Nadir Hussein,* (L. R., 15 I. A., 10), relied on. Such a suit is not invalid under s. 42 of the Specific Relief Act, by reason of the fact that no consequential relief is claimed, even if there be temple properties in the possession of the defendants as *dharmakartas.* Where a suit is maintainable under s. 539 of the Code of Civil Procedure and the plaint seeks the relief specified in that section, s. 42 of the Specific Relief Act does not apply. *Strinivasa Ayyangar* v. *Strinivasa Swami,* (I. L. R., 16 Mad. 31), distinguished. New trustees appointed under clause *(a)* of s. 539 will be entitled to demand possession of the temple properties from the defendants in the suit whose title to administer the trust has been negatived by the decree, and, if such possession be not given, will be entitled to bring a suit to eject them from the temple and its endowments. NETI RAMA JOGIAH *v.* VENKATACHARULU. **I. L. R., 26 M. 450.**

97. s. 42.—*Civil Procedure Code 1882 Section 268, 278—283.*

The attachment of a right to receive a debt is not property capable of possession within the meaning of sections 280 and 281 of the Code of Civil Procedure. When it appeared that what was attached was a debt in respect of which prohibitory orders had been issued under section 268 and objection to attachment was disallowed, a suit under section 283 was not maintainable—*22 W. R. C. R., 36, referred to.* BASAVAYYA *v.* SYED ABBAS SAHEB. **24 M., 20.** *See Nos. 139, 144, 156 infra.*

98. s. 42.

The plaintiff brought this suit for a declaration that his late father had no right or title to the property in suit, and that the testamentary disposition alleged to have been made by him by a will was illegal and void. He also prayed for an injection restraining defendants from interfering with or obstructing him in is rights as owner over the said property, as well as for a further injunction prohibiting defendants from claiming to manage or administer the property in question by virtue of their appointment as trustees or executors under the alleged will. The plaint stated that his late father had been in management as his trustee. It was objected on behalf of the defendants that the plaintiff should have sued for possession, and the suit as framed was not sustainable. The property in suit was in the possession of tenants.

Held, that the objection was not valid, and the plaintiff was not bound to ask for actual physical possession from the tenants, and there was no rule of law which compelled a man to seek for all the relief that he was entitled to, or might obtain if he desired it.

An injunction is a consequential relief within the meaning of section 42 of the Specific Relief Act—*18 Bom., 100, referred to.* FARASRAM RATANRAM *v.* BHIMBHAI KIRPARAM. **5. B. L. R. 195.**

99. s. 42.—*Discretionary power of Court in granting declaration—Declaration of a void instrument—Court's inherent powers of, to stay or dismiss vexatious suits—Court Fees Act—Ad valorem stamp not necessary in suits for declaration where no consequential relief asked.*

Every Court of competent jurisdiction has inherent power to prevent abuse of its process, by staying or dismissing without proof, actions which it holds to be vexatious. Where the facts alleged in a plaint are totally inconsistent with decisions pronounced on the amplest materials, in litigation extending over three quarters of a century, such a plaint ought to be dismissed summarily in the exercise of such inherent power. The discretionany power to grant declaratory decrees under the Specific Relief Act ought not to be exercised when the plaintiff seeks to have declared as invalid and void a transaction which, on his own allegations, would be but a *brutum fulmen* so far as his rights are concerned. *Thakurain Jaipal Kunwar* v. *Bhaiya Indar Bahadur Singh* (L. R., 31 I. A., 67 at p. 69). It will be no ground for the grant of such discretionary relief that the transaction in question may furnish a piece of evidence against the plaintiff. Where a plaint merely prays that a will in regard to a property may be declared void as against the plaintiff, the stamp duty payable is that for a declaratory suit and not an *ad valorem* fee on the value of such property.—WIJIASAMY TEVAR *v.* SASIVARMA TEVAR, **I. L. R., 28 M. 560; 15 M. L. J. 469.**

100. s. 42—*Succession Certificate Act (VII of 1889), S. 18 (c)—Hindu Law—Joint family—Certificate to widow—Declaratory Suit.*

On the death of a member of a joint Hindu family, another member of the same family is entitled to bring a suit for a bare declaration that he is entitled to collect certain debts payable to the deceased member in spite of the fact that his widow has already obtained a certificate under the Succession Certificate Act. Such a suit is under S. 42 of the Specific Relief Act and is not barred under S. 18 *(c)* or any other provisions of the Succession Certificate Act. —CHINNAPPA CHETTIAR *v.* THULASI AMMAL, **15 M. L. J. 399.**

Sup: Govt. acts (I of 1877) (*Contd*).

101 s. 42—*Amendment of plaint—Suit for declaration—Consequential Relief.*

The plaintiff filed a suit against the Secretary of State for India in Council for a declaration that they were entitled to hold certain lands free from assessment. The defendant objected that the suit was barred under s. 42 of the Specific Relief Act (I of 1877). After the settlement of the issues in the case, the plaintiffs applied for leave to amend the plaint by adding thereto a prayer for injunction by way of consequential relief. The lower Court refused to grant the prayer. *Held* that the lower Court should have exercised its discretion in plaintifs' favour although the prayer for amendment was made very late, as it was a mere matter of form which could not affect the merits of the claim or transform the nature of the suit.—KALABBAI *v* THE SECRETARY OF STATE, **6 B. L. R. 648=29. B 1C.**

102 s. 42.

Held, that the Original Court acted properly in dismissing the plaintiff's claim as reversioners to set aside a mortgage executed by the widow, on the ground that the mortgage was for a very small sum and might be paid off by the widow in her life-time. A finding in the judgment of the Lower Court that the mortgage was for necessity held not binding on the plaintiffs as the suit was dismissed. *9 Cal., 817 and 10 Cal., 324, distinguished.* CHHOTU MAHTON *v. Mussammat* SHEOBARTI KOER. **5 W.N., C., p. 445.**

103 s. 42—*Declaration. Suit for—Denial of right.*

Section 42 of the Specific Relief Act only entitles a person to institute a suit against any person denying or interested to deny his title to such cahracter or right as the section describes. Where there has been no denial there is no right to suit. CHINTAMAN *v.* MAHADEV. **6 B.L.R. 283.**

104 S. 42—*Oudh Estates Act (1 of 1869), s. 22, Cl. (7)—Suit for declaratory decree—Cause of action to reversionary heir—Execution of will by Hindu widow as taluqdar—Adverse title set up as defence to suit for declaralory decree—Discretion of Court.*

The execution of a will by a limited owner, such as a Hindu widow, affords, as a general rule, no sufficient reason for granting a declaratory decree. But where such a decree had been granted by the lower Courts in a suit the defence to which made it clear that the defendants relied upon an alleged title in the widow inconsistent with any present or future rights of the plaintiff or any other reversionary heir, and the defendants had besides no legitimate interst in the appeal except in respect of costs which had been incurred only by the course taken by them throughout the case, the Judicial Committee, always slow to reverse the decisions of the Courts below made in the deliberate exercise of a discretion entrusted to them by law, declined to interfere with

Sup: Govt. acts (I of 1877) (*Contd.*)

the decree on appeal.—JAIPAL KUNWAR *v.* INDAR BAHADUR SINGH, **I.L.R., 26 A. 238; 8 C.W.N. 465; M.L.J., 1904, p. 149;=6 B.L.R. 495=31 I.A. 67=26 A. 238 (p.c.)**

105 s. 42—*Suit for declaration—Joint family—Non-joinder of parties.*

The defendant held two rent-decrees against one N deceased. The present plaintiffs who are successors in title of N brought this suit for a declaration that the joint ancestral property was not liable to be attached and sold in execution of those two decrees. N had left two sons surviving him but they were not made parties to the suit. *Held* that the lower Court exercised a wise discretion in refusing to grant the relief claimed under s. 42 of the Specific Relief Act.—MAHARAJA OF BENARAS *v.* RAMJI KHAN, **A. W. N. 1904. p. 190=I. L. J. 512=27 A. 38.**

106. s. 42.—*Hindu Law—Succession—Joint Hindu family—Daughter. Rights of—Family arrangement—Alienations contrary to family arrangement—Right of suit.*

In the case of the death of a member of a joint Hindu family the daughter of the deceased does not succeed to the share of the deceased in the joint family property left by him.

But when after his death some property is given to her under a family arrangement and the members mortgage it subsequently to some outsiders she is entitled to bring a suit for declaration that the mortgage will not be binding upon her. AMMACANNU AMMAL *v* RANGANATHA CHETTY,—**15 M. L. J. 392.**

107. s. 42.—*Declaratory suit—Landlard and Tenant—Jurisdiction.*—

Where there is no dispute as to whether a person is a tenant holding under a settlement Court decree, the Landlord's suit to eject him on the true enterpretation of the decree would be in a Revenue Court under S. 52 (2) and 108 (4) Oudh Rent Act (1886) but not in a Civil Court for the interpretation of the decree with a view to have him ejected by a Revenue Court thereafter. But where the alleged tenant under the settlement Court decree denies his tenancy and sets up his title as an under-proprietor a question of right and title arises and the Civil Court alone can decide it although it involves the interpretation of a settlement Court decree and proves so to S. 42 Sh: Relief Act will not apply to the case. EWAZ ALI KHAN *v* MAHESHUR PERSHAD,—**5. O. C. 118.**

108. S .42.—*Declaratory decree—Reversioner's suit against* Talukdar's *widow—Discretion. Oudh Estates Act (I of 1869).*

A had a *taluka* governed by the Oudh Estates Act (I of 1869). On his death, his eldest widow B succeeded to the *taluka*. After the death of the other widows, B executed a registered will in favour of C her sister's son, declaring him as her heir and successor to the estate, D filed the present suit against B and C the appellants, alleging himself to be

the next reversionary heir to the estate. He contended that B's will was invalid, and asked for a declaratory decree. The appellants (B and C) alleged that B was absolute owner of the estate under an oral will of A and that the mere execution of a will did not give the respondent D a cause of action to obtain a declaratory decree. The Courts granted D a declaratory decree as prayed. The appellants, then, appealed to their Lordships of the Privy Council.

Held, that under section 42 of the Specific Relief Act (I of 1877) a claim to a declaratory decree is not a matter of right, but that it rests with the judicial discretion of the Court. Under the circumstances of the present case, it was held that the decisions of Courts below made in the deliberate exercise of a discretion entrusted to them by law should not, at least, be interfered with.—JAIPAL KUAR *v.* INDRA BAHADUR SINGH,—**7 O. C., 239 = 8 C. W. N. 465 = 14 M. L. J. 149 = 5 B. L. R. 495 = 31 I. A. 67 = 26 A. 238.**

109. S. 42.—*Declaratory suit for a right belonging to a class of persons.*

S. 42 does not authorize any person to sue for a declaration of his own name of the right which he claims for himself and others as a class of persons entitled thereto. All such persons in whom the right to sue exists must be made plaintiffs in the suit. S. 42 is subject to this general rule. SHAIKH CHEDI *v.* DEPUTY COMMISSIONER BAHRAICH,—**3; O. C. 351 (See C. P. Code S. 30).**

111 s. 42—*Mortgagee's suit for rights in land sold in execution of a decree of third party —Amendment of plaint.*

The appellants were mortgagees in possession of a number of plots in a village. The respondent obtained an order for sale of the *patti* in execution of his decree against the other respondents mortgagors without any declaration of appellants rights under their mortgages. The appellants' objections to the sale were dismissed. Then they sued for a declaration that the plots were not liable to attachment and sale or, that they had a lien on the property under their mortgage-deeds. The respondents denied the rights of appellants, and the Lower Court dismissed the suit.

Held, that the suit lay under section 42 Specific Relief Act, for a declaration that the appellants were entitled to possession of the plots. The reliefs prayed for might be construed to include such a declaration, and that the Lower Court should have permitted them to amend their plaint.—SHEO NATH SINGH *v.* MANOHAR LAL, **6 O C., 324.**

112 s. 42 *Suit for declaration of legitimacy —Act XXIII of 1873, ss. 4, 5, 6.*

A sued B and C for a declaration that she was the legitimate daughter of B, on the ground that B and C had denied that she was B's daughter. The object of this declaration was that when B dies A may be in a position to claim the right to inherit a

Government pension, and any other property of B.

Held, that such a suit was maintainable under section 42, notwithstanding that no present existing right to property was involved by the question of legitimacy.

Held further, that the A's suit was not one relating to *wasika*, but one for a declaration of her legitimacy and that the suit was not barred by ss. 4 to 6, Act XXIII of 1871.—QUAMAR ARA BEGAM *v.* PEARE SAHABA, **2 O. C., 57.**

113 s. 42—*Attachment of joint Hindu family property in execution of decree against father—Suit by sons for declaration—C.P.C. (1882) S. 42 & T P A (1882) S. 85 and 88.*

The sons of a mortgagor, members of a joint Hindu family, their father and his mortgagee for a declaration that, their shares in the ancestral property were not liable to attachment and sale in execution of mortgage decree against their father. *Held*, that the sons cannot set up their rights either against the alienations of the father for antecedent debts or against the remedies of his creditors for their debts not tainted with immorality.

Held, that the rights and liabilities of a mortgagee, who ought to have been but was not a party to the suit, are not affected by S. 85 of Act IV of 1882.

Held, further that a Court ought not make a declaration in a suit which is brought in contravention of s. 42 of the Code of Civil Procedure. *Bhawani Pershad* v. *Kallu* I. L. R., 17 All., 537, dissented from; *Mata Din Kasodhon* v. *Kazim Husain*, I. L. R. 13, All. 432, discussed; *Nanomi Babuasin* v. *Modhun Mohan*, I. L. R., 13 Cal. 21, followed. SHEO RATTAN *v.* RAJA JAGMOHAN SINGH. **1 O. C., 53.**

114 S. 42—*Declaratory Decree—Landlord and tenant—Possession, prayer for—Under-proprietary rights, acquisition by—New plea—Second appeal.*

A alleged in the plaint that B was a mere tenant, that a suit was brought against him for arrears of rent by the *thekadars*, that the Rent Court decided that B was not liable to pay rent and the decision was affirmed by the Court of appeal; and that by these decisions the proprietary rights in the land were affected. A claimed a declaration that B had no proprietary or under-proprietary right in the land. B alleged that he was not in possession and that the land was in the possession of C & D who were then joined as defendants. They pleaded that the land had been in their possession, as *zamindars*, from the time of native rule and the suit was time barred. The first Court decreed A's claim and the Lower Appellate Court dismissed the defendants' appeal. On second appeal by C and D it was urged that A could have sued for possession of the land and therefore the suit was barred by s. 42 of the Specific Relief Act.

Sup: Govt. acts (I of 1877) (*Contd.*)

Held, that as the suit was originally brought A, inasmuch as he alleged that B was tenant, could not have claimed possession. When C & D. were joined as defendants, they did not plead in the Lower Courts that A should sue for possession, nor was this plea taken in the memorandum of second appeal. It was, therefore, too late to take up such a plea.

Held, further, that if the defendants had been in possession of the land for 12 years, claiming to be under-proprietors and adversely to A he would not be entitled to the declaration granted, for the defendant would have acquired under-proprietary right by prescription. HAR NANDAN *v.* RAJA BHUP INDAR BIKRAM SINGH. **4 O. C. 207.**

115. S. 42.—*Suit for rent by assignee of landlord—Jurisdiction of Civil Court—Appeal—Transfer of appeal by District Judge to Subordinate Judge—Act XIII of 1879, S. 19.*

On 6th September, 1895, D. and H. mortgaged their under-proprietary rights to T. with possession. The deed provided that D. and H. should retain possession of their *Sir* and pay Rs. 100 annually as rent to the mortgagee. On 6th November, 1897, the mortgagee assigned his rights to J. expressly providing that rent for the *Sir* land for 1303 and 1304 F. was recoverable. On May 25th, 1900, J. sued in the Munsiff's Court for recovery of the rent for those years, impleading D., H. and T. as defendants. The Munsiff decreed the claim against D. and H. only, holding art. 116, sch. II, Limitation Act to apply D. and H. appealed to the District Judge who transferred, under S. 19, Act XIII of 1879, the appeal to the Subordinate Judge, who held that the limitation applicable was that provided by S. 132, Oudh Rent Act, 1886, and therefore dismissed the claim for the rent of 1303 F. as beyond time. He also held that the suit being brought by the assignee of the lessor was rightly laid in the Civil Court, though it was for rent.

Held, that the Lower Appellate Court was right on all the points and that it had jurisdiction under S. 124B and 124C, Oudh Rent Act, 1886, to decide the appeal.—DHARA SINGH *v.* JAI DAYAL, **6 O. C., 104.**

116. S. 42.—*Pleading—Form of relief—Alienation by widow with consent of some of the next reversioners—Major reversioner's consent on behalf of a minor—Presumption—Necessity for sale—*

One of five reversioners, to the estate of a deceased last male-holder, sued for a declaration, under S. 42 Spcific Relief Act, that the sale by the widow was not binding on his reversionary interest. No necessity for the sale was found. But the sale-deed had been executed by the widow and four out of the above reversioners. The Defendant contended that the consent of the reversioners validated the sale independently of the question of the necessity for it.

Held, (1) that a sale by a widow must be valid, either be for necessity, or be

Sup: Govt. acts (I of 1877) (*Contd*).

concurred in by all the reversioners, as in the last case, she may be taken as relinquishing her interest in favour of the reversioners and accelerating their succession: (2) a consent of some only of several persons, equally entitled as next reversioners, does not *per se* validate her alienation: (3) consent of the next reversioners is evidence of the propriety of a transfer and the value of the consent must depend on the circumstances of each case: (4) that the reversioners that joined in the alienation had no right to transfer the share of the plaintiff, and there being no necessity for the sale, the alienation could not bind the plaintiff's interest: and (5) that the burden of proving the circumstances validating the sale lay on the defendant. A reversioner could sue for a declaration that the sale by a widow was not binding on his interest, as if it was a definite interest, C. 933 (P. C.); 7 O. C. 239 (P. C.); 21 A. 71 (P. C.); 19 C. 236 (P. C.); 10 C. 1102 (F. B.); 17 C. 896; 8 M. I. A. 500, 13 M. I. A. 209; F. C. A. No. 46 of 99; 25 B. 129 and 21 M. 128, refd. to. CHANDI SINGH *v.* JANGI SINGH, **8. O. C. 21.**

117. S. 42.—*Suit by a remote reversioner—Nearer reversioner alive—Death—Collusion.*

A a remote reversioner of a Hindu widow's husband M sued for a declaration that a mortgage executed by the widow, to defendant No. 2, would be invalid against his interest. M's daughter's son, a nearer reversioner, was alive, when the suit was brought, but died prior to the disposal of the appeal. *Held*, that, as a nearer reversioner was alive at the date of suit, A's suit was unsustainable, in the absence of an allegation or proof that the nearer reversioner and the widow colluded; the fact that the nearer reversioner died after suit, could not better the position of plaintiff so far as the maintainability of suit in its inception was concerned. (26 A 238 referred to, I A. L. F. 380 Dissented and 8 I. A. 14 Explained.) SHEOPAL SINGH *v* MUSSAMMAT BANDOO KUAR,—**8 O. C. 81.**

118 S. 42.—*Declaration that the plaintiff is entitled to get from his co-sharer the arrears of revenue, S. 108 Oudh Rent Act.*

A suit by a co-sharer for a declaration that another co-sharer is liable for the payment of arrears of revenue to the extent of his share does not lie in the Civil Court, but under S. 108 of the Act, is cognizable only by the Revenue Court; it is also barred under S. 42 of the Specific Relief Act, as the plaintiff can sue for the arrears alleged to be due from the defendant. BABU BHAN PARTAB SAHAI *v* MAHANT BISHESHAR DASS, **9 O. C. 232.**

119. S. 42.—*Suit by heir presumptive against life tenant to restrain waste by life tenant—Injunction.*

A presumptive reversionary heir (*i. e.* the person entitled to succeed if the life tenant were to die at the moment of the suit) may institute a suit for a declaration that as against the life tenant, he is entitled

Sup: Govt. acts (I of 1877) *(Contd.)*

as next reversioner, and for an injunction restraining the life tenant from wasting the property in dispute, and also for the appointment of a Receiver. *Rani Anund Koer* v *The Court of Wards* (L. R., 8 I. A. 14) followed. *Gangyya* v *Mahalakshmi* (I. L. R., 10 Mad. 90) referred to. *Greiman Singh* v *Wahari Lall Singh* (I. L. R., 8 Cal. 12) dissented from.—MANMATHA NATH BISWAS *v* ROHILLI-MONI DASI,- **A W. N. 1905, p. 6 = 2 A. L. J. 84 - 27 A. 406.**

120 S. 42.—*Suit for declaration of title—Omission to seek further relief.*—

The effect of the proviso to S. 42 of the Specific Relief Act (I of 1877) is that the Court shall not make a declaration in the events specified in the proviso, not that the Court shall not grant the relief that is prayed.—SAKHARAM *v* THE SECRETARY OF STATE FOR INDIA IN COUNCIL,—**6 B. L. R. 124 = 28 B. 332.**

121. S. 42—*Declaratory Suit—Further Relief—Court Jurisdiction.*

Section 42 of the Specific Relief Act enacts that no Court shall make a declaration in a suit in which the plaintiff being able to seek further relief omits to do so. The section does not empower the Court to dismiss such a suit. An injunction is a "further relief" within the meaning of S. 42 of the Specific Relief Act. *Farasram* v *Bhimbhai*, (5 Bom. L. R. 195) followed.—KUNJ BIHARI *v* KESHAVLAL HIRALAL. **—6 B. L. R., 475 = 28 B. 567.**

122 S. 42—*Suit to set aside an auction sale—Plaint not asking for possession—Defendant subsequently put in possession of property sold.*

A plaintiff instituted a suit to set aside an auction sale. The plaintiff, not having at the time of filing the suit been dispossessed of the property sold, claimed only the setting aside of the auction sale and costs, and paid a proper court fee on the suit so framed. About a month after the institution of the suit, the auction purchaser was put into possession of the property which he had purchased. When the suit came on for hearing, the plaintiff was directed to amend his plaint by adding a claim for possession of the property, and to pay the proper court fee upon a suit for possession, and on his declining to do so, his suit was dismissed with costs. On appeal by the plaintiff, it was *held* that the suit when instituted being in every respect regular and properly stamped, no action on the part of the defendants subsequent to the institution of the suit could affect or prejudice the right of the plaintiff, and the suit was remanded under s. 562 of the Code of Civil Procedure to the lower Court for determination according to law. *Surjan Singh v. Baldeo Prosad*, (A.W.N., 1900, p. 172), followed.—RAM ADHAR *v.* RAM SHANKAR, **A. W. N. 1903. P. 236 = 26. A. 215.**

123 S. 42—*Declaratory suit—Adoption—Will—Declaration of invalidity of adoption—Will—Court-fee—Jurisdiction of Court—Rejection of plaint—Dismissal of vexatious suit*

Sup: Govt. acts (I of 1877) *(Contd.)*

without investigation of claim—Abuse of process.

D. T. was common ancestor of the parties. His eldest son succeeded him and died having adopted his daughter's son. One of his grandsons sued his father, defendant No. 1, the adopted son, defendant No. 2, and his deceased uncle's sons, defendants Nos. 3 and 4, for a declaration that the adoption of the second defendant was invalid and that Will executed by the adoptive father and proceedings and decrees and judgments in certain civil cases were not binding on the plaintiff. The Court of first instance was of opinion that the suit was chargeable with *ad valorem* fee with reference to the value of the estate in dispute in regard to which the declarations were sought. It was contended for the defendants that the suit was vexatious and the plaint should be rejected, and that the declarations asked for should not be made.

Held, that the suit was for mere declarations and *ad valorem* Court fee was not required.

(2) that the declaration asked for regarding the Will should not be granted, for upon the plaintiff's own showing the estate concerned was inalienable and the Will with reference to the plaintiff and in so far as it concerned the estate would be but a *brutum fulmen*. And no daclaratory relief could be granted on the ground that the defendant had brought into existence evidence against his interests.

(3) that the declaration asked for as to adoption could not be made. When the plaintiff asks for a declaration that an adoption is invalid, alleging that by the custom in the zemindari, adoptions are not recognized, it would be futile to make it the subject of judicial investigation for the purposes of the grant of specific relief by way of declaration, but when the conditions warranting the validity of an adoption were in truth wanting and the party alleging the adoption pretends that these conditions existed, a person whose rights would in law be affected by the adoption so set up can obtain relief by way of a declaration in order that the cloud sought to be cast upon his title may be removed.

Every Court of competent jurisdiction has an inherent jurisdiction to prevent abuse of its process, by staying or dismissing without proof actions which it holds to be vexatious; but this power is one which ought to be exercised sparingly and only in very exceptional cases.

Where the plaintiff brought a suit for a declaration of his title to a *zemindari* reopening therein questions already settled by decisions of the Judicial Committee and other Courts in more than one litigation regarding the same *zemindari*—

Held, that the suit was liable to be dismissed as vexatious. VIJAYASAMY THEVAR *v.* SASIVARNA THEVAR. **15 M.L.J. 469 = 28 M. 560.**

Sup: Govt. acts (I of 1877) *(Contd)*

124 s. 42—Onus—*Suit for a declaration that property mortgaged with plaintiff was not liable to sale in execution of decree of a prior mortgagee.*

When a mortgagee in possession sues for a declaration that the mortgaged property in his possession is not liable to be sold in execution of a decree of another mortgagee, to which he was no party, the plaintiff must prove that at the time of his filing the suit the mortgage in his favour was still subsisting. CHITTA SINGH *v.* DEBI DIN. **W. N., A. 1901, p. 212=24. A. 170.**

125 s. 42—*Declaratory suit—Consequential relief not claimed—Hereditary office—Adoption—Right of adopted son.*

The adopted son of a trustee is not entitled to a declaratory decree against his adoptive father that he acquired an interest in the management of the trust by right of his being adopted son of the trustee, for when the devolution the trust follows is the devolution of joint family property he is entitled to claim joint possession and management of the trust property, and section 42 of the Specific Relief Act bars the suit; if it follows the descent of separate property he is not entitled to claim any right or interest in the office so long as the father holds the office. NATARAJA CHETTY *v.* KOLANDAVELU CHETTY. **15. M. L. J. 456.**

126 s. 42—*Property in custodia legis plaintiff being the custodian.*

Plaintiff sought for a declaration of his right to property without asking that the property should be delivered to him. The property had belonged to S deceased. Prior to the death of S, who was a minor, proceedings had been taken for the appointment of a guardian for him under the Guardain and Wards Act. Pending those proceedings, the District Court appointed plaintiff Receiver and placed him in possession of the property, removing the minor's mother, the present defendant, from the charge thereof. The High Court reversed that order and directed that possession of the property should be handed back to the defendant. This order had not been carried out to any extent at the date of suit. On the objection being raised that the suit was not maintainable by reason of S. 42 of the Specific Relief Act:

Held that the suit was maintainable. The possession of the property was, at the time, neither with the defendant nor with the plaintiff, it being in *custodia legis* and in the hands of an officer of the Court and it being a mere accident that, that officer was the plaintiff. Inasmuch as the defendant was not in possession, plaintiff could not, as against her, have consequential relief, and nothing more was required to be done to secure to the plaintiff all his rights than to obtain an order of the Court enabling him to retain possession in his own right.—VEDANAYAGA MUDALIAR *v.* VEDAMMAL, **14 M. L. J. 297=27 M. 591.**

127. s. 42.—*Declaratory Decree—Further Relief.*

This was a suit for a declaration that a certain house was not liable to sale in execution of mortgage decree obtained by one T against one S. The allegation of the plaintiff was that the house was his own, that he was in possession of it and that S had no title to mortgage it. The District Judge held that inasmuch as the plaintiff did not ask for any other relief, such as, cancellation of the mortgage deed or the setting aside of the mortgage decree, the suit was barred under S. 42 of the Specific Relief Act.

Held that the District Judge was wrong in coming to this decision. There was no obligation on the plaintiff even under the proviso to S. 42 to have sued to set aside either the mortgage or the decree or for any other relief.—GANGA GHULAM *v.* TAPESHRI, **A. W. N., 1904, p. 138.=2 A. 606.**

128. S 42.—*Suit for declaration of invalidity fo will on ground that it bequeathed family property—No claim for partition—Maintainability—Hindu Law—Existence of leases over family property no bar to partition.*

Plaintiff sued his brother, his sister and his brother's son for a declaration of invalidity of a will which purported to have been executed by his late father, by which certain property had been bequeathed to one of the defendants. Plaintiff claimed that the property was ancestral; that he was entitled to his share in it by right of survivorship and that the testator had no power to bequeath it. No claim was made in the plaint for partition of the property, which was stated to be in the possession of tenants under leases ganted by plaintiff and first defendant:

Held that the suit was barred by the proviso to S. 42 of the Specific Relief Act, inasmuch as plaintiff might have sued for partition of his share in what he claimed to be the joint family property. Even though the land were in the possession of tenants entitled to continue in occupation under subsisting leases, that would be no bar to a partition of the property among the members of the family.—SURYANARAYANAMURTI *v.* TAMMANNA, **25 M. 504.**

129. S. 42.—*Civil Procedure Code 1882, Section 13—Competent court—Value of a suit to have it declared that certain persons are or are not members of a tarwad.*—

The value of a suit to have it declared that certain persons are or are not members of a tarwad is the value of the share of the tarwad property which would be allotted to them if a partition were made by common consent.

A suit for a mere declaration that the defendants are not members of the tarwad

Sup: Govt. acts (I of 1877) (*Contd.*)

is barred under section 42 of the Specific Relief Act when the plaintiffs, in addition to the declaration asked for, are in a position to ask for the further relief of possession of the portion of the property which is in the enjoyment of the defendants on a claim that they where members of the family. PANGA *v.* UNNIKUTTI. **24. M. 275.**

130. S. 42.—*Suit to set aside an invalid award and decree based on it—No claim for further relief.*

The plaintiff sued to have an arbitration award, alleged to have been made on the basis of an invalid agreement, declared null and void as against her, that if for any reason the award so far as it related to the two suits referred to as Nos. 2 and 9 of 1899 be considered binding upon the plaintiff, the remaining portion of the award might be held invalid as against the plaintiff; also that the decrees which had been passed in those suits may be declared null and void. The suit was dismissed as not maintainable under the provisions of section 42 of the Specific Relief Act.

Held, that the suit was maintainable. —*7 All., 884, distinguished*; *21 All., 289 followed.* GOMTI KUNWAR *v.* DARAB KUNWAR. **A. W. N. 1902. P. 187.**

131. S. 42.—*Suit for a declaration without praying for consequential relief—Costs.*

Where the plaintiffs sued for a bare declaration that they are members of the defendants' *tarwad* and have community of property with them, *held*, that as the plaintiffs did not pray for consequential relief, the suit was barred by the proviso to Section 42 of the Specific Relief Act.

Each party was directed to bear his own costs throughout, as the defendants had failed to take the legal objection that the suit was not maintainable. RAMAN ADIODI *v.* KELU. **11. M. L. J., 1901, p. 338.**

132 s. 42. *Limitation Act* (*XV of 1877*), *Sch. II, Art. 119—Suit by an adopted son more than six years after interference with plaintiff's rights—Claim far declaration as to adoption and to recover possession of property due to plaintiff as adopted son—Maintainability.*

Plaintiff's rights, as the adopted son of A, were interfered with, in connection with certain immoveable property, in 1889. In 1897, plaintiff sued for a declaration that he was the adopted son of A, and sought to recover the property:

Held (Bhashyam Ayyangar, J., dissenting) that the suit was barred under art. 119 of sch. II to the Limitation Act. *Jagadamba Chaodhrani v. Dakhina Mohun*, (L. R., 13 I. A., 84; I. L. R., 13 Cal. 308), followed; *Parvathi Ammal v. Saminatha Gurukal*, (I. L. R., 20 Mad. 40), and *Shrinivas* v. *Hanmant*, (I. L. R., 24 Bom. 260), approved.

Per MOORE, J.—Where a plaintiff cannot obtain a decree for possession without

Sup: Govt. acts (I of 1877) (*Contd.*)

a decision that an adoption is invalid or never in fact took place, or that an adoption is valid, the question whether his claim is barred by limitation must be decided with reference to the provisions of arts. 118 and 119 of sch. II to the Limitation Act.

Per BHASHYAM AYYANGAR, J.—The suit was governed by art. 144. Art 119 is applicable only to a suit of the character defined by s. 42 of the Specific Relief Act for a declaration that the plaintiff is entitled to a status or legal character as adopted son. In the present case, the plaitiff having been out of, and the defendant having been in, possession since 1889, plaintiff could not maintain a suit for a mere declaration of title, and the only suit he could maintain was the present which was governed by art. 144 and was, in consequence, not barred.—RATNAMASARI *v.* AKILANDAMMAL.—**B. M. L. J. 27=26. M. 291.**

133 s. 42 *Arts. 120 and 144—Act XIV of 1859, S. I, cl. (16)—Suit for declaration of title to immoveable property—Amendment of plaint when character of suit would be altered.*

A sued for the declaration of his title to certain immoveable property, alleging that C executed a mortgage thereof in favour of B. that the latter sued to enforce his security and obtained a decree, that, the mortgaged properties having been advertised for sale in execution of the decree. A preferred a claim under S. 278, C. P. Code that the application was summarily rejected on the ground that no claim could be entertained in the course of proceedings in execution of a mortgage-decree, and that, consequently, the properties were sold and purchased by defendant B, who subsequently transferred them to D, and that he therefore wished to clear the cloud cast on his title. The Subordinate Judge found that A. was in actual possession, and decreed in his favour. But, on appeal, the District Judge reversed this decree and held the suit was barred by limitation inasmuch as it was not instituted within six years from the date of the execution-sale. On appeal to the High Court, it was urged, on behalf of A that no rule of limitation is applicable to a suit for declaration of title to immoveable property, that if any rule of limitation is applicable, it is one embodied in art. 144 and that cause of action was erroneously determined. Finally, the appellants prayed for an amendment of the plaint so as to convert the suit into one for possession.

Held, the provisions of the Limitation Act are applicable to a suit for the declaration of title to immoveable property 13 A 126, 15 M 492, 23 B, 659 *referred to.*

Held, also, that art. 120 applied to the case, and not art. 144. 20 A. 35 fol. 2. B. 120, 16 M 140 referred, 7 W. R. 96 19 W. R. 32 Diss. The suit was barred

Sup: Govt. acts (I of 1877) (*Contd.*)

as it was not instituted within six years from the date of execution-sale.

Held, further the amendment could not be granted, since, if the amendment were allowed, the case would be materially altered, and it would be wholly contradictory to the evidence on the record and the findings of the Subordinate Judge. 4 C 46 20 I. A. 99, Referred, 16 W. R. 27, 24 W. R, 301, 25, W. R. 168, 15 M 15, 11, M, I. A. 468 Diss. And the attempted interference of the defendants with the plaintiffs' possession will not entitle the latter to a decree for ejectment. MAHABHARAT SHAHA *v.* ABDUL HAMID KHAN. **1 C. L. J. 73.**

134. s. 42. *Declaratory suit by remote reversioners—Existence of nearer reversioners—Grounds on which remote reversioner can sue.*

Where there are several reversionary heirs, some near, and others remote, the former being entitled to a life estate and the latter entitled, after them, to an absolute estate, the latter can maintain a suit under S. 42 of the Specific Relief Act, for a declaration that the alienations made by the holder of the life estate, in present possession of the estate, are void beyond the life of the alienor, notwithstanding the existence of such nearer reversioners (15 A 132 Diss).

Where a nearer reversioner has precluded himself from suing, or concurred in the alienation by the holder of the life-estate by allowing the period of limitation to elapse, the remoter reversioner may sue 14 M. L. J. 209 followed. ABINASH CHANDRA, MAZUMDAR *v.* HARINATH SHAHA. **32 C. 62.** *See No 152 & 161 infra.*

135. s. 42. *Declaratory suit—Consequential relief—Injunction—Claim for possession not necessary—Criminal Procedure Code (Act V of 1898), Section 145—Dispute relating to immoveable property.*

The plaintiff sued for injunction against the defendant restraining him from preventing entry of the plaintiff in the temple in suit for worship and using the vessels and paraphernalia appurtenant to the worship. He did not claim a right of possession either exclusive or joint in the temple, nor did allegations in the plaint show that he was entitled to such possession. In a proceeding under section 145 of the Criminal Procedure Code the Joint Magistrate had declared the defendant to be in possession of the right of performing worship. The District Judge on appeal dismissed the suit on the ground that the plaintiff should have sued for possession.

Held, that the order of dismissal was wrong. The order passed by the Joint Magistrate was without jurisdiction and it was not necessary for the plaintiffs to have it set aside. VENGAN POOSARI *v.* CHINNU. **14 M. L. J. 290.**

136. s. 42. *Declaration that defendant is not the adopted son of the plaintiff.*

Sup: Govt. acts (I of 1877) (*Contd*).

Where Defendants' adoption by the plaintiff has been set up under circumstances, which would operate to the prejudice of the plaintiff, if he did not take steps to have it declared not true, the plaintiff is entitled to sue for, and obtain a declaration that the defendant was never adopted by him. To enable plaintiff to institute this suit, it is not necessary that the claim must have been set up by the Defendant himself as by his having said or done anything with reference to the adoption. CHINNA-SAWMY MUDALIAR *v.* AMBALAYANA MUDALIAR **29. M. 48.**

137. S. 42. *Declaration—Consequential relief—Injunction.*

The defendant interferes with the plaintiff's right in building upon a piece of land on the ground that he was a joint owner: *Held* the plaintiff was entitled to bring a suit for a declaration that he was the exclusive owner and need not have ask for an injunction to restrain the defendant from interfering with his right. SUNDAR LAL *v.* RAM GHULAM. *15 M. 15 referred to.* **3 A. L. J. 319=A. W. N. (1906), 149.**

138. S. 42.—*A Hindu daughther's right to sue for construction of Will of father and for incidental declarations.*

A Hindu daughter can, during the life time of her mother, maintain a suit for the construction of a Will of her deceased father and declaration incidental thereto, especially where the mother has allowed her rights to be barred by limitation and where the immediate conduct of the executors will be determined by the construction.

A suit for the construction of a Will can lie only when some immediate necessity for the construction is established: "Perpetuation of testimony" is not the only ground on which declaratory suits of this description are allowed L. R. 2 I. A. 169, 15 B. L. R. 83, 4 Ch. D. 413, 27 Ch. D. 237, 45 Ch. D. 51, D., and 29 C. 260, 32 C. 62, 3 B. L. R. A. C. J. 362, 24 W. R. 86 (note), followed. SRINEBAS DAS *v* MONMOHINI DASI.—**3 C.L. J.**

139. S. 42.—*This Section not applicable to —Suits under S. 283, Civ. Pro. Code, Prayer for further relief not necessary.*

C attached certain immoveables in execution of a decree for money, which she had obtained against B. A presented a claim based on a mortgage alleged to have been made to him by B. The claim having been rejected, A sued under the S. 283 for a declaration of his right as mortgagee to the attached property and for the cancellation of the order of rejection of his claim. On reference to the Full Bench of the question whether the suit was sustainable with reference to S. 42 of the Specific Relief Act, *held*, that the proviso to S. 42 of the Specific Relief Act does not operate to take away from a party, against whom an order has been made under S. 280, 281 or 282 of the Code, the special right conferred by S. 283 to sue for

Sup. Govt. acts (I of 1877) (*Contd.*)

a declaration of his title in so far as it is affected by the order which he seeks to impeach and such a suit is, therefore, not liable to dismissal on account of the omission to pray for further relief obtainable. 16 M. 140 doubted and 14 M. 23 followed. KRISTNAMSOORAYA *v.* PATHMA BEEF,—**29 M. 151.** *See No. 97 supra and 144, 156 infra.*

140. S. 42.—*Alienation by widow—Right of collateral's widow to contest such alienation—Ghirths of Kangra District.*

A Ghirth by caste, in tahsil Hamirpur, District Kangra, sued to set aside an alienation by the widow of a collateral of her deceased husband, on the ground that she was entitled to succeed to such collateral by a custom prevaling in the District. Her right to succeed collaterally and her right to question the alienation were disputed by the defendant. *Held* that, by virtue of a custom among Ghirths in the District in question, a widow was entitled to succeed collaterally to any property to which her husband, if alive, could have succeeded, and that, consequently, the plaintiff was competent to question the alienation in question. 56 P. R. 1891, 111 P. R. 1891, 20 P. R. 1895 refd. to.—LAHORI *v* RADHO,—**72 P. R. 1906=108 P. L R. 1907.**

141 S 42—*Cause of action—Suit for a declaration that the defendant had no right to mortgage joint property—Court-fee.*

The plaintiff alleged that he was a half sharer with the defendants Nos. 1 and 2 in certain houses, that by an arrangement with them he held these houses while they held other portions of the joint property exclusively and that they had mortgaged the joint property which was in his sole possession. He sued for a declaration that the defendants had no right to mortgage it. The Court held that the suit as brought was not maintainable.

Held, that the decision of the lower Court was wrong.

Held, also, that Court-fee for the suit was payable on half the mortgage-money secured by the mortgage-deed. GHULAM KADAR *v.* WAJIH-UD-DIN. **50 P. L. R. 1904.**

142 S. 42—*Cause of action—Hindu Law—Widow—Suit against reversioners for declaration that widow was competent to transfer property for necessity.*

The plaintiff, a Hindu widow of *Arora* caste, residing in the town of Kohat, sued her husband's reversioners for a declaration that she was entitled to alienate family property in her charge in order to discharge certain *bona fide* expenditure partly incurred and partly to be incurred. The plaintiff had served a notice on the defendants giving them intimation of her intention to alienate but they paid no attention to it. The defendants denied the plaintiff's title to the property and pleaded that the suit did not lie.

Held, that, in the absence of allegation by the plaintiff that the defendants had

Sup: Govt. acts (I of 1877) (*Contd*)

overtly disputed her rights to alienate, the suit was premature. MANNA SINGH *v.* *Mussammat* BAI JAN. **76. P. L. R. 1904.**

143 S. 42—*Court Fee Act (VII of 1870), Section 7 (IV) (d)—Injunction—Declaratory decree—Suits Valuation Act (IX of 1887), Section 9, Rules under—Rule IV.*

The plaintiff alleging herself to be in possession along with others of the piece of land in suit, sued the Municipal Committee of Delhi and the transferee from the Committee praying for a declaration of her right to use the same, for a further declaration that the Municipal Committee was not entitled to use it so as to deprive her of her right of user and for an injunction to prohibit the Committee and the transferee from so doing. The Court ordered the plaintiff to pay Court-fee on the value of the site and the plaintiff failing to comply with the order, her suit was dismissed.

Held, that the orders requiring Court-fee to be paid on the value of the property and dismissing the suit were wrong. The plaintiff was liable only to pay Court-fee on nominal value permissible under the Suits Valuation Act to be fixed by the plaintiff as regards the relief for injunction and Rs. ten each for the two declarations prayed for. *Mussammat* MULK-UN-NISA *v.* MUNICIPAL COMMITTEE DELHI. **118. P. L. R. 1904.**

144 S. 42—*Civil Procedure Code (Act XIV of 1882), Sections 278 and 283—Execution of decree—Attachment. Objection against—Suit to establish title and possession—Order passed without investigation.*

An order cannot be held to be an order under section 281 of the Civil Procedure Code unless it is passed after investigation and an opinion expressed and judgment given on the merits. 3 *All.*, 504 18 *Mad.*, 265, 12 *Cal.*, 108, 15 *Cal.*, 521 *(P. C.)*, 1 *W. N. C.*, 24 *referred to.* SAJAN RAM *v.* RAM RATTAN. **S. C, 119 P. L. R. 1904=87 P. R. 1904.** *See Nos 79, 139 Supra and 156 Infra.*

145. *Jurisdiction of Civil and Revenue Courts—Declaratory suit that the* kamiana *dues were not payable by plaintiffs.*

The plaintiffs sued for a declaratory decree to the effect that *kamiana* dues are recoverable only from the *kamins* who construct houses on the sites belonging to proprietors and get benefit from pasturage and *Shamilat* lands, and that the plaintiffs who were the owners of their houses and cultivators were not liable to pay the said dues.

Held, that the suit was cognizable by Civil Court. SHEIKH MUHAMMAD *v.* HABIB KHAN. **113 P. L. R. 1905.**

146 S. 42 *Suit by reversioner for declaration of their right to redeem a mortgage by a woman—Discretion.*

A woman, having a life interest, mortgaged a portion of the property, and the reversioners sued for a declaration of their right to redeem the mortgage in the event of her death.

Sup: Govt. acts (I of 1877) (*Contd.*)

Held that the Court should not, in the exercise of the discretion conferred by S. 42, make the declaration. Because the woman's right to redeem might possibly become time-barred before her death and the mortgagees are entitled to the benefit of this contingency. Further, it may be that, when the right now vested in her passes to the reversioners, they may be unwilling or unable to exercise it. MUTHUKARUPPAN *v.* KASINATHAN PILLAY, **2 M. L. T. 67.**

147 S. 42 *A trustee who has been removed can sue for declaration of his right of trusteeship—Removal of trustee by a caste is not a cast question—Hostility is no ground for removal—Intention must be gathered only from the deed—Evidence.*

By a trust deed power may be given to its beneficiaries to remove a trustee appointed under it and appoint a new one in his place; but the power must be exercised reasonably, and the Court will interfere if it is satisfied that the power was exercised not for the benefit of the trust and in a capricious manner, 230 and Lat 95 followed.

A trust deed executed by members of a caste, appointed trustees but contained no provision empowering the caste to remove them. One of the trustee, being excluded from management by his co-trustees, filed a suit asking for a declaration of his trusteeship and for an injunction to restrain the defendants from denying, or interfering with, his rights as a trustee :—

Held, (1) that no beneficiary or trustee can remove a trustee, whether the beneficiary is an individual or a caste ;

(2) that, a person whose legal character is denied can under s 42 Specific Relief Act institute a suit "against any person denying" such character. It is no reason that there are other persons than those sued, who also are denying the right that he must sue them all ;

(3) that, the plaintiff was entitled to the declaration and injunction prayed for.

The question whether a caste can remove a trustee of any of its charitable trusts is not a caste question. Where a caste creates civil rights in its own property, they are legal rights and legal obligations enforceable by our Courts, as much as if any entity, such as a private preson, had been a party to their creation. The fact that the caste happens to be a party to the creation is merely accidental. Where a trust is created, whether by a caste or by an individual, the same law applies to both.

Friction or hostility between trustees and the immediate possessor of the trust is not of itself a reason for the removal of the trustees. But where the hostility is regarding the mode of administrating the trust and has been caused by substantial overcharges against the trust estate, it is

Sup: Govt. acts (I of 1877) (*Contd.*)

not to be disregarded 9 App case 371, 381 followed.

The intention of parties must be gathered from the language they have used in a deed, and, there the words of the deed are clear, all evidence of what occurred or what was said when the parties were in a state of negotiation, is inadmissible. CHAPTEY COOVERJI *v.* JETHABHAI NURSEY, **9 B. L. R. 514.**

148. S. 42.—*Gift by Hindu widow in favour of daughter—Sale by one sister to another—Surrender of estate—Cause of action—Reversioner*

A Hindu widow, in possession of her husband's estate, transferred portions of it to her daughters by gift or sale, and one of these daughters subsequently conveyed the portion so transferred to her to one of her sisters: *held* that these transfers did not give any cause of action to a daughter's son, the next presumptive reversioner, to sue for a declaration that the transfers were made without legal necessity and would not be binding on him 11 A 253 followed. TULSHA *v.* BARU, **4 A. L. J. 677**

149. s. 42.—*Declaration—Plaintiff's chance of succession very remote—Discretion.*

Where the plaintiff's chance of succession to the property was very remote and his suit to set aside a mortgage of the property was dismissed, the Chief Court declined to remand the case for further enquiry. TARA SINGH *v.* MUSSAMMAT CHANDI, **51 P. L. R. 1908.**

150. s. 42.—*C. P. C. S. 43 and 525—Award—Suit for specific performance of contract of sale—Subsequent suit for possession—*

A decree was passed by the Court for specific performance of an award of arbitrators in a previous suit for specific performan of a contract of sale. The defendants having failed to obey the decree of the Court, the Court itself execut d a sale deed under S. 262 Civ. Pro. Code. Upon the basis of this deed, the plaintiff brought the present suit for possession of the property.

Held, that the plaintiff was not compelled by S. 42 Specific Relief Act to add a prayer for possession in the previous suit for specific performance; and that S. 43 C. P. C. (1882) was no bar to the plaintiff's present suit for possession. SHEODIN *v.* MT. GODHI BAI, **4 N. L. R. 14.**

151. s. 42. *Succession of daughters—Rights of collaterals of seventh degree—Mahomedan Chohan Rajputs of Kharwan, Jagadhri tahsil, Umbala District—Suit for declaration—Specific Relief Act, S. 42.*

In this suit neither the plaintiffs (a collateral) nor the defendant (a daughter), succeeded in proving their possession of the property in dispute, and one party relied on the mutation entry in his favour and the other party on entries in the *girdawri* papers, but the land in dispute was in actual possession of mortgagees, occupancy tenants and tenants at will, and it was

Sup: Govt. acts (I of 1877) *(Contd.)*

not clear whether the plaintiff or the defendant had received rents from the tenants at will: *Held*, that under such circumstances a suit for a mere declaration of title was maintainable. 15 M. 307 followed. ABDUL KARIM *v.* SAHIB JAN, **5 P. R. 1908.**

152. S. 42.—*Declaratory suit by next male reversioner while daughter is living—Discretion.*

Where the first Court decree a remote male reversioner's declaratory suit, the appellate Court should not interfere with that discretion and dismiss the suit on the only ground that he was not a presumptive reversionary heir. It should determine particularly whether the alienation was for a legal necessity or not. SHEO NARAIN *v.* DAMODAR DAS. **I. A. L. J. 388.** *See No 134 supra & 161 infra.*

153. S. 42.—*Declaration to manage a bathing ghat.*

A sued to be declared the manager of a *ghat* on the ground that he and his *Guru* before him, had for a long time occupied a small room on the top of the *Ghat* and had swept and repaired it: *Held* that A had no hereditary office on these grounds, and the suit was dismissed. 17 I. A. 187 referred to. BASDEO SAHAI *v* DAMODRANAND.—**1. A. L. J. 44.**

154. S 42. *-Inconsistent pleadings—Declaration.*

The Court should not grant declaration, in a case, where it is not only not made in the plaint but is, on the other hand, inconsistent with the plaint. 11 M. I. A. 7 referred to. RAJ JATINDRA NATH *v* AMRATA LAL.—**5. C. W. N. 20.**

155. S. 42.—*Suit by a sub-mortgage that prior mortgage decree was satisfied.*

A sub-mortgage can not maintain a suit for a declaration that a prior mortgage decree was satisfied. He should properly bring a suit for redemption and can get his costs if his allegation is proved. HARPERSHAD *v.* PHULCHAND. **2. A. L. J. 609.**

156 S. 42.—*Suit to establish right to attach property—Bar to suit—Consequential relief—Code of Civil Procedure, s. 283—Specific Relief Act, s. 42.*

The proviso to section 42 of the Specific Relief Act does not apply to suits brought under section 283 of the Civil Procedure Code. *Ma Dun v. Ma Pa U, 2 L. B. R., 124, distinguished.* KYA GET *v.* BU NWE. **4 L.B.R. 1907. P. 88.** *See 97, 139 and 141 supra.*

157 S. 42.—*Declaration—Altering prayer in plaint.*

Although a suit for mutation of names in a Revenue Register of holdings cannot lie; the Court may allow the prayer of the plaint in such a suit to be altered to a prayer for possession. 2. L.B.R. 4. referred to. MAUNG THA CHU *v.* MAUNG PO KAUK. **2. L.B.R. 1904. P. 243.**

158 S. 32—*Declaration—Omission to seek further relief—Amendment.*

Sup: Govt. acts (I of 1877) *(Contd)*

A sued B that the latter was not entitled to keep the trees which A had sold to B standing on A's land. The original court gave a declaratory decree with a direction that B should cut the trees. The Lower Appellate Court dismissed the suit as A had omitted to claim further relief. *Held* that the Lower Appellate Court should have directed A to amend the plaint by asking further relief *i.e.* a permanent injunction to restrain B to allow the trees to stand on A's land and to cut them. HAZARA SINGH *v.* BISHAN SINGH, **128. P. R. 1907.**

159 S. 33—*See ss. 39 & 42.* 25. A. 1. P.C. No. 90, 1. O.C. 4, No. 91, I.O.C. 18. No. 92. and I.O.C. 123. No. 93 supra.

160 s. 62 (2) *Declaration that a certain land is plaintiff's exclusive property—Private partition—Effect of such a declaration on the portion to be made by Revenue Court—Land Revenue Act (N. W. P. and Oudh), S. 233*

On a private partition between A., B. and C. (brothers) the land in dispute was allotted to C., the father of the present plaintiff, and other lands were allotted to A. and B., after which each held separate possession and collected the rents of his land. A mortgagee from the son of B. sued the plaintiff for settlement of accounts of rents. The plaintiff contended that there had been a private partition and he was not liable to account. The Rent Court rejected this contention and compelled the plaintiff to accout. The plaintiff sued for a declaration that he was the owner of the land allotted to his father at the partition and that he was not liable to account. The defendant mortgagee contended that the Civil Court had no jurisdiction to make such a declaration and the suit was barred under S. 233, cl. (k) of the N. W. P. and Oudh Land Revenue Act, 1901.

Held further, that the only declaration to which the plaintiff was entitled was, that he alone was entitled to the profits of the land in suit, until regular partition had been made by the Revenue Court. He could not declared to be the owner of the land in question, inasmuch as such declaration would interfere with the partition, if any, made by the Revenue Court. RAM AUTAR *v.* THAKUR JAGAN NATH BAKHSH SINGH, **10 O. C. 204. U.**

161 S. 42.—*Ill e The nearest reversioner concurring in alienation by a Hindu widow —Right of remote reversioners to sue—*

Plaintiff, a minor reversioner, sued after 25 years of an alienation by a Hindu widow for a declaration, that the alienation was invalid as against him after her death. Plaintiff was born about twelve years after the alienation, and was a remote reversioner of the third grade. There were nearer reversioners of the first and second grades, including the plaintiff's father. None of these questioned the alienation, and their right was time barred at the date of the plaintiff's suit. The defence was, that (1) the plaintiff was not an immediate rever-

Sup: Govt. acts (I of 1877) *(Contd.)*

sioner and had no right to sue (2) that he could not sue during the life of the nearer reversioners, who did not sue and whose suit was barred by limitation. It was found that the alienation was improper and without necessity except to a trifling extent. The nearer reversioners were impleaded in the suit.

Held, (1) that the right to sue for a declaration was given by S. 42 Specific Relief Act, that, although illustration (*e*) to that section and art. 125 of the Limitation Act, refer only to suit by presumptive reversioners, it would be wrong to hold that the words of a section in an Act must be limited to the illustrations given in the Act or by reference to the suits specifically enumerated in the Limitation Act: (2) that a more distant reversioner may sue, if those nearer in succession are in collusion with the widow or have concurred in the alienation or have precluded themselves from suing (as in this case) 8 C. L. R. 381=6 C. 754=8 I. A. 14. (P. C.); 10 B. H. C. R. 351; 14 M. I. A. 193; and 18 M. 52, *referred to.* *See No. 134 and 152 Supra.*

The High Court decreed the claim on the ground that, though it might be open to doubt whether the Court of first instance ought to have allowed the suit by plaintiff to proceed, still, as the suit had been tried in three Courts, and as the plaintiff would, if the widow should live to a great age and he should happen to be the nearest reversioner at her death, have lost the testimoney in support of the invalidity of the alienation, which was now available to him. GOVINDA PILLAY *v.* THAYAMMAL, **28 M. 57.**

162 S. 42—*Ills. (e) and (f).—Suit to set aside the will of last male owner, by a presumptive heir after the widow.*

A presumptive reversionary heir, entitled to inherit after the death of the widow of the last male owner, can sue for declaration that a will, under which others claim was made by her husband under undue influence and coercion, and is, therefore, invalid as against his reversionary right.

His right to sue for declaration under S. 42 of the Act is not confined to transactions by the widow herself, as are referred to in ills. (*e*) and (*f*) to the section; nor is he bound to show collusion, acquiescence or laches on the part of the widow, before he is allowed to institute the suit 6 C. 764 (P.C.) distinguished. PUTTANNA *alias* KESHAVA BHATTA *v.* RAMAKRISHNA SASTRI, **30 M. 195.**

163 S. 42, 45.—*Municipal Election–Omission of a name from the candidate's list—Declaration and injunction.*

A Receiving Officer, appointed by the Collector under the Election rules, refused to accept the nomination paper of the plaintiff, a candidate for a councillorship of the Surat City Municipality, and the published list of candidates omitted his name from it. The plaintiff sued the Municipality for a declaration that he was entitled to come forward as a candidate and for an injunction to prevent the Municipality from carrying on the by-election without accepting him as a candidate;

Held, (1) that the suit for declaration, failed, as the Municipality neither denied, nor was interested to deny, the character or right which the plaintiff sought to establish. It was the Receiving Officer that was concerned with the question and over him the Municipality had no control;

(2) that the injunction too could not be granted, as the Municipality had done no wrong and was threatening to do no wrong; it only proposed to proceed in accordance with the Act and the rules so far as they related to it. THE SURAT CITY MUNICIPALITY *v.* CHUNILAL MANIKLAL GANDHI, **3 B. L. R. 209=30 B. 409.**

164 S. 45—*Enforcement of public duties by Public servant—Bombay City Police Act (IV of 1902), Ss. 28 and 129 Police Commissioner—Notice—Segregation of prostitutes.*

The Commissioner of Police at Bombay, under S. 28 of the Bombay City Police Act, 1902, issued a notice upon the applicants requiring them to vacate the premises occupied by them, and intimating that failure to comply with the notice would render them liable to punishment under S. 129 of the Act. The applicants applied to the High Court, under S. 45 of the Specific Relief Act, 1877, for a rule against the Commissioner of Police to show cause why the notice should not be cancelled and why he should not be restrained from carrying the same into effect:—*Held*, that the cancellation of the notice or the non-enforcing of it is an act clearly incumbent, by law, upon the Comissioner of Police, so as to bring it within S. 45 (b) of the Specific Relief Act, 1877. Under S. 28 of the Bombay City Police Act, 1902, the Comissioner of Police can only serve the notice upon the person who comes within the section, and not upon any person whom he merely suspects to be guilty of the conduct therein referred to. The misconduct or the immoral conduct must be a matter of fact and not a mere matter of suspicion. A Magistrate would not be justified in convicting any person, under S. 129 of the Bombay City Police Act, 1902, unless and until he is satisfied that the notice under S. 28 of the Act was not only duly served, but also that the woman had really conducted herself in the manner imputed to her under S. 28. *In re* TARABAI IBRAHIMPURKAR, **7 B.L.R. 161.**

165 S. 45—*License of public conveyance—Power of Commissioner of Police to grant licenses—B. Act VI of 1863, s. 6.*

S. 6 of B. Act VI of 1863 empowers the Comissioner of Police in Bombay to grant licenses for public conveyances and provides

Sup: Govt. acts (I of 1877) *(Contd).*

that he "may in his discretion refuse to grant any such license for any conveyance which he may consider to be insufficiently found or otherwise unfit for the conveyance of the public." Under this section the Comissioner is bound to exercise his discretion in each case. This discretion is not an absolute one, but one which is to be exercised after he had made himself acquainted with the conveyance to be licensed and has considered whether it, as an individual carriage, is fit for the conveyance of the public. When it appeared that the Commissioner of Police had approved of a certain pattern of victoria as a public conveyance in Bombay and refused to license victorias which did not conform to that pattern; *Held* that his refusal on that ground was illegal, and under s. 45 of the Specific Relief Act (1 of 1877), he was ordered to issue the licenses asked for.—GELL *v.* TAJA NOORA, **I.L R., 27 B. 307.**

Specific Relief Act (1 of 1877), s. 45—High Court Rule, No. 577.

Per Russell, J.—Under rule 577 of the High Court Rules, all applications under s. 45 of the Specific Relief Act (1 of 1877) should be made by motion and not by petition.—GELL *v.* TAJA NOORA, **5 B.L.R. 133=27. B. 307.**

166 S. 45—*License—Eating-house—Commissioner of Police—Discretion to refuse license—Act XLVIII of 1860, ss. 11, 12—Construction.*

The petitioner applied to the Commissioner of Police of Bombay under ss. 11 and 12 Act XLVIII of 1860 for a license for an eating house in a specified locality in Bombay. The license was refused on the ground that no more shops of the description were required in that locality. On petition to the High Court under s. 45 of the Specific Relief Act (1 of 1877): *Held* that under ss. 11 and 12 of Act XLVIII of 1860 the Commissioner of Police had no discretion to refuse the license.—RUSTOM JAMSHED IRANI *v.* HARTLEJ KENNEDY, **I.L.R. 1902. P. 1= 26. B. 396.**

167. S. 45.—*Indian Ports Act (X of 1889)—License.*

Licenses, granted under the Indian Ports Act to boats to ply for hire, cannot be revoked on the ground that the continuance of them affects the interests of contractors with Government. *In re* HAJI HASSAM MAHOMED, **4. B. L. R. 773.**

168. S. 45.—*Act XLVIII of 1860, Sections 11 and 12—Power of High Court to order Commissioner of Police to grant license for eating house.*

The five conditions mentioned in Section 45 of the Specific Relief Act are not disjunctive, the effect of which is that if any one of them is not complied with, the High Court will not put the section into operation.

The words 'personal rights' in that section are intended to cover what are known as such rights in the language of the jurisprudence, *i. e.*, rights *in rem* such as every human being in a civilized society possesses independently of any act of his own.

An order under Section 42 of the Specific Relief Act cannot be passed to compel the Commissioner of Police to grant a license for an eating house under Act XLVIII of 1860, Sections 11 and 12, as these sections give him a discretionary power to grant or refuse a license. *In re* RUSTOM JAMSHED IRANI. **3 B. L. R., 653.**

169. S. 45.—*Duty of Board of Examiners for Pleadership and Mukhtarship Examination.*

The Board of Examiners for Pleadership and Mukhtarship Examination refused a candidate to be examined without entertaining the certificates of character presented to them by the candidate relying on a decision of the previous Board arrived at some years previously that the candidate was not a fit and proper person to be accepted.

Held, that before the Board debar a person from presenting himself as a candidate, they ought to examine into his fitness at the time of his application. IN THE MATTER OF RUDRA NARAIN ROY. **28 C. 479.**

170. S. 45.—*See S. 42 and 45—30. B. 404. No. 163 supra.*

171. S. 52.—*Injunction—Lease—Coal-Surface rights—Subsoil rights—Mineral right—Landlord and tenant—Transfer of Property Act (IV of 1882), S. 108. cl. (o)—*

Of the land in suit which belonged to the Jheriah Raj, a lease was granted in 1824 to the principal defendants, who, on the 11th October 1893, transferred their rights as lessees to the other defendants to whom on the 2nd April 1896, the rajah also granted a lease of the under-ground rights in the land with the power of cutting and raising coal. In 1849, the then rajah had made a *khorposh* or maintenance grant of the same land to a member of the Raj family who on the 1st March 1893, leased whatever rights he had in surface and subsoil to the plaintiff. In a suit brought for a declaration of the plaintiffs' absolute proprietory right to the land and the minerals, for possession, damages and for an injunction to restrain the defendants for cutting, raising and appropriating coal:

Held that there was no direct evidence of the terms of the grant to the plaintiffs' lessor in 1849, which could not then be presumed to be more than a grant of the rents of the land for the life of the grantee and did not carry with it the right to open mines and raise minerals; and the present rights in the surface land were in the lessees under the lease of 1824 and their assignees. It was contended that the plaintiff nevertheless had a sufficient interest in the soil to entitle him to object to the working of minerals in or under it without his consent.

Held, that the plaintiffs' right being limited to the receipt of rents for the life of

Sup: Govt. acts (I of 1877) (*Contd.*)

his lessor, and there being no evidence that the security of those rents would be in any degree impaired by anything that the defendants had done or might do, or that the enjoyment of the right vested in the plaintiff had been or would be interfered with by them, the Court, in the exercise of discretion given by s. 52 of the Specific Relief Act refused to grant an injunction. TITURAM MUKERJEE *v.* COHEN. **9 C. W. N. 1073; 15 M. L. J. 379=7 B. L. R. 120=32 I. A. 185=33 C. 203. (P. C.).**

172. s. 52 & 54. *Civil Procedure Code (Act XIV of 1882), Section 522—Arbitration—Award—Award set aside by original Court—Decree in the terms of award by appellate Court is final—Injunction—Frame of suit.*

The plaintiff sued the defendant on the allegation that the plaintiff's goods were stored in a room of a house in the joint possession of the parties and that the defendant had obstructed him in having access to the room. He asked for an injunction to restrain the defendant from placing any obstruction in the way of his access to the room in which his goods were stored. It was objected that the suit as brought did not lie.

Held, that the form of the suit was not open to any objection.

When a court of first instance wrongly sets aside an arbitration award and passes a a decree against the terms of such award and a court of appeal dealing with the merits of the case comes to the conclusion that the award was not open to any such objections as are contemplated by section 521 of the Civil Procedure Code, and upon that finding passes a decree strictly in accordance with the terms of such award, such decree of the court of first appeal is entitled to the same finality as a decree of the first court would have been entitled to under the last part of section 522. 12 *W. R.*, 93; 14 *W. R.*, 327; 12 *C. L. R.*, 564; 22 *W. R.*, 447, *dissented from.* 26 *P. R.*, 1890; 25 *P. R.*, 1902 (*P. C.*), s. c., 1 *Digest* 1902 (*P. C.*); 10 *All.*, 8 *followed.* BAHAR BAKHSH *v.* INAYAT ALI. **89 P. R., 1904=26 P. R. 1905.**

173 s. 53, 54, 55—*High Court's power to grant temporary injunction.*

The plaintiff sued in the High Court, for the specific performance of an agreement for lease of certain premises, and the defendant in the suit sued the former in the Small Cause Court to eject him from the same premises; *Held* the High Court could on the application of the plaintiff grant an injunction restraining the defendant from proceeding with the suit in the Small Cause Court, pending the hearing of the suit in the High Court. The High Court has this power independently of the Civ. Pro. Code. (27 B 357. Dissented, 33 C 927. 9 C. W.N, 784, 34 C 101 referred to.) RASH-BEHARY DEY *v.* BHAWANI CHURN BHOSE. **34 C. 97.**

174. s. 53, 54, 56. *Injunction—Temporary injunction to restrain suit brought by defendant in the Small Cause Court—Civil Procedure Code (Act XIV of 1882), ss. 492, 493.*

In a suit by plaintiffs in the High Court to recover damages for breach of contract, they sought to obtain an interlocutory injunction restraining the defendant from proceeding with a suit filed by the defendant against the plaintiffs in the Small Cause Court in respect of the same contract until the hearing of the High Court suit.

Held that an application to restrain a suit in the Small Cause Court does not come within the provisions of ss. 492, 493 of Civil Procedure Code. The provisions of the Civil Procedure Code as to temporary or interlocutory injunctions are not the same as those under the Judicature Act, 1873, s. 25, sub-cl. 8. As the injunction asked for is a perpetual one, it can, under the Specific Relief Act, only be granted by the decree made at the hearing. JAIRAMDAS *v.* ZAMONLAL. **5. B. L. R. 201=27. B 357.**

175. s. 54. *Judicial discretion of Court—Where the act of the defendant amounts to an ouster of the plaintiff from the possession of the joint property.*

In a case where the act of the defendant amounts to an ouster of the plaintiff from his possession of joint-property, pecuniary compensation not being an adequate relief, an injunction would be the proper remedy. *Anant Ramrav* v. *Gopal Balvant*, (I. L. R., 19 Bom. 269), followed. —SOSHI BHUSAN GHOSE *v.* GONESH CHUNDER GHOSE. **I. L. R, 29 C. 500.**

176. s. 54. *Injunction—Encroachment on land—Building over a* dhora*—Compensation not proper remedy.*

The defendant encroached on an abutment (*dhora*) of the wall of the plaintiff which stood on a piece of ground belonging to the plaintiff. The wall divided the properties belonging to the parties. The abutment was on the defendant's side of the wall. The Lower Appellate Court awarded compensation for this encroachment, on the ground that there was a merely technical encroachment on the part of the defendant because only a foot or so of the plaintiff's ground was covered thereby;

Held that relief by way of injunction was the proper remedy in such a case, for to allow compensation would be to let a trespasser put a value or money's worth on another man's property and deprive him of it against his will. JETHALAL HIRACHAND *v.* LALBHAI DALPATBHAI, **I. L. R., 28. B. 298; 6. B. L. R. 83.**

177. s. 54. *Injunction—Mandatory Injunction restraining use of brick kilns.*

The plaintiffs sued for an injuction restraining the defendant from using certain brick kilns recently built by him, on the

Sup: Govt. acts (I of 1877) *(Contd).*

ground that substantial injury was certain to be done by the use of those kilns to a grove of fruit trees, close by, belonging to the plaintiff. The kilns had not been used, but there were evidence to the effect that similar kilns had done substantial injury to other groves in the neighbourhood.

Held that having regard to s. 54 of the Specific Relief Act, the plaintiff was entitled to the injunction prayed for, although no actual damage had yet been caused.

Held also that the fact that the plaintiff did not interfere with the erection of the kilns, did not estop him from bringing this suit.—HARGU LAL *v.* DWARKA PRASAD, **A. W. N., 1904, P. 101.**

177 (a) s. 54 *Injunction—Fact alleged by plaintiff and not denied in defendant's written statement or at hearing—Presumption—Repeated violation of legal right—Damages—Adequate remedy.*

In a suit praying for an injunction restraining the defendant from interfering with the plaintiff's possession of certain land, the plaintiff in the plaint alleged obstruction by the defendant. It was not denied by the defendant in his written statement or put in issue at the hearing:

Held that it might be presumed that the defendant did not deny the fact of obstruction. Repeated violation of an established legal right cannot in ordinary cases be adequately met by damages, nor can these damages be satisfactorily ascertained. APAJI *v.* APA **4. B. L. R. 534= 26. B. 735.**

178. s. 54. *See S. 21, 54, 56. 57—26. M. 168. No 46 Supra.*

179. s. 54. *See S. 52. & 54—26. P. R. 1905 No. 172 Supra.*

180 s 54—*See s. 53, 54, 55—34. C. 97 No. 173. supra.*

181 S 54—*See s. 53, 54, 56—27. B. 357. No. 174 supra.*

182 s. 54.(k)—*Agricultural purpose—Indigo factory—Injunction restraining tenant from rendering land unfit for tenancy.*

The manufacture of indigo cakes from indigo plants is not an agricultural purpose. Where a land has been let out for agricultural purposes, generally the erection of an indigo factory on any part of such land renders it unfit for the "purposes of the tenancy," and the landlord is entitled to a permanent injunction restraining the tenant from erecting the factory—SURENDRA NARAIN *v.* HARI MOHAN MISSER **9 C. W. N. 87=31. C. 174.**

183 S. 54, 55—*Obstruction to light and air —Injunction—Discretion.*

Both in India and England it is always discretionary with the Court to grant an injunction, where the discretion is reasonable and proper the Appellate Court should not ordinarily interfere with it. But where a mandatory injunction is issued arbitrarily the interference even in second appeal is

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not only justifiable but legally necessary. 33 Ch. D. 471, 15. W.R. 387, 5. Ch. A. 163, 32. I. A. 185 referred to. BIHARI LAL *v.* SHEOLAL **3. N.L. R. 114.** *(See Easements Act 5 of 1882 ss. 17, 15, 16, 33 and 35 for full notes of this case).*

184. s. 55.—*Building on another's land—Owner entitled to mandatory injunction and recovery of land.*

The plaintiff alleged that defendant had by constructing a new wall partly on his own land and partly on the plaintiff's land made an enroachment and prayed for possession of his land on removal of the encroachment. Both the lower Courts found that the defendant had encroached, but decreed only compensation to the plaintiff;

Held, relief by way of compensation in such a case as the present is tantamount to allowing a trespasser to purchase another man's property against his will 28 B. 298, F. "It is well established law in England that, if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it; unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land. This is also the law in India, with the exception that the party building on the land of another is allowed to remove the building" 20 B. 298, F. 20 A. 345, Distd 43 L. J. Ch. 790 and L. R. 1 H. C. 129, R.

In the present case, defendant has not even alleged any circumstances, which could give rise to an equitable estoppel and the relief asked for in the plaint should, therefore, have been decreed to plaintiff. SETH MOHAN LAL PARWAR *v.* CHAOUDHRI CHUNNI LAL PARWAR, **2 N. L. R. 4.**

184. (a) s. 55—*Suit for demolition of buildings—Delay—Damage.*

The plaintiff sued for the demolition of a building erected on property which has been found to belong jointly to the parties. The suit was instituted about a year and a half after the completion of the building but the lower appellate Court had found that the plaintiff, though he lodged no complaint, had from the first protested against the erection and that the building blocked one of the lower doors of the plaintiff's house.

Held, that under the circumstances of the case the mandatory injunction granted by the lower appellate Court in plaintiff's favour was proper. (A. W. N. 1901 P, 53 30. C. 901. distinguished) RAJA RAM *v.* MOTI RAM **A. W. N. (1906) 221.**

185 s. 55. *Injunction—Discretion of Court.*

No general rule can be laid down as to the cases in which a mandatory injunction to demolish a building should be given to a co-sharer who brings a suit for such

Sup: Govt. acts (I of 1877) *(Contd).*

injunction and who does not sue until some time after the completion of the building complained of. KAUSHAL SINGH *v.* GANESH SINGH **W. N. A. 1901, p. 53.**

186. s. 55 *Injunction—Mandatory injunction—Perpetual injunction—Trees over-hanging neighbour's land—Continuing nuisance—Threatened damage*

As every owner of land is under an obligation not to allow the branches of his tree to grow so as to over-hang, or the roots of his tree to extend so as to penetrate his neighbour's land to the detriment of the latter, in case of breach of such an obligation, it is open to the Court to grant a mandatory injunction for the removal of the nuisance under s. 55 of the Specific Relief Act, *Lemmon v. Webb, (1895 A. C. I.); Hari Krishna Joshi v. Shankar Vithal,* (*I. L. R.*, 19 Bom. 420): *Norris v. Baker,* (I Roll, 393); *Baten's Case* (9 Rep 53): *Shelfer v. City of London Electric Lighting Company.* (1 Ch. 287) referred to. A perpetual injunction restraining the defendant from planting trees the roots of which are likely to penetrate the foundation of the plaintiff's building and wall was held to be unworkable. *Bindu Basini Chowdhrani v. Jahnabi Chowdhrani.* (I. L. R., 24 Cal. 260), referred to.—LAKSHMI NARAIN BANERJEE *v.* TARA PROSANNA BANERJEE, **I. L. R., 31 C. 944; 8 C. W. N. 710.**

187. s. 55—*See S. 53, 54 & 55—34. C, 97 No. 173 supra.*

188, s. 55.—*See s. 54, 55—3. N. L. R. 114 No. 183 supra.*

189. s. 56. *Municipality—Bombay District Municipal Act (Bom. Act III of 1901), ss. 82 (c) 86—House-tax—Suit for injunction restraining levy of tax.*

The Surat City Municipality served, under section 82, clause (3) of the Bombay District Municipal Act (III of 1901) a notice of demand upon the plaintiff for house-tax due by him. The plaintiff instead of proceeding under s. 86 of the Act instituted a suit in the Civil Court for an injunction to restrain the Municipality from recovering the house-tax from him. The Lower Courts rejected the claim on the ground that, as the plaintiff had omitted to appeal to a Magistrate under s. 86 of the Act, his suit was premature.

Held that s. 86 was permissive merely and that it did not make it incumbent in every case upon a party complaining of an illegal levy of a tax by a Municipality to appeal against the action of the Municipality to a Magistrate before suing in a Civil Court. But *held* also (confirming decree), that the injunction prayed for in this case could not be granted. By s. 56 of the Specific Relief Act, an injunction cannot be granted where efficacious relief can be obtained by any other usual mode of proceeding. S. 86 of Bom. Act III of 1901 gave a remedy to the plaintiff but instead of restoring to it, he filed this suit for an injunction. It was discretionary for a Court to grant an injunction and that discretion must be exercised judicially with caution and only in very clear cases. This was not a case of that kind. —CHUNILAL *v.* SURAT CITY MUNICIPALITY, **I. L. R. 27 B. 403.**

190 S. 56.—*Execution of decree—Agreement in satisfaction of—Civil Procedure Code (XIV of 1882), s. 244, 258—Separate suit—Uncertified adjustment—Suit for staying execution and declaration of—Satisfaction—Injunction.*

Where a decree is alleged to be satisfied by an agreement out of Court, but satisfaction is not certified to the Court, a subsequent suit on the agreement is not maintainable for a declaration that the amount payable under the decree has been paid and satisfied and for an injunction restraining the decree-holder from executing the decree. S. 244 of the Civil Procedure Code (Act XIV of 1882) is a bar to such suit; s. 258 of the Code does not restrict the operation of s. 244. *Prosunno Kumar Sanyal* v. *Kalidas Sanyal* (I. L.R., 19 Cal. 683); *Azizan* v. *Matuk Lal Sahu* (I.L.R., 21 Cal. 437) and *Bairagulu* v. *Bapanna* (I.L.R. 15 Mad. 302) followed.

Per Hill J.—The prayer for injunction restraining the defendant from proceeding with the execution of the decree conflicts with the provisions of s. 56 of the Specific Relief Act (1 of 1877).—DENO BUNDHU NUNDY *v.* HARI MATI DASI, **I.L.R. 31 C. 480; 8 C.W.N. 395.**

191 S. 56 (G)—*Drains—Municipal Committee's powers—Conditional injunction—Municipal Act, 1890, Section 123—Specific Relief Act, 1877, Section 56 (g).*

In this case the plaintiffs were certain house-owners whose houses abut on a public street in the town of Pindigheb. A drain runs along this street through which the surplus water of the residents of the street and others is discharged. There is a *dharmsala* to the east of plaintiff's houses which has a well, the waste water of which used to run to the north through certain premises in that direction. On the Municipality diverting the flow of this water from the north, and constructing a masonary drain through which it now runs on to the drain in plaintiffs' street, a suit was filed against the Municipality by the plaintiffs for a perpetual injunction restraining the Committee from discharging the water of the *dharmsala* through the drain in their street. A suit was filed also by the person in charge of the *dharamsala* for a similar injunction to restrain the defendants from interfering with the discharge of water through the properties lying to the north and diverting its flow to the drain in the street above-mentioned.

Held that the plaintiffs had no right whatever to prevent the defendants from letting the water of the *dharmsala* flow

into their drain. They could only object if their rights were interfered with by the diversion, and only to that extent. The lower Courts acting on the expert opinion of defendants' witnesses found for plaintiffs on the question of prospective damage to them, and granted the injunction prayed for so long as the Committee do not construct a new drain on its own land not calculated to cause any damage to plaintiffs. The Chief Court on appeal in lieu thereof granted a perpetual injunction prohibiting the defendants from diverting the water of the *dharmsala* into their drain, if they do not, by a certain date, construct a masonry drain along the street in front of plaintiffs' houses which will be sufficient in the opinion of the Court of the District Judge to carry off all the water that ordinarily runs through that drain as well as the water of the *dharmsala* without causing any damage to plaintiffs' houses. The injunction to come into force on failure of the defendants to consrtuct such a drain by the date fixed.

The Specific Relief Act contains no prohibition against conditional injunctions and the jurisdiction in equity in cases of this kind must be plenary, so that the Court may be able to give relief proper to the circumstances of the case and ought not to be hampered by rigid rules.

In the case by the person in charge of the *dharmsala*, *held*, that the Committee could have ordered the diversion of the water and the construction of the *pacca* drain under Section 123 of the Municipal Act, subject to causing no injury to the plaintiff's property by such order. Although Acts of trespass on private property by powerful public bodies require to be put down by the Courts, and it is no defence to say that the act complained of, though not done in accordance with the procedure provided by the statute governing them could have been so done, yet in this case the defendants were more favourably placed with respect to the *dharmsala* and the equity in favour of the plaintiff was not strong. The defendants had with the tacit consent and acquiescence of the plaiutiff and others interested in the *dharmsala* acquired a footing with respect to looking after the discharge of the water, their act had caused no damage, but had improved the sanitary condition of the *dharmsala* and they had defrayed the expenses of the new drain themselves.—6 Mad., H. C. R., 112; 39 L.J., Ch. 129; L. R., 17, Ch. Dn., 685, *followed*. HARI SINGH *v.* THE MUNICIPAL COMMITTEE OF PINDIGHEB. **P. R. No. 78 of 1901.**

192 S. 56—*See ss. 21, 54, 56, 57—26 M. 168 No. 46 supra.*

193 S. 56—*See S. 53, 54, 56—27. B. 357. No. 171 supra.*

194 S. 57—*Contract Act (IX of 1872) Section 27—Injunction—Negative agreement—Agreement in restraint of trade.*

Section 57 of the Transfer of Property Act deals only with such objection to the enforcement of a negative agreement as might arise from the inability of the Court to compel specific performance of the affirmative agreement coupled therewith, and therefore appears to leave unaffected objections that might arise on other grounds such as the invalidity of a negative agreement, so far as it would operate to restrain any one from exercising a lawful trade or business.

The invalidity arising from section 27 of the Indian Contract Act 1872, does not depend upon the restraint being absolute either as to time or space.

An agreement to exercise a trade or business, for a given period, in the exclusive service of one person, is not an agreement in restraint of trade, though it may necessarily prevent service for any one else during that period.

The section extends to agreements of a negative character such as are necessarily implied from contracts for whole time service, even if not expressed therein and the operation of such contracts as contracts for service, appears in such cases to prevent the application of section 27 of the Contract Act to such negative agreements so far as they purport to impose restrictions only during the period of affirmative agreement for service after the expiry of that period, such negative agreement could form no part of a contract to exercise the business or trade, and would then be void as agreements purporting to do nothing else than restrain. PRAGJI SOORJI *v.* PRANJIWAN TOOLJARAM, **5 B. L. R. 878.**

195 S. 57—*See ss. 21, 54, 56, 57—26. M. 168 No. 46 supra.*

43. Act III of 1877 (*Registration Act*).

1 S. 3—*Kanom—Unregistered agreement to renew—Right of subsequent assignee with notice of agreement.*

The defendant held a *kanom* from the owner who agreed to grant a renewal of the same to him for a further period of 12 years. The agreement to renew was not registered. The plaintiff, assignee of the rights of the owner, sued for possession of the property on the expiration of the *kanom* and contended that the agreement to be operative against him required registration. The defendant pleaded that the plaintiff when he purchased the rights of the owner was aware of the agreement to renew the kanom and was not entitled to eject him.

Held, that in the absence of a registered instrument in support of the defendant's alleged title to hold the kanom for a further period of 12 years it must be held that the defendant had not valid answer to the plaintiff's claim. 24 Mad., 462, 8 A.C. 474 *referred to.* ACHUTAN NAMBUDRI *v.* KO-

Sup Govt. acts (III of 1877) *(Contd.)*

MAN NAIR. **12 M.L.J. 217.**

2 s. 3—*T. P. A. Ss. 105, 107, Lessee's suit to recover rent from tenant—Lease—Kabuliat—Stamp Act.*

A obtained a lease of a village from B whose tenant was C. A sued C for recovery of rent, C admitted in his statement that A was lessee of the village but subsequently contended that no lease was executed by B in favour of A who had merely executed a *kabuliat* which was registered.

Held, per SCOTT, J.C., that C could not be allowed to deny that A was lessee of the village.

Held, per WELLS, A.J.C., that under the Stamp Act and S. 3 of the Registration Act, "lease" includes *kobuliyat*, and that it need not be executed by the lessor under the Transfer of Property Act. BHOPAL *v.* CHHATAR SINGH, **8 O.C. 197.**

3 s. 3—*Suit for money due as price of trees—Damages for breach of contract—Suit for arrears of rent—Grant to cut timber of a certain size, and class—Lease of Forest rights.*

A grant of the right to cut timber of a particular class and size during a defined time, though extremely restricted in its scope, which prohibited the lessee from doing any damage to the forest, and granted no interest in the soil itself, was a grant of the most valuable of the forest rights and could not be regarded as a sale of timber.

A grant of a fishery or of pasturage rights or the like may be made independently of an interest in land 33 C. 601 Ref.

Standing timber though moveable property within the meaning of S. 3 of the Registration Act, yet under S. 3, cl. 25 and S. 4 of the General Clauses Act of 1897, it is immoveable property within the meaning of the Civ. Pro. Code P.R. 112, 7 A.W.N. 59, 19 B 207, 11 M. 193 Ref.

Growing trees may be regarded as part of the soil and consequently immoveable property 7 Exch 77=86 R.R. 576 Ref.

But where the grantee has no right to the soil, takes no interest in the land and obtains a right to the trees to fell them immediately or within a reasonable time without any stipulation for the beneficial use of the soil but with a license to enter and take the trees away, the transfer may be regarded as one of the moveable 33 R.R. 259 Ref. ABDULLAH SARKAR *v.* ASRAF ALI MANDAL, **7 C.L.J. 152.** *(See No. 29 infra.)*

4 s. 3 17—*Transfer of Property Act (IV of 1882) s. 107—Immoveable property—Lease of right to receive market dues.*

Held that the right to collect market dues upon a given piece of land is a benefit to arise out of land within the purview of s. 3 of the Registration Act. A lease, therefore, of such right for a period of more than one year must be made by registered instrument.—SIKANDAR *v.* BAHADUR—**2 A. L. J. 208=A. W. N. 1905. P. 48=27. A. 462.**

5— s. 3 and 17—*Amalnama not registered and not forming lease,—Admissibility—Suit for ejectment.*

Certain documents produced by the defendant in answer to the plantiff's claim for ejectment were described as *amalnamas* and had been granted to the defendant by the plantiffs' lessor. They permitted him to clear the jungle and hold the land without payment of any rent for 9 years and, on the expiration of that period, the lands were to be measured and assessed and granted on *patta* to the defendant on execution of a *kabuliat* by him. No lease was granted to the defendent in accordance with the *amalnamas* that he was allowed to hold on upon payment of rent.

Held, they were neither leases nor agreements to lease within S. 17 of the Act and could be admitted in evidence without registration 7 C. 733. D. DWARKA NATH SAHA *v.* LEDU SIKDAR, **33 C. 502.**

6. S. 3, 28, 64, 65.—*Registration of a document relating to property situate partly outside British India.*

A document relating to immoveable property which is partly situate within British India and partly outside British India, can be registered, under Act III. of 1877, in the district in which a portion of the property is situate.—GOPAL *v.* ANNABHAT, **25 B. 50.**

7. S. 3, 47, 75.—*Deed of gift.*

Held, that, sections 75 and 47 of Registration Act show that the registration of a document does not depend on the consent of the person executing it. If the Registrar finds that the document has been executed, and that the requirements of the law have been complied with on the part of the applicant or person presenting the document for registration as the case may be, the document would be registered. S. 75 provides that registration shall take effect as if the document was registered when first presented for registration. The donor who made over the deed of gift to the donee and gave him authority to present the document for registration, had done all that was necessary to make the deed legally complete. (17 Mad. 433 dissented from).—PAYAG SINGH *v.* KAMTA SINGH, **3 O. C., 231.**

8. S. 7.—*Registration of mortgage—Interest in land—Right to redeem immoveable property mortgaged—Transfer of Property Act (IV of 1882), S. 59.*

Two documents were produced in evidence, one of which was in terms an absolute sale. This document had been registered. The other document (which was not dated) had apparently been written contemporaneously with the first, but it had not been registered. This document purported to show that the transaction between the parties was a mortgage:

Held that the second document could not be received as evidence of a mortgage transaction not below Rs 100, and that the registration of the first document, which was on the face of it an absolute and uncon-

Sup: Govt acts (III of 1877) (*Contd.*)

ditional sale, could not be regarded or operate as the registration of a mortgage. Though there is nothing to prevent the whole of a mortgage transaction being reduced in any form to writing on different papers, whether attached together or detached, yet the requirements as to registration cannot be said to have been complied with if some of such papers are registered while others are left unregistered. A document which gives a person a right to redeem a mortgage on immoveable property on payment of money creates an interest in immoveable property and its registration is compulsory under s 7. of the Registration Act.—MUTHA VENKATACHELAPATI *v.* PYANDA VENKATACHELAPATI, **27 M. 348.**

9. S. 7,—30 (a), 87. *District Registrar—Registration of a deed concerning lands situated in separate Registration sub-district.*

A Sub-Registrar, being empowered, under s. 7 of the Act, to discharge the duties of a District Registrar, registered a bond which might have been registered by the Registrar at his discretion under section 30 (a) of the Act.

Held, that the bond was validly registered and that section 87 of the act removed any doubt as to the validity of the registration.—18 C. 556 D. JOGESHWAR NARAIN SINGH *v.* RAI RADHA RAWAN.—**3 C. L. J. 165.**

10.—S. 17.—*Agreement to lease—Endorsement of Manager on memorandum of* Darkhast *communicated to the applicant.*

Held, that the endorsement of the Manager on the memorandum of *darkhast*, which endorsement was communicated to the applicant, must be taken to be an agreement to lease and therefore to be subject to the provisions of the Registration Act as if it were a lease.

Where it did not in terms purport to be for a period of exceeding five years nor did the rent reserved by it exceed Rs 50 per annum—

Held, that it did not require registration under s. 17 of the Registration Act being exempted from registration by the notification of Goverment published under that section. The criterion for registration is what is expressed on the face of the document and not what would be the operation of document by custom.—RAMASAMY AIYAR *v.* THIRUPATHE NAICK.—**13. M.L.J. 1903 P. 356 = 27. M. 43.**

11.—S. 17.—*Endorsement on mortgage bond about part payment of debt.*

The plantiff purchased a mortgage bond and brought a suit against the transferees of the property mortgaged to recover the principal and interest. The bond bore an endorsement that a portion of the mortgage debt had been paid off and that a specific portion of the property was released thereby. *Held* such endorsement did not require registration,—GANGA BAKSH *v.* JAGANNATH,—**A.W. N. 1904. P. 266 = 27. A. 305.**

12. S. 17—*Assignment of arrears of profits—Registration S. 54 Transfer of Property Act.*

A co-sharer assigned arrears of profits

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due to him by a lambardar. The assignee sued to recover the arrears due.

Held that the deed of assignment did not require registration either under S. 17 Registration Act. or S. 54 of the Transfer of Property Act, as the arrear was only a debt due to the plaintiff's vendors by the *lambardar* DAMODAR DAS *v.* GIRDHARI DAS. **A.W. N. 1905 P. 100. = 2. A. L. J. 692 = 27. A. 564.**

13. S. 17.—*Deed of gift of immoveable property—Registration by legal representative after death of donor—Validity of gift.*

The voluntary registration of a deed of gift by the legal representative of the donor has the same effect as its voluntary registration by the donor himself in his life time.—MELYYALU NADAN *v.* ANJA LAY, **12. M. L. J. 409 = 25. M. 672.**

14 S. 17.—*Withdrawal petition setting out terms of compromise filed in Court but not registered—Subsequent suit for land referred to in the compromise—Necessity for registration.*

In 1893, plaintiff sued defendants for possession of certain immoveable property The parties then entered into a compromise, by the term of which defendants were to give plaintiff a portion of the property sued for. They then filed a petition in Court setting out the agreement at which they had arrived and asking that the suit might be withdrawn. The Court thereupon ordered the suit to be struck off the file, and made an order as to costs. The agreement was never registered. Plaintiff, relying on the agreement now sued to have it established and to recover possession of the property to which he was entitled under it.

Held that the agreement should have been registered and that the suit brought on it must fail.—MUTHAYYA *v.* VENKATA RATNAM, **25 M 553**

See Nos. 14, 17, 18, 20, 22, 24, 27, 34, 41, 69 *infra.*

15. S. 17—*Endorsement on a mortgage-bond showing payment for and release of a specified portion of mortgaged property—Registration.*

A purchased a specified portion of a certain mortgaged property and paid off a portion of the mortgage-debt. The fact of such payment together with the release of the portion purchased was endorsed on the mortgage-bond.

Held, that the endorsement did not require registration, 7. A. 820 followed GANGA BAKHSH *v.* JAGANNATH, **27. A. 305.**

(*See* Nos. 28, 21, 60, 63, 65, 77, & 78 *infra.*)

16. S. 17—*Partition already completed—Memorandum in bahis—Registration evidence.*

Held, that entries in the *bahis*, containing the details of a partition of immoveable property exceeding the value of Rs. 100 already completed by the parties, do not constitute a deed of partition and do not require registration. They are only a memorandum of the transaction already com

Sup: Govt. acts (III of 1877) (*Contd.*)

pleted and cannot be excluded from evidence for want of registration. GANGOD GIR *v.* SHAM GLIR, **33 P. L. R. 1905=48. P. R. 1905.**

17 S. 17—*Registration—Compromise of suit embodied in a decree.*

In a suit for possession of certain land reference was made to a compromise in a previous suit relating to other lands, but which dealt also with the land in suit and had been incorporated into the previous decree.

Held, that such compromise did not require registration and was admissible in evidence. 20 A. 171. 22 M. 508, 1 C. L. J 388. ref. RAGHUBANS MANI SINGH *v.* MAHABIR SINGH. **A. W. N. (1905), 195=2 A. L. J. 564=28. A. 78.** *(See No 14 Supra and Nos 17, 20, 22, 27, 34, 41 and 69 Infra.)*

18 S. 17—*Registration—Agreement by plaintiff not to prosecute claim and not to execute decree—Release—Decree in favour of plaintiff—Execution applied for by plaintiff's son.*

The plaintiff in a suit agreed not to prosecute the suit against one of the defendants, and even if a decree were passed, not to execute the decree on the ground that he had subsequently discovered and admitted the defendant's title in the property. The suit was accordingly not defended by the said defandant. Nevetheless the property came to be included in the decree. On the death of the plantiff, an application was made on behalf of his minor son to execute the same.

Held, that the agreement was not a release of interest in immoveable property, and so did not require registration.

Held, also, that even if it was a release, it was admissible in evidence for the collateral purpose of proving that the deceased plaintiff was not to prosecute the suit or to execute the decree should the property be included in the decree, and that the application for execution should be dismissed. KRISHNAMACHARIAR *v.* RUKMANI AMMAL. **15. M. L. J. 370.** *(See Nos. 14, 17, 20, 22, 27, 34, 41 and 69)*

19 S. 17—*Registration—Document collateral—A permanent lease of immoveable—Property—Transfer of property Act (IV of 1882), s. 107—Evidence Act (1 of 1872), s 92—Assignment of property to trustee—Trust deed.*

An agreement to pay Rs. 500 a month to a lessor in consideration of receiving from him a permanent lease of portions of his zamindari, which agreement was come to before, but reduced to writing after, the execution of the lease, was *held* to be not affected by s. 92 of the Evidence Act, nor to require registration either under the Registration Act, s. 17, or the Transfer of Property Act, s. 107, where it was net inconsistent with the lease, its provisions formed no part of the holding under the lease, the payment bargained for was no charge on the property, and it was not rent or recoverable as rent, but a mere personal obligation collateral

Sup: Govt. acts (III of 1877) (*Contd.*)

to the lease: *Held also*, that the lessor's rights under the agreement did not pass under a settlement subsequently executed by him for the benefit of his son, by which he assigned to a trustee his zamindari with its incidents, and also that the use of the words "Now due, owing or payable" in a deed do not include "demands payable and to become payable" and where therefore, the lessor had, after execution of the trust deed, assigned his rights under the agreement: *Held* that the assignee could maintain a suit upon it to recover the amount due.—SUBRAMANIAN CHETTIAR *v.* ARUNACHALAM CHETTAIR, **I. L. R., 25 M. 603=6. C. W. N. 865=12. M. L. J. 479=4. B. L. R. 839=29. I. A. 138 (P. C.)**

20. S 17 *Compromise—Muhammadan Law—Family arrangement.*

Held, that a family arrangement in consideration of a cancellation of a *tamliknama*, which provided that J. S. should get the estate with which he had already parted subject to certain conditions during his life and with remainder to certain other persons on his death, was valid under Muhammadan Law.

Held, also, that a petition containing the above arrangement filed in a suit did not require registration under section 17, Registration Act 1877.—*Mussammat* NURAIBIBI *v.* GHULAM HASSAN SHAH. **P. L. R., 20 of 1901.** *(See Nos. 14, 17, 18, 22, 24, 27, 34, 41 69)*

21. S. 17—*Receipt operating as relinquishment of mortgage-rights.*

A receipt for rupees one hundred or upwards to operate as a relinquishment of mortgage rights and as an acknowledgment that the mortgage has been redeemed, requires registration under section 17 of the Registration Act, and if unregistered is inadmissible inevidence. NAND LAL *v* GURDITTA MAL.—**141 P. L. R., 1902=93 P. R. 1902.**—*(See No. 15 Supra and Nos. 28, 60, 63, 65, 77 and 78, infra.)*

22 S. 17.—*Application embodying agreement hypothecating immovable property and granting time filed by parties in execution proceedings S 257 A C. P. C.—Objection in a subsequent suit as to non-registration of the application—Evidence Act (I of 1872), Section 91—Admissions as to agreements requiring registration.*

In execution of a money-decree an agreement was arrived at between the parties, which was embodied in an application filed in Court, under which the equity of redemption of the two houses, which had been attached, were hypothecated for the sum due on account of the decree including costs, and four months' time was given for payment. The plaintiffs applied for execution after the expiry of the term, but it was held that the agreement was a complete satisfaction of the decree which was not therefore capable of execution. The plaintiffs brought the present

Sup: Govt. acts (III of 1877) (*Contd*).

cation was not inadmissible in evidence, and the suit was not in any way barred.

The want of registration of an agreement requiring registration does not invalidate it, and Section 91 of the Evidence Act does not prevent admissions made by the executant of such a deed to be admitted into evidence in proof of the agreement. PARABH DIAL *v.* GURMUKH **98. P. R. 1902=18. P. L. R. 1903.**—*(See Nos. 14, 17, 18, 20, 22, 24, 34, 41, 69)*

23. s. 17. *Sale in lieu of dower—Value of property.*

Section 17 of the Registration Act being a disabling section must be construed strictly.

Unless a document clearly purports, on the face of it, to affect an interest of greater value than Rs. 100, it lies upon the party affirming the value to exceed Rs. 100 to prove the fact affirmatively.

A deed of sale by a husband in favour of his wife in lieu of dower requires registration when the interest affected by the document exceeds Rs. 100. It cannot be treated as a mere gift. 4 *Mad High Court Reports 115; 5 All., 65; 7, All, 178; P. R. 87 of 1882, referred to.* MUSSAMMAT BHAGAN *v.* HARI MAL. **90. P. L. R. 1904.**

24. S. 17.—*Petition of compromise registration thereof so far as it relates to properties not litigating.*

S. 17 of the above Act does not apply to proper judicial proceedings whether they are pleadings filed by the parties or orders made by the Court. A petition of compromise, so far as it relates to properties in dispute, does not require registration, for, such portion of the compromise becomes merged in the decree passed by the Court which does not require registration. But so far, as it relates to properties extraneous to the litigation, the decree passed in the suit not being operative, thereon the petition of compromise must be registered, if it affects immoveable property exceeding one hundred rupees in value, 30, C. 783,26 I. A. 101 Referred, 20 A. 175 25, I. A 9 distinguished BIRBHADRA RATH *v.* KALPATARU PANDA, **I. C. L. J. 388 (406)** *See Nos. 14, 17, 18, 20, 22, 24, 34, 41 69.)*

24 (a). s. 17. *Compromise—Decree in a money suit—Charge on immoveables—Registration.*

S. 17 Registration Act does not apply to proper judicial proceedings, whether consisting of pleadings file in court by the parties or orders made by the court when registration would otherwise be compulsory. In order to see whether a particular term of a compromise incorporated in a decree under S. 375 C. P. C. relates to the suit, the frame of the suit, the relief claimed and the relief allowed by the decree must be considered. GOBIND CHANDER PAUL *v.* DWARKA NATH PAUL—**7. C. L. J 492.**

25. s. 17—*Immoveable property—Right to manage temple and endowment—Description,*

Sup: Govt. acts (III of 1877) (*Cont'*)

sufficiency of—Defective description of part of document—Refusal to register whole, if good.

The right of a manager of a Hindu temple, even though such management involves the holding of immoveable property forming part of the endowment of the temple, is not immoveable property within the meaning of the Registration Act.

A document which transfers the right to manage a temple and its endowment is sufficiently descriptive if the name and situation of the temple, the extent of the lands and the registry are given in it.

The description of a portion of property included in a deed was not sufficient and registration of the deed was refused.

Held, that the deed should have been registered in regard to property sufficiently described. KESAV PILLAY *v.* KANNUSAMY PILLAY. **15. M. L. J. 30.** *(See no 28 infra.)*

26. s. 17. *Oral conveyance—Possession given to a transferee—Subsequent registered deed in favor of transferee who has notice of pervious agreement—Estoppel.*

Certain successful plaintiffs after obtaining their decree, gave certain portion of land to their relative who had helped them in their suit and got this person's name entered in the village papers as a co-sharer and he was put into possession by consent of the other co-sharers, but no conveyance of the share was executed and registered. Subsequently one of the original donors purported to sell the share so assigned to a person who had notice of the terms upon which it was held by the original donee.

Held, that this sale, though under a registered instrument, was ineffectual as against the rights of the original donee, for both the vendor and the vendee knew that the vendor could not convey without committing a fraud on the orginal donee. 1 Johnson & Hemming 702, 14 Ch D 563 & 3 Atk 646 *Referred.* ANNU MAL *v.* THE COLLECTOR of BAREILLY, **A. W. N. (1906), 17=3 A. L. J. 100=28 A. 315.**

27. s. 17. *Compromise—Petition registration—Admissibility.*

A *razinamah* stamped with eight-anna Court fee stamp filed in a Court in a suit relating to immovable property of over Rs. 100 in value giving the names of the parties and the nature of the suit and praying for dismissal of the suit in accordance with its terms does not require to be registered under S. 17 of the Act 76 P. R 1897, 25 M 553 Diss Whether it actually contains the contract between the parties to it, or whether the agreement was actually made prior to the writing of the document, the latter being merely a memorandum of the oral contract and intended solely as a petition to the Court with a view to its taking action in accordance with the arrangements made out of Court 95 P. R 1894 & 98 P. R 1902 followed

Sup: Govt. acts (III of 1877) (*Contd*).

neither creates nor declares any rights so as to be compulsorily registrable under the section. Moreover, the *razinamah*, in so far as it was submitted to and was acted upon judicially by the learned Judges, was in itself a step of judicial procedure not requiring registration. 22 M 508 followed & 30 C 783 Diss. KHAIR-UL-NISA *v.* BAHADUR ALI, **27 P. R. 1906**. (*See Nos. 14, 17, 18, 20, 22, 24, 27, 34, 41 & 69*).

28. S. 17.—*Release.*—

A release executed by a mortgagee in favour of an assignee of a portion of the properties mortgaged must be registerd, where the interest sought to be extinguished by it is of the value of Rs. 100 or upwards. (2 A 554, 2 B 489, 16 W. R. 56, 2 P. L. R. 615 referred.) IMAM ALI *v* BAIJ NATH RAM SAHU,—**10 C. W. N. 551=3 C. L. J. 576=33 C. 613.** (*See Nos. 15 Supra and Nos. 21, 60, 63, 65, 77 and 78 infra.*)

29. S. 17.—*Registration—Sale of standing timber.*

Held, that a document giving a "*theka*" of a certain portion of a forest "for all kinds of trees" for two years was not a document conveying an interest in immovable property and did not require to be registered.—MATHURA DAS *v* JADUBIR THAPA,—**20 M. 58 Diss A. W. N. (1906), 4=3 A. L. J. 138=28 A. 277**.—(*See No. 3 Supra.*)

30. s. 17.—*Document creating a future right in immovable property.*

A sold property to B by a registered sale-deed for Rs 399 and on the same day agreed by an unregistered deed to re-transfer the property for Rs 150 on the last day of *Jeth* in any year. *Held*, that the latter document not having been registered was inoperative.—SURAJ PERSHAD *v* PHUL SINGH,—**A. W. N. (1906), 180.**

31 s. 17.—*Registration—Transfer of property under litigation—Promise of transfer—Value of right when not expressed.*

A document containing a promise to transfer property under litigatiton, if decreed in favor of the executant, is not compulsorily registrable under section 17 of the Registration Act.

In the case of a promise to transfer property under litigation, the value of the property, after the litigation is over, cannot be presumed to have been the value of the right of the party found entitled to it while the litigation continued. GIRJA NAND *v* NATHU RAM.—**174 P. L. R. 1905.**

32. S. 17. *Malabar Law—Karnawan—Renunciation of right to succeed as kárnawan—Validity.*

It is open to a *karnavan* of a *tarwad* to renounce his right to manage the *tarwad* affairs but such a right is not an interest in immoveable property and does not require registration under S. 17 (6 Mad. H. C. R., 145) commented on. KENATH PUTHENVITTIL TAVAZHI *v* NARAYANAN,—**14 M. L. J. 415=28. M. 182.** (*F. B.*)

Sup: Govt. acts (III of 1877) (*Contd.*)

33. s. 17.—*Receipt for money not purporting to extinguish mortgage-debt—Registration Act (III of 1877), S 17.*

A sued B. to recover a certain sum of money due on a mortgage-bond. B. alleged that nothing was due and produced a receipt to prove payment of the principal—the payment of interest having been proved by other evidence. The receipt was unregistered and A objected to its admissibility.

Held, that the receipt did not require to be registered, as it did not purport to extinguish the mortgage, nor was it used or relied on for any other purpose than to prove payment of the principal. SOHAN LAL *v.* BALDEO PARSHAD, **7 O. C. 321.**

34. s. 17. *Compromise, petition of, relating to immoveable property—Judicial proceedings.*

Held, that a petition or a pleading acted upon or given effect to by the Court becomes part of the judicial proceeding and does not require registration, but if a transfer which the petition purported to effect was not only not given effect to by the decree but was positively inconsistent with it, the petition was not exempt from the necessity of registration as part of a judicial proceeding. SYED NURUL HASSAN *v.* WAZIR MIRZA, **6 O. C. 362.** (*See Nos, 14, 17, 18, 20, 22, 24, 27, 41, & 69*).

35. s. 17—*Splitting up of transaction.*

Two unregistered mortgage bonds for Rs. 99 each were executed by the same person on the same date in favour of the same person. Both the bonds formed portion of one and the same transaction by which a sum of Rs 198 was borrowed. *Held* that there is nothing in the Registration Act which forbids the splitting up of a transaction in this manner and the bonds were valid.—RAMJI MAL *v.* CHHOTI LAL,—**A. W. N. 1906. P. 281=3. A. L. J. 661=29. A. 50**

36. s. 17.—*Mortgage-decree for Rs. 100 or up-wards—Sale by unregistered deed—Validity C. P. C. S. 232.*

A mortgage decree for Rs 100 or more is assignable without registration (23 C 450, 6 C. W. N. 5 followed 9 C. 839 considered.)

The validity of an assignment of a decree cannot be questioned after the assignee has been placed on the record as substituted decree-holder. RAM RATAN CHUCKERBUTTY *v.* JOGESH CHANDRA BHATTACHARYA,—**12 C. W. N. 625.**

37. s. 17.—*Security bond given under Civil Procedure Code, S. 545—Transfer of Property Act, S. 58—Order accepting security.*

A security bond, pledging immovable property exceeding Rs 100 in value was signed by the obligor and attested by two witnesses. The Court endorsed thereupon the words "security is accepted." It was contended that the deed did not require registration. *Held* the deed fell under S. 58 of the Transfer of Property Act and required registration under S. 59, and S. 17 of the Registration Act. *Held also*, the words "security

is accepted" merely meant an intimation by the Court that the property given as security was sufficient for the purpose. (32 C. 494 followed, 13 M. 1 and 203. 22 M. 508 and 20 A, 171 referred.) NAGARURU SAMBAYA *v.* TANJATUR SUBBAYYA,—**3 M. L. T 317.**

38. s. 17.—*And 11 and 12 Victoria Ch 21 S. 23—Insolvency —Fixtures—Goods and chattels—Registration of mortgage—*

The owner of a flour mill mortgaged all the machinery, engines, plant, stock, implements, utensils, trade fixtures, chattels, and effects specified in schedule annexed to the deed of mortgage, to the plaintiff, for Rs. 8,000 then advanced, and power was given to the plaintiff to sell the same in default of payment. After this the owner became insolvent, and his estate thereupon vested in the Official Assignee. The plaintiff claimed the mortgaged property, but the Official Assignee contended that under S. 23 of the Indian Insolvency Act, (Stat. 11, 12 Vic., c. 21) he was entitled to it as property which with the consent of the true owner was in the possession, order, or disposition of the insolvent at the date of insolvency. The property was sold by consent and plaintiff brought this suit to recover the proceeds. From the evidence it appeared that the greater portion of the mortgaged property consisted of articles fixed to various parts of the flour mill or of the machinery therein.

Held as to the articles not so fixed, that the plaintiff was not the true owner of these and that they were not therefore within the section and passed to the Official Assignee. As to the fixed articles, that they were not goods and chattels in the possession, order, or disposition of the insolvent as the reputed owner and that they were not in his reputed ownership within the section. The plaintiff was therefore entitled to them or to such portion of the proceeds of sale as represented their value. It was contended that the fixed articles must either be goods and chattels or immoveable property, and if the latter, they could not be affected by the mortgage deed as it was not registered, and the charge in favour of the plaintiff was therefore invalid.

Held that the question of registration depended on the Registration Act (III of 1877), which requires the registration of all assurances of immoveable property. The fixed articles in question did not fall within the definition of immoveable property contained in S. 3 of the Act, not being "attached to the earth or permanently fastened to any thing which is attached to the earth." S. 17 of the Registration Act therefore did not apply. Fixtures are not goods and chattels within the rules of reputed ownership laid down in S. 23 of the Indian Insolvency Act (Stat. 11, 12 Vic, c. 21). The fact of such fixtures being removeable by a tenant makes no difference. They are still fixtures to which the doctrine does not apply.—MACLEOD *v.* KIKABHOY, **3. B. L. R. 426=25. B 659.**

39. s. 17.—*See S. 3 and 17—27. A. 462 and 33. C. 502. Nos. 4 and 5 supra.*

40. S. 17.—*Documents compulsorily registerable and not registered—Evidence for collateral purposes.*

A document, of which registration is compulsory under the Registration Act 1877 may be used as evidence for any collateral purpose—for any purpose other than that of creating or extinguishing a right to immoveable property. (1876) L. R. Sch. H. L. 53, 18 C. 23 3 B. 159, 12, I. A. 83 *Referred.* BAI GULABBI *v.* SHRI DATGARJI MOHANGARJI—**9 B. L. R. 393.**

41. s. 17—*Compromise decree, its effect on extraneous properties.*

A petition of compromise, as far as it relates to properties in suit, does not require registration under S. 17, Registration Act, and the decree also settlement touching such properties operates as *res judicata.* In relation to extraneous properties, the parties must fall back upon the petition itself, which cannot, without registration, effectively declare or create title to immoveable property exceeding Rs. 100 in value 26 I. A. 101=22 M. 508; I. C. L. J. 388; 30 C. 783; 20 M. 365; 25 M. 553; 25 M. 7. R. 28, A. 78, *Disapproved.* GURDEO SINGH *v.* CHANDREKA SINGH—**5 C. L. J. 611.**—*(See Nos. 14, 17, 18, 20, 22, 24, 27, 34 and 69).*

41. (a) s. 17—*See S. 23. to 26 I. C. L. J. 126 No. 87. infra.*

42. s. 17.—*18, 28, 49—Registration of documents Jurisdiction to register documents—Effect of registration by an officer not having jurisdiction—Mortgage security, ineffectuality of by reason of defective registration—Money decree—Limitation.*

Where registration of a deed has been effected by a Registrar having no jurisdiction in that behalf under S. 28 of the Registration Act (III of 1877), the document is not effective for the purpose for which it is created. The Sub-Registrar of Sealdah registered a mortgage deed, dated October 10 1896, purporting to hypothecate an immoveable property within the area of the Sealdah Registration Office. In the suit, brought on August 31st, 1901, for the enforcement of the mortgage bond, the defendant contended *inter alia*, that no such property as described in the deed ever existed; and no satisfactory evidence having been given as to its existence: *Held* that the document could not take effect as a mortgage bond, but it being registered, the plaintiff's claim was not barred, though the suit was brought more than three years after the date of execution of the deed; and the plaintiff was entitled to a money-decree for the whole amount secured by the deed with interest contract rate. *Baij Nath Tewari* v. *Sheo Sahoy Bhagut* (I. L. R., 18 Cal. 556) and *Beni Madhab Mitter* v. *Khair Mondul* (I. L. R., 14 Cal. 449)

Sup: Govt. acts (III of 1877) *(Contd.)*

relied upon.—JOGINEE MOHUN CHATTERJEE *v.* BHOOT NATH GHOSAL, **6. C.W.N. 856=29. C. 654**

43 S. 17, *18, 21, 24, 77.—Document evidencing relinquishment of a share by a daughter to her father in his property—Registration—Refusal to register on the ground that the document did not contain sufficient description of the property—Discretion of the Registrar--Jurisdiction of Civil Court —Right of heir to succeed—Vested or contingent estate—Transer of property Act (IV of 1882), S. 6, 19, 21—Indian Succession Act (X of 1865), S.* 107—Spes Successionis *—Mahomedan Law—Document—Altration.*

A Muhammadan daughter executed a deed in favour of her father and brothers agreeing that, in consideration of her receiving Rs. 9,000, she had relinquished all her rights and claims to any property there may be on her father's death. This document was presented to the Sub-Registrar of Bombay for registration who after taking the Registration fee refused the registration on the ground that the document did not contain a sufficient description of the immovable property to which it related as required by S 21 of the Act. In a suit under S. 77 of the Act,

Held, (1) that the document cannot be treated as relating to property, much less to immovable property. capable of being described and identified and S. 21 of the Act did not apply to it;

(2) that if the document related to immovable property, it contained not only a sufficient, but the only, description that could be given of it;

(3) that the document did not fall within S. 17 of the Registration Act but within S. 18 clause (d) or (f) of the Act

Where a Sub-Registrar or Registrar has exercised his discretion under S. 24 or S. 21 of the Act and accepted a documen. for registration, though subsequently he refuses to register it, the Court, in a suit under S. 77 of the Act, has no power to enquire into the propriety of his finding and directing such acceptance.

The discretion under S. 21 of the Act arises only where a non-testamentary document 'relates to immovable property. Where it does not relate, the section cannot apply and the discretion cannot arise. And this question may be inquired into by a Civil Court in a suit under S. 77 of the Act.

The right of a heir of a person to inherit that person's property on his death is not an estate in remainder or in reversion in immovable property or an estate otherwise deferred in enjoyment. It is neither a vested nor a contingent right. It does not come within the definitions of a 'vested interest' in S. 19, or of 'a contingent interest' in S. 21 of Transfer of Property Act and S. 107 of the Indian Succession Act. So far from being a vested or contingent right in present or in future, it is, in the language of cl. (a) of S. 6 of the Transfer of Property Act, 'the chance of an heir apparent succeeding to an estate or 'a mere possibility of succession which cannot be transferred.'

A mere *spes successionis* is unknown to, and not recognised by, the Mahomedan Law. That the addition of a Schedule by the brothers (Plaintiffs containing description of property) to the deed, was not a material alteration of the deed as it did not affect the legal effect of the contract so as to make it cease to be the same instrument. ABDUL HOOSAIN MULLA *v.* GOOLAM HOSAIN ALLY, **7 B.L. R. 742=30 B. 304.**

44 S. 17,*—21, 49—Power of attorney to create a charge on immoveable property.*

A executed a power of attorney in favour of B to enable B to recover the rents and profits of the properties of which A was the administrator, in order to pay off an amount advanced by B to A as such administrator:

Held, that in as much as the document was entered in Book IV instead of Book I, it was not registered according to the provisions of the Registration Act, and therefore could not affect immoveable property. *7 C 196 Referred to.* SRIMATI INDRA BIBI *v.* JAIN SIRDAR AHIRI, **7 C. L. J. 149**

45. Sl. 17.*—Registration of a document bearing no date of execution and giving only the villages and chuks of the property and not the District in which it is situate-1 C.L. J. 126 (See. No. 87 infra)*

46. S. 17, *See S. 32, 34, 35, and 87 23 A 233 P. C infra No. 99.*

47. S. 17—23, 34, 49, 73, 77. *Suit to enforce Registration.—Invalid Registration.—Time limit.—Mortgage deed. Oral evidence—Personal undertaking to repay loan—Evidence Act S. 91 T. P. A. S. 86*

A borrowed money from B and executed a mortgage deed of certain land in his favour in December 1901. In January 1902 B instituted a suit for an order to the Sub-Registrar to register the deed. In June 1903 he obtained a decree that the deed should, on application, be registered whether A admitted execution and receipt of consideration or not.

The deed was registered in accordance with this decree in July 1903. The present suit was brought by B for sale of the mortgage property and was based on the mortgage deed in question.

Held that the former suit not having been brought under the conditions of S. 77 Registration Act, the decree therein had no value as exempting the document registered under it from the necessity for compliance with all other provisions of the Act. The Court had power to decide as to the validity of the Registration and as the document was not registered according to S. 23 and 44 of the Act, it could

Sup: Govt. acts (III of 1877) *(Contd)*

not, under S. 49, be received in evidence as effecting the mortgaged property, and no Oral evidence could under S. 91, Evidence Act, be given of the existence of the mortgage.

Held also that as the deed contained a distinct agreement to repay the money borrowed it was admissible as the basis of a personal money decree for the amount due. 3. A. 397, 9. C. 150, 11. Bur. L. R. 166, 20. A. 512 followed 2. A. 46, 16. A. 303, L. R. 2. I. A. 210, 2. C. L. R. 428 referred to. KYAGET *v.* BU NWE.—**4. L. B. R. 1907. P. 88.**

48. S. 17, 48—*Priority—Notice—Mortgage by deposit of title deeds—Transfer of Property Act (IV of 1882), Ss. 3, 58, 59—Registration.*

A deposit of the title-deeds of property by a mortgagee under a verbal arrangement to secure payment of a debt, is not an oral agreement or declaration relating to such property within the meaning of s. 48 of the registration Act, but is a value submortgage of it in the mofassil.

A subsequent registered mortgage does not apart from the question of notice, acquire priority over a previous sub-mortgage created by a prior-mortgagee by deposit of mortgage-deed 11 C. 158.

In India there is no such distinction between legal and equitable estates as is known to the English Law 8 C. W. N. 41=31 C. 57 referred.

Held, that the subsequent mortgagees were affected with notice of the prior sub-mortgage.

A document purporting to contain an admission merely of a mortgage transaction between the parties, as distinguished from the mortgage itself, which in this case had already been created by the deposit of title-deeds, did not require registration under s. 17 of the Registration Act 20 W. R. 150 & 7 B. L. R. 55 referred to.—RAJA GOKAL DAS *v.* THE EASTERN MORTGAGE AND AGENCY CO., Ltd. **10 C. W. N. 276=4 C. L. J. 102=33. C. 410.**

48 S. 17, 49—*Adoption—Adoption by widow in joint family—Registration Act (III of 1877), s. 49—Unregistered document compulsorily registrable—Evidence of collateral purpose—Partition—Minor co-parceners—Gift by father to children out of joint estate—Minor Appointment of defendant as next friend.*

When a widow adops with the full authority of her husband, the adoption even into a joint family is valid, and the adopted son takes an interest in the property of the family accordingly.

A will does not require to be registered, although it confers a power to adopt a son.

A document which requires to be registered, in order to affect immoveable property, or to confer a power to adopt, may be used for a collateral purpose which does not require registration—4 *B. L. R.*, 18 (F. B.), *followed.*—BACHOO HAR KISHAN DASS *v.* KHUSHAL DASS—**4. B. L. R. 883.**

Sup. Govt. acts (III of 1877) *(Contd.)*

49 S. 17, 49 *Registration Act (III Of 1877). ss. 17, 49—Perpetual mokurari right.*

The material portion of a document ran thus: "The Huzur also admits you as representative of the *mokuraridar* and appoints you as a *mokuraridar* and gives thus in writing that you and your children, generation after generation, both in male and female lines, should continue in the occupation of the said village.' *Held* that the document clearly comes within s. 17 of the Registration Act and unless registered is inadmissible under S. 49. It declares as well as creates a right to immoveable property and is both a confirmatory lease as well as a lease for a term exceeding one year.—AGIN BINDH UPADHAYA *v.* MOHAN BIKRAM SHAH, **30 C. 20 (at pp. 24-25).**

40. S. 17, 49 *Unregistered lease, admissibility of, to proveadverse possession.*

A person can acquire, by adverse possession, a limited interest such as that of a permanent lessee.

Where adverse possession of certain lands by the plaintiff, as a permanent tenant, for the statutory period, is the transaction to be proved in a suit, and unregistered permanent lease cannot be received as evidence of such transaction (27. B. 515, 25. W R. 211 Diss: 2. R. R 642. refered) SUBBAYYA *v* MADULETIAH, **17 M. L. J. 469=3 M. L. T. 186.**

51 S. 19, 49—*Exchange—agreement setting one decree against another—Registration—Admissibility in evidence—Registration Act (III of 1877), Ss. 17, 49.*

A and B having obtained decrees against each other, settled their differences by an *aposhnama.* A gave up certain jotes to B, the decrees obtained by A were set off against the decrees obtained by B and the parties gave up their claims under their respective decrees, *held*, that the transaction embodied in the *aposhnama* did not amount to an exchange under S. 118 of the Transfer of Property Act, as the mutual transfer of two things was wanting in this case:

It was, therefore, not necessary to register the document.

That S. 49 of the Registration Act was no bar to the document, which was unregistered, being used, as evidence to prove that the decrees had been satisfied, notwithstanding that it also purported to convey immoveable property. DINA NATH DAS *v.* MATIMALA DASSYA, **II C.W.N. 842.**

52 S. 17, 49—*Authority to adopt in writing and not contained in a will—Document not a testamentary disposition of property and not registered—Invalidity—Evidence Act (I of 1872) s. 91—"Grant"—Admissibility of evidence of authority to adopt.*

In a suit for a declaration that first defendant was not the adopted son of plaintiff's deceased brother the first defen-

Sup: Govt. acts (III of 1877) *(Contd.)*

dant and his mother relied on an authority to adopt which was contained in a document which they contended was a will of the deceased. This document which had never been registered, and which was the only evidence of the alleged adoption, authorised the wife to adopt, and further authorised her to put into the possession of the adopted son all the properties which the deceased got under a certain decree, and all his immoveable properties &c.:

Held that the document was not a testamentary disposition of property, within the meaning of s. 3 of Act V. of 1881. It was an authority to adopt and nothing else, and the direction therein to put the adopted son into possession of the property could not be construed as a devise of the property. It was simply a statement of the consequences that should legally follow on the adoption. *Mussumat Bhubum Moyee Debia* v. *Ram Kishore Acharj Chowdhry (10* M. I A 279 at. p. 312. referred to.) The authority to adopt being in writing, and not being contained in a will its registration was compulsory.—SOMASUNDARA MUDALI *v.* DURAISAMI MUDALIAR, **13. M. L. J., 1903, p. 283.=27 M 30.**

53 S. 17 & 49. *S. 54 T.P.A. not extended to Bera – Transfer of intengible— Immoveable property—Registration—Estoppel*

The equity of redemption of a usufractuary mortgage is an intengible thing under S. 54 Transfer of Property Act—(24. M. 449 Referred to.*)* But as T.P.A has not yet been extended to Berar, the rub that a transfer of intengible, immoveable property of whatever value must be by registered deed can not be enforced in Berar (26. C. 1, 26. C. 39 Expld.) So the parties to a sale in Berar are not bound by law to reduce the terms of the transaction to writing but if they did reduce them to the form of a document, and the consideration for the sale exceeded Rs. 100, that document requires to be registered under S. 17 Registration Act, in the absence of which the document cannot under S. 49, Registration Act, confer a valid title. And a transaction, which is effected by an unregistered instrument, does not become valid in law, because it is admitted and has been acted upon 12. C.P.L.R. 154, 25. W. R. 211, 22. M. 508. 3. Berar. L.J. 19. R, 18. B. 66. D.

Where the consideration for the sale of the equity of redemption is expressly set forth as being the amount of the mortgage, that amount must be taken as consideration for deciding whether the deed requires to be registered 15. W.R. 558, 11. B.H.C.A.C. 149, 16. P.R. 1892 R.

A representation made to a person who knows the facts, does not amount to an estoppel 30. C. 539. P. C. R. and an admission on a point of law is not an admission, so as to make the admission matter of

Sup. Govt. acts (III of 1877) *(Contd.)*

estoppel 21 A. 285 R. JAIRAM *v.* BALKRISHNA DAS. **3 N. L. R. 72.**

54. s. 17, 49.—*Unregistered lease for quarrying lime-stone—Admissibility—*

A sued for possession on the allegation that he had been dispossessed from certain land from which he was authorized to quarry limestone for a certain period. The question was whether two deeds by which he and his predecessor got right to quarry required registration.

Held, that the deeds were merely leases and as such their registration was absolutely necessary under s. 17, cl. *(d)* of the Registration Act (III of 1877); and that absence of registration rendered them null and void and that only were they not admissible in evidence but under S. 49 of the Rigistration Act they could not "affect any immoveable property comprised" in them nor could other evidence be given of their contents.–SHEIKH KARAM HUSAIN *v.* RAM GOPAL, **7 O. C., 231.**

55. S. 17, 50—*Evidence Act (1 of 1872), s. 90—Documents thirty years old—Proper custody—Presumption—Constructive notice—Possession.*

A registered document contained a recital of unregistered incumbrances, and a question having arisen as to whether the recital of the unregistered incumbrances, amounted to notice: *Held*, that registration is at most constructive notice and the doctrine of constructive notice cannot be so extended as to cover unregistered documents under which the holders of registered documents derive title. The defendants further relied on their being in actual possession. Possession amounts to notice of such title as the person in possession may have, and any other person who takes a mortgage or other charge upon, or purchases, immoveable property without ascertaining the nature of the claim of the person in possession, does so at his own risk. The general consensus of opinion of all the High Courts of India is that possession is at least a very cogent evidence of notice which a purchaser cannot with safety disregard, and that section 50 of the Registration Act (III of 1877) does not do away with the effect of notice in favour of the registration to which *cæteris paribus* it gives preference. *Per Batty J*:– S. 90 of the Evidence Act (I of 1872*)* admits a presumption of the genuineness of documents purporting to be thirty years old, if produced from proper custody proved to have had a legitimate origin or an origin the legitimacy of which the circumstances of the case render probable. It is not necessary that the documents shall be found in the best and most proper place of deposit. The section insists only on a satisfactory account of the origin of the custody and not on the history of its continuance.

Sup: Govt. acts (III of 1877) (*Contd*)

Per Aston, J.—S. 90 of the Evidence Act requires that a document must be produced from the proper custody.—SHARFUDIN *v.* GOBIND, **5 B. L. R. 144 = 27. B. 452.**

56 S. 17 *(2)—Admissibility in evidence of letter reducing tenant's rent—Registration Act (VIII of 1871), s. 17, cl. (2)*

When a landlord by a letter written by him reduces the rent of a tenant, it cannot be said that his title to, or interest in, the land held by his tenant is, to any extent, extinguished. The reduction of the rent does not affect his title as landlord, in any way. *Held*, therefore; that the registration of the letter was not required under cl. (2), s. 17 of Act VIII of 1871 and that it was admissible in evidence.—MUBARAK ALI *v.* DEPUTY COMMISSIONER, BARA BANKI, **2 O. C., 250.**

57. S. 17 (B)—*Award effecting partition of immoveable property used for purposes of S. 525 of C.P.C.*

An award of arbitrators privately appointed does not require registration even if it effects a partition of joint immoveable property and is signed by the parties to signify the acceptance of the award, in case the award is merely sought to be filed and to be made a rule of Court under s. 525 of the Code. BHAGAT RAM *v.* PARAS RAM. **84 P.R. 1907**

58 S. 17 (b) and 47.—*Execution—Registration—When a registered deed begins to operate—Priority—Non-payment of consideration in full—Mortgage—Right of mortgage to recover portion of debt advanced.*

B executed a document to A on one-anna stamp mortgaging his property to A for a sum of money, a part of which was due to A by B and the balance was payable in cash. This deed provided that within fifteen days, a regularly stamped-mortgage-deed was to be executed and registered. B did not attempt to receive the balance from A but, on the contrary, sold some portion of the property mortgaged to C and another portion to D and registered the deeds. Some time after, A got the deed on the one-anna stamp paper executed in his favour compulsorily registered by paying stamp duty and penalty. A now sued to recover so much of the consideration-money as was due to him as a debt, by sale of the property mortgaged to him. It was contended for the defence (1) that the deed executed in A's favour was not a complete mortgage-deed; (2) that A was only entitled, under that deed, to get a mortgage-deed at a later date; (3) that the deed on the one-anna stamp could not, and did not, create any charge; (4) that A's deed having, in any event, been registered after the registration of the deeds in favour of C and D it was not entitled to priority over them; and (5) that A's non-payment of the balance payable in cash affected the nature of the document.

Sup: Govt. acts (III of 1877) (*Contd*).

Held, (1) that notwithstanding the recital in the deed that, later on, a regularly stamped deed would be executed to A the deed executed on the one-anna stamp created an actual mortgage on its date, that the deed evidenced a present demise; that such was the intention of the parties was gatherable from the other terms in the deed and that, consequently, the deed began to operate as a present demise on mortgage from its date (10 B 101 followed) (2) that the non-payment of the balance did not affect either the nature of the deed or the right A to recover what was originally due to him as a debt on the security of the property, since B had a right, if he chose to assert it, to recover the unpaid mortgage-money; (3) that, on registration the deed of A began to operate, not from the date of registration but from the date of execution thereof (29 B 42 followed) and (4) that the deed of the plaintiff was consequently entitled to priority over those of the defendants C and D. MOTICHAND *v.* SAGUN, **29. B. 46.**

59. S. 17 (b), 49.—*Award by arbitrator, making partition of immovable property of over Rs. 100, compulsorily registerable—Secondary evidence of, inadmissible under S. 91, Evidence Act.*

A and B, by agreement, appointed a sole arbitrator to effect a partition of their joint ancestral property and consented that the arbitrator, by taking the bids of the parties for the property, will effect the partition which will be accepted, and the award was thereon made and written up on the back of the said agreement *held*, that the document was intended to be an instrument declaring rights in or to immoveable property and that, since it did 'operate to declare' such rights in immoveable property of value exceeding Rs. 100, it was an instrument compulsorily registrable, and being unregistered, was inadmissible in evidence and that S. 91 of the Indian Evidence Act barred the parties to prove the partition, independently of the document, by oral evidence *aliunde*. 4 B 126, 13 M 255 9 A 109 48 P. R. 1905 and 175 P. 2 R 1905 Dist. AZIMAT SINGH *v.* KALWANT SINGH **71 P. R. 1906. = 111. P. L. R. 1907.**

60. S. 17 (b)—*Assignment of charge on immovables.*

If a charge for a sum exceeding rupees one hundred on immoveable property is assigned by a deed, the document requires registration under cl. *(b)* of S. 17 and the fact that the consideration for the assignment is stated in the deed as less than rupees one hundred does make the registration of the deed optional. (33 C. 450 13 A 89 Dist, 2, B 97, 18 M 454 not followed 11 B. H. C. R. 149 Ref.) RAM SARUP *v.* MUBARAK SINGH, **190 P. L. R. 1905 = 1 P. R. 1906.** (*See Nos. 15, 21, 25 supra and 60, 63, 65, 77, 78 infra.*)

Sup: Govt. acts (III of 1877) *(Contd.)*

61 S. 17 (b). *Value of right, title or interest in immoveable property created by mortgage—Interest and principal.*

For S. 17 (b), Registration Act, S. 59, Transfer of Property Act, the 'value' of the right title, or interest in immoveable property created by a mortgage is the principal money secured (19 C. 623, 5 A 447, 10 C. P. L. R. 10, 21 M. 141. followed, 5 M. 119 and 23 M. 105 diss. 10 C. 82 26 C. 179, 2 B. 253, 3 B. L. R. 133 referred.) Hence the words "principal money secured" were deliberately inserted in S. 59 to show that interest is not to be taken into account. GAMA *v.* LAHANOO. **4 N. L. R. 86.**

62—s. 17, (b)—*Nikahnama—Assignment by husband in favour of wife in discharge of dower-debt.*

Held, that a *nikahanma* which was an assignment by a Mohomedan husband in favour of his wife, in full discharge of her dower-debt was a document which under cl. (b). S. 17 of the Act, purported to create a vested right, title and interest in certain immoveable properties such properties admittedly exceeding Rs 100 in value and its registration was compulsory and that it could not be regarded as a composition deed—MARIAM BEGAM *v.* SAYAD MOHANMAD, **3 O. C., 277. S. 17, cl (2).** *See. Resjudicata 4.*

63—s. 17 (b)—*Assignment of charge on immoveable property.*

When a charge for a sum exceeding Rs one hundred on immoveable property is assigned by deed the document requires registration under clause (b) of S. 17 of Registration Act, and the fact that the consideration for the assignment is stated in the deed as less than rupees one hundred does not make the registration of the deed optional. 23 *Cal.*, 450 *13 All.*, *9di .inguished.* 2 *Bom.*, 97, 18 *Mad.*, 454 *not followed.* 11 *Bom.*, H. C. R., 14?, 15 *Cal.* W. R. 558 (*Civil Rulings*) *referred to.*—RAM SARUP *v.* MUBARAK SINGH.—**190. P. L. R. 1905**—*See Nos. 15, 21, 28, 60, supra & 60, 63, 65, 77 & 78 infra).*

64—S. 17 (b)—*Registration—Partition deed —Document relating to both moveable and immoveable properties.*

An unregistered instrument of partition relating to both moveable and immoveable properties of the value of one hundred rupees and upwards is inadmissible in evidence for want of registration and the Court is not at liberty to refer to such portions of it as relate to moveable property.—BUA DITTA *v.* MUSSAMMAT GANGA DEVI., **P. W. R., 1906, P. 10 119 P. L. R. 1906.**

65 s. 17—*Cls.* (*b*), (*c*) *and* (*n*)—*Registration—Mortgage—Satisfaction.*

A mere receipt for money paid in satisfaction of such a right as is mentioned in cl. (*b*) to S. 17 of the Act, and not acknowledging receipt of moneys paid as the consideration for the extinction of such a right by a new act of will, is not compulsorily registrable. Endorsements or receipts, acknowledging satisfaction of a mortgage by

Sup: Govt. acts (III of 1877) *(Contd.)*

the payment of the whole mortgage money, are not compulsorily registrable under cl. (*n*) of the section. A payment made in discharge of an existing obligation, as in paying off a mortgage debt, according to its terms is a payment made in satisfaction of that obligation and is not technically "consideration" paid in order to obtain the extinction of that obligation.

Therfore neither cl. (*c*) nor cl. (*n*) of the section requires registration, in respect of the mere satisfaction or performance of the pre-existing obligation. These clauses require registration only when money is paid as consideration for a new agreement by a fresh act of the parties, the effect of which is to do away with the old obligation. (19 M 288 Ref). MAHAMAD KASAM *v.* RANU YESJI NAIK. **9 B. L. R. 254.** (*See Nos 15, 21, 28, 60, 63, supra and 77 and 78 infra.*

66 S. 17 (b) (h)—*Non-testimentary document—Evidence—Secret trust—Will—Unregistered agreement.*

A party setting up a secret trust must adduce evidence to prove that it was communicated by the testator to the universal legatee, and that the legatee agreed to accept the property bequeathed in the terms of the trust. *Jones* v. *Badley* (L. R. 3 Ch. A. C. 362), referred to. In proceedings for obtaining Letters of Administration, the parties, having settled their disputes, presented a petition to the Court to the following effect:—

"That I, Gyanoda Sundari Dassi, will get 10-anna share of all the moveable and immoveable properties left by Kristomoni, deceased, and I, Ishwar Chander Sarkar, will get the remaining 6-anna share."

"Be it explicitly expressed that after taking out the Letters of Administration, I, Gyanoda Sundari Dassi, shall amicably take 10-anna share, and I, Ishwar Chander Sarkar, shall take 6-anna share of the moveable and immoveable properties after dividing the shares by demarcation." No order was made on this petition. The properties were of the value of over handred rupees.

Held that the petition, unless registered would be inadmissible in evidence. *Pranal Anni* v. *Lakshmi Anni*, (I. L. R. 22 Mad. 508; L. R. 26 I. A. 101), referred to.—KALI CHARAN GHOSAL *v.* RAM CHANDRA MANDAL. **I. L. R., 30 C. 783.**

67 S. 17 (b), (h)—*Clause giving one partner only a right of redemption of mortgaged property—Document giving right to obtain another document deed of partnership.*

A deed of partnership which contained a clause stating that the partnership property was mortgaged, and giving one only of the partners a right of redemption for and during a future period of limited duration, was held to declare a right in immoveable property and therefore to need registration under cl. *(b)* of s. 17 of the Registration Act (III of 1877) to make it ad-

missible in evidence.—MAUNG PO HTI *v.* MAHOMED CASSIM. **I. L. R., 30 C. 1016; 7. C. W. N. 861; P. C.=5 B. L. R. 975=13 M. L. J. 329=30. I. A. 230 (P. C.).**

68. S. 17. (c.)—*Agreement whereby mortgage debt extinguished.*

An agreement which extinguishes a mortgage debt and converts the lien under the mortgage bond to one under the agreement is one which is compulsorily registerable under S. 17 (c) of the Act. TARAN SINGH *v.* RAM RATAN, **31. C. 89. at 94.**

69 S. 17 (d)—*Petition of compromise reciting a pervious oral agreement for lease—Registration.*

A petition of compromise merely contained a recital of a previous oral agreement for lease entered into between parties;

Held—that it did not require registration or stamp.

It was evidence of an oral agreement but not an agreement, in itself. PITAMBAR GAIN *v.* UDDHAB MONDAL, **12 C. W. N. 95** (*See Nos. 14, 17, 18, 20, 22, 24, 34, & 41*).

70. S. 17. (d)—*Lease exceeding one year —Registration.*

A lease, whereby the lessor agrees to let his premises for a period of one year and also agrees "not to increase, nor to have the premises vacated for further two years, if the said tenant wishes to occupy it for that period," is not compulsorily registrable under S. 17 (d) of the Act. BENIN MENAHIM YOUSAF *v.* JOHN POLEOLOGO **8 B. L. R. 580.**

71. S. 17. (d) *S. 17. Cl, (d)—Transfer of Property Act (IV. of 1882)., s. 107, 117—Lease for agricultural purposes—Lease reserving annual rent—Term exceeding five years.*

Defendants executed an instrument by which they leased a betel garden from plaintiff for an indefinite period at an annual rent of Rs. 35. The instrument was not registered. Rent having fallen into arrears plaintiff sued to recover the same, when it was pleaded in defence that the instrument of lease was inadmissible in evidence for want of registration. The Munsif dismissed the suit on the grounds (1) that the lease was not for agricultural purposes and that therefore its registration was compulsory under s. 107 of the Trdasfer of Property Act, and (2) that assuming it to be an agricultural lease its registration was compulsory under s. 17 (d), of the Registration Act, inasmuch as it was not a lease for a term not exceeding five years. On a petition being filed to revise the Munsif's decree;

Held (1) that a lease of land for the cultivation of betel is an agricultural lease. (17 Mad. 98 not followed) (2) that although the lease might continue beyond five years in the event of neither party determining it in the meanwhile, it was not a lease for a term exceeding five years as either party might determine it before the expiration of that period. (4 Mad.. 381 followed.) Inasmuch as the annual rent was under Rs. 50 registration was optional and plaintiff was not precluded from proving the letting by oral evidence or by proof of the unregistered instrument.—MURUGESA CHETTI *v.* CHINNATHAMBI GOUNDAN, **I. L. R 24 M. 421.**

72—S. 17 (e). *Composition Deed—Conveyance—Trustees under the deed.*

The expression "composition deed" as used in s. 17 (e) of the Registration Act (III of 1877) denotes a transaction entered into by a debtor, insolvent or in embarrassed circumstances, with his creditors with the object of paying the latter a composition upon their claims. The deed must in substance be of the nature of a composition, not a conveyance. Hence, where a debtor transfers his property to a creditor or creditors in consideration of his debts i.e., where he parts with his rights absolutely, the transaction may partake of the nature of a composition, but it is in reality a conveyance. It is otherwise where with the consent of his creditors he parts with his property in favour of a trustee for the purpose of paying the composition upon the claims, and the trustee is authorised to deal with the property for that purpose. A composition deed for the benefit of all the creditors, not comprising the whole of the judgment-debt, is not void, if the transaction is fair and *bona fide* and in the ordinary course of business or upon the pressure of the creditors. It does not become void by the circumstance that it is signed by some only of the creditors and that among them are some whose debts are barred by limitation. MALUCKCHAND *v.* MANILAL. **6 B. L. R. 296.= 28 B 364.**

73 .S. 17 (h).—*Agreement to execute a mortgage-deed—Whether such agreement can constitute a charge on immoveable property See Transfer of Property Act (IV of 1882) ss. 54 & 100 28 M. 54.*

74. S. 17 (h). *Deposit of title deeds—Agreement to execute a mortgage. C.T.P.A. s. 54, 59 & 100 Konchadi Shan Bhonge v. Shiva Rao* **28 M. 54.**

75—S. 17 (h)—*Power of appointing appointment—New trustee in place of dying trustee.*

On the death of one of the trustees, the surviving settlor, in exercise of the power of appointing new trustees reserved to the settlors apdointed a new trustee and this deed of appointment was not registered. She again appointed three additional trustees by deeds of appointment bearing different dates.

On the death of the surviving settlor without leaving progeny, the whole of the trust property was to be utilised for charitable uses and purposes, under the deed of settlement.

Held, that the deed of appointment did not require registration, as it by itself created no interest in the property, but merely gave the new trustee the right to obtain another

Sup: Govt. acts (III of 1877) *(Contd).*

document.—FATMA BIBI *v.* SHAIK HASSAN, **9. B. L. R. 1071.**

76 s. 17 (i)—*Award—Instrument of partition.*

An award is exempt from registration under clause (i) of section 17 of the Registration Act and is not rendered compulsorily registrable by reason of the fact that it is chargeable with stamp duty as an instrument of partition under article 45 of the second schedule of the Stamp Act. 1899.

Where the award stated that out of the entire land of the parties certain shares were allotted to them by the arbirators and the rent due by the tenants was divided in certain other shares and the award was signed by the arbitrators and also by the parties to signify their consent to the arbitration and its result.

Held, that the award was not compulsori by registrable GULAB SINGH *v.* MOHAR SINGH **160 P. L. R. 1906.**

77. S. 17. (N)—*Limitation Act (XV of 1877), Schedule II, Article 91—Registration Act (III of 1877), as amended by Act (VII of 1886, Section 17 (n)—Receipt extinguishing mortgage.*

Held, that a receipt which acknowledges extinction of mortgage right of the value of over Rs. 100 in immoveable property is compulsorily registerable under clause (*n*) of section 17 of the Registration Act, 1877 as amended. P. R. 39 of 1904, s. c., 91 P. L. R., 1904, followed.

Held, also, that a document compulsorily registerable cannot be admitted in evidence when it has not been registered. Article 91 of the second Schedule of the Limitation Act is not applicable to a claim which involves the cancellation of such a document, DWARKA DAS *v.* SARDAR LACHHMAN SINGH **103. P. L. R. 1905.** *(See Nos. 15, 21, 28, 60, 63, 65 and 75 Supra and 78 infra.*

78. s. 17 (n) *Receipt for payment of mortgage-money.*

A receipt for part payment of the mortgage-money which does not purport to extinguish the mortgage is not compulsorily registerable.

Though a receipt which purports to extinguish the mortgage is inadmissible in evidence for want of registration, the fact of payment may be proved *aliunde*. *W. N. All, 1887, p. 188, followed.* AMIR *v.* DIALA MAL. **39. P. R. 1904=91. P. L. R. 1904.**

79. S. 17 (o)—*Sale certificate granted by court—Registration*

A sale-certificate granted to a purchaser of property sold by public auction by a Civil or Revenue Officer is exempted from the operation of section 17 of the Registration Act by addition of clause (0) by the amending Act VII of 1888. and it requires no registration. AJUDHIA PERSHAD *v.* CHANDAN **36 P. L. R., 1903=9. P R. 1903.**

80. S. 18.—*See S. 17, 18 and ca. 29. C. 654 No. 12 and 30. B. 301 No 13 supra.*

Sup: Govt. acts (III of 1877) *(Contd).*

81. S. 18, 50.—*Document of which registration is optional—Priority of subsequent registered document over prior unregistered document—Notice of prior document—Onus of alleging and proving notice.*

To check fraud, priority is not given by the Courts, in cases to which S. 50 of the Registration Act applies to the holder of a later registered mortgage, if he, at the time when he obtained his mortgage, had notice of an earlier one. But the onus lies on the party alleging such knowledge or notice, to aver it in his pleadings and to prove it.—CHINNAPPA REDDI *v.* MADICKAVASAGAM CHETTI, **25 M. 1.**

82. S. 21.—*Document in part a deed of gift (subject to obligation) and in part an appointment of a guardian*

A document purported to be in part a deed of gift of immoveable property (subject to an obligation) and in part an appointment of a guardian of the person and property of certain minors. The property was not fully described as required by the provisions of the Registrations Act and the donor died before registration—

Held, that the document so far as it appointed a guardian was not a document relating to immoveable property within the meaning of Section 21 of the Registration Act any more than a power of attorney authorizing an agent to collect rents of immoveable property is such a document. Registration of that part of the document could be ordered in case of admission or proof of execution. But so far as the document was a deed of gift, though an onerous one, its registration could not be compelled, either against the donee or his legal representatives since that would be compelling the donor or his legal representatives to complete an incomplete gift. *19 Mad., 433, 25 Mad. 672, referred to.* AMIRDAM *v.* MUTHUKUMARA CHETTY. **13. M. L. J. 303.**

83. s. 21. See S. 17, 21, 24, 77—30. P. 304 No. 43 *Supra,*

84. s. 21. See S. 17, 21, 49—7. C. L. J. 149—No 44 *Supra.*

85. s. 23. See S. 17, 23 to 26 & 77—1. C. L. J. 126. No 45 *Supra.*

86. s. 23 See S. 17, 23, 34, 49, 73, 77—4. L. B. R. 1907. P. 88 No 47 *Supra.*

87. s. 23 to 26. *Time of presentation.—S 17—Registration optional—S. 77—Description.*

Held a document bearing no date of execution can be registered and oral evidence as to its date of execution is admissible.

Held also that a document giving the name of the village and chak wherein the property comprised therein is situate gives sufficient description of the property for the purpose of registration although the name of the District is not given in the deed. (4 M. H. C. R. 91, 18 C. 556 referred to)

Held also that the provisions of Part VII for enforcing the appearance of executants and witness and registration under S. 77 and consequent civil suit are equally applicable to documents whereof the registration is optional. (6 W. R mis. 131, 1 B. L. R. O. C 47, 4 M. H. C. R 425 Distinguished). "Executed" means Voluntarily executed with free consent and not under compulsion as in this case by being kept in a *najat* without food and bathing by the sub-Divisional officer. CHANDER KISHOR *v.* DINENDRA NATH SANYAL. **1. C. L. J. 126.**

88—s. 24—Section 24 of the Registration Act 1877 empowers the Registrar to register a document within eight months of its execution under certain circumstances, the Courts must accept the Registrar's finding that such circumstances existed when he has allowed registration. *10 Bom. H. C. R. 98, 93 p. R. 1883 referred to.* KHAIR MUHAMMED *v.* ABDUL GHAFFAR KHAN. **Punjab Record 44 of 1901**

89. S. 24—*See S. 17, 18, 21, 24, 77—30 B. 304 No. 43 Supra.*

90. S. 24—*to 26—See S. 23 to 26—I. C. L. J. 126 No. 87 Supra.*

91. S. 28.—*See S. 17, 18, 28 49—29. C. 654 No. 42 supra.*

92. S. 28.—*See S. 28, 64, 65—25. B. 50. No 6 supra.*

93. S. 28, 49.—*Mortgage-deed not registered in accordance with law—Its admissibility in evidence as money-bond—Limitation Act (XV of 1877), Schedule II, Article 116.*

The instrument in question in this case purported to be a mortgage-deed, and hypothecated two pieces of property, one sitauted within the jurisdiction of the Registrar of Calcutta, and the other within that of the Sub-Registry Office of Sealdah. Upon the basis of this latter property, the document was registered at the Sealdah Registration Office. Upon proof that there was no such property whatsoever—

Held, that the document was registered by the Registrar of Sealdah without any jurisdiction in that behalf, and the deed was inadmissible in evidence as registered a mortgage-deed, though it operated as a registered money-bond, and a suit brought upon it within six years of its execution was not barred under article 116 of the Second Schedule of the Limitation Act—*14 Cal., 449; 7 C. L. R., 223; 18 Cal., 556, followed.* JOGINEE MOHUN CHATTERJEE *v.* BHOOT NATH GHOSAL, **6 W. N., C. 856 = 29 C. 654.**

94. S. 28 and 66.—*And C. P. C. S. 13—Suit for possession—Defendant's possession under a decree based on a mortgage deed—Enquiry whether Court passing the previous decree had jurisdiction—*

A mortgaged his half share in a village in the Bhandara District to B. in 1881, and the mortgage-deed which was compulsorily registerable was registered in the Chanda District. A copy of the deed is al-

leged by B to have been sent to the Bhandara District Registrar, (the idea being that S. 66 Registration Act applied to the case). In 1890 B sued for possession in Chanda District and on A's confession got a decree in 891 and possession of the property in execution in 1895. In 1892 C took a mortgage from A of that very property, and sued in 1901 for its sale on the footing of this mortgage. B set up his absolute ownership under the decree in 1898. C rejoined (1) that B's mortgage could not affect the share as it had been registered in an office without jurisdiction to register it: (2) that the Chanda Court decree was a nullity; as that Court had no jurisdiction, the property being in Bhandara District: (3) that B had already realized his mortgage money from the property.

Held, following 14. C. 449, 18. C. 556. (F). 29. *C*, 654 and 18. M. 364. and dissenting from 7. C. L. R. 223 and 4. A 14, that a Court can go behind the registration certificate endorsed on the deed, and that this registration being in contravention of S. 28 Registration Act rendered the deed inoperative and that the Chanda Court decree was a nullity and that S. 13 did not bar the suit and that C's suit was rightly decreed. BALAJI VITHAL *v.* VEIRAIK DAJI. **16. C.P.L.R. 1903. P. 141**

95 s. 30 (a)—*See S. 7, 30 (a) and 87—3. C. L. J. 165 No 9 Supra.*

96 s. 32—*Registration by agent after revocation of his authority.*

Where an agent holding power of attorney from the executant of the document got the document registered when his power of attorney had been revoked by the principal before the date of registration.

Held that the revocation was not invalid if the revocation was not made known either to the person in whose fovour the document was executed or to the registering officer. 5. C. W. N. 177=28. I. A. 15 distinguished. MOHINDRA NATH *v.* SAMBU BIBI, **7. C. W. N. 229.**

97 s. 32, 33, 60, 87—*Registration of document by duly authorized agent—Defect of procedure—Limitation Act (XV of 1877), sch. II, art. 179 (b),*

A, an Agent of a decree holder, having a general power of attorney which was not executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district D. H. resided as required by S. 33 of the Act, presented a copy of the decree for registration and got it registered and it bore the certificate given under S. 60 of the Act.

Held, that persons mentioned in sec. 32 and none others are legally competent to present a document for registration, as "having title" to move the Registrar. The agent of the person specified in S. 32 must be duly authorized by a power of attorney provided by sec. 33 before the law will in-

vest him with the right of presenting the document for registration.

Held, that therefore A was not a person legally entitled to present the copy of the decree for registration and that the registration having been effected on the motion of A it was not a mere defect in the registering Officer's procedure, which was cured by sec. 87, but that the registration was invalid.

Held, further, that the document could not be deemed to be a registered one under art 179 Indian Limitation Act, sch. II. to extend time—ATAL. BIHARI LAL *v.* HIVANCHAL SINGH, **6 O. C., 9.**

98. s. 32, 33 and 87.—*Validity of registration—Power of attorney defective—Authority to register.*

A sold certain immovable property to B on the 6th August, 1900, and afterwards sold the same property again on the 12th August, 1900, to C. The latter sale-deed was duly registered on the 13th August, 1900, and on the same day the sale-deed of the 6th August, 1900, was presented for registration by a pleader acting under a power of attorney from B. The power of attorney was not executed in accordance with S. 33 of the Registration Act. The registering officer, however, took no notice of the defect: and after summoning A who admitted execution, registered the sale-deed of the 6th August on the 17th November, 1900.

Held that B's document had not been legally registered. The terms of S. 32 and 33 of the Registration Act are imperative and proper presentation by an authorized agent is quite indispensible for the registering officer's jurisdiction; nor was this error a mere defect in procedure that could be cured by S. 87 of the Act or by the fact that the executant consented to the registration of the sale deed. ISHRI PARSHAD *v.* BAIJNATH. **A. W. N. (1906), 195.=3. A. L. J. 743**

99—S. 32, 34, 35 and 87—*Presentation of document without due authority—Waqf—Family endowment ineffective as a waqf*

A person, who had executed a document disposing of immovable property, made his power of-attorney to his agent to present it for registration, but died before the presentation. The Registrar was aware of his death, but accepted and registered the document.

Held, that this was not a mere defect in procedure falling under s. 87 of the Registration Act. The registration was illegal and invalid. The power and jurisdiction of the Registrar only arises, when he is invoked by a person in direct relation to the document, and the relation of the person authorized by the maker in his life had ceased on his death. The document, describing itself as a deed of family endowment, declared that the income and profits of the property, after defraying the necessary expenses according to the provisions in the deed, should be applied to charitable purposes. But this liberality was by the conditions in the deed only to an uncertain and discretionary amount and as an incident to an endowment for the family. The dedication was in substance only for the maintenance and increase of the family property and not for charitable purposes. Therefore no *waqf* was established.—MUJIB-UN-NISSA *v.* ABDUR-RAHIM, **5. A W. N. 177=11. M. L.J. 58=3 B.L.R. 114=28 I.A 15. (P.C.)=23 A 233 (P.C)**

100—S. 33. See S. 32, 6. O. C. 9. No. 97 and 3, A. L. J. 743 No. 28 *supra.*

101—S 34—*See S.* 17, 32 and ea—23. A. 233 =28. I. A. 15. (P.C) no. 46. *supra.*

102. s. 35 *Registrar's duty before registration.*

There is o duty imposed on the District Registrar to read out to the parties deeds brought to him for Registration. PHULCHAND *v.* LAKHU, **A. W. N. 1903. P. 70=25. A. 358 at 365.**

103. s. 35—*Execution of deed—Admission of signature before Registering Officer—Certificate of registration—Power of Court to go behind.*

The Registering Officer must register the document presented to him for registration, when the person by whom the document is purported to have been signed admits his signature to the deed, though he denies its execution. When a document is registered under such circumstances, the Court cannot go behind the certificate of registration.

Where the mortgage-deed for Rs. 21,750 contained the endorsement in the handwriting of the mortgagor, 'the mortgage-bond for Rs. 21,750, on account of *hundis* executed by me is correct,' *held*, that the words implied that the bond was written on the paper before the endorsement and signature were affixed to the deed.

Held, also, that the deed was valid, even if the mortgagor signed the blank sheet of paper with the above endorsement and the mortgage-deed was written afterwards, there being nothing to show that the mortgagees had exceeded the implied authority given them to use the paper for the preparation of a mortgage-bond for Rs. 21,750. DAVID YULE *v.* RAM KHELWAN SAHAI. **6. C. W. N. 329.**

104. s. 35—*Denial of execution—Deed nevertheless registered as against person denying execution—Admissibility of deed in evidence.*

Where a Sub-Registrar in disregard of the provisions of s. 35 of the Registration Act, 1877, registered a document as against a person denying execution thereof, it was *held* that his action was *ultra vires* and without jurisdiction, and that the document could not be admitted in evidence as against the party denying execution. *Muhammad Ewaz* v. *Birj Lal*, (I. L. R., 1 All 465), *Malkarjun* v. *Narhari*, (I. L. R., 25

Sup: Govt. acts (III of 1877) *(Contd.)*

Bom, 337), and *Nujib-un-nissa* v. *Abdur Rahim*, (L. R., 20 I. A. 15; I. L. R., 23 All. 233), referred to.—RAZI-UN-NISSA *v.* SABIR HUSSAIN, **A. W. N. 1903 P. 95 = 26 A. 57.**

105 s. 35—*Gift to wife—Admission of execution by her as 'donors' representative after his death.*

A Hindu executed a deed of gift in favour of his wife and died, and the deed was subsequently registered at the instance of the widow.

Held, the widow being entitled to letters of administration to the estate of the donor, was competent to admit execution of the document as his "representative" under S. 35 of the Act, and the fact, that she herself was the donee under the document was immaterial. 23 M. 580 referred.—BHABATOSH BANERJEE *v.* SHEIKH-SOLEMAN,—**10 C. W. N. 717 = 33 C. 584.**

106. s. 35 *See S. 17, 32 & ea—23. A. 233 = 28, I. A. 15 (P. C.) No. 46 supra.*

107 S. 35, *73, 74, 75, 87—Registration of document under orders of District Registrar —Time for presentation, extension of—Procedure, defect of—Registration after fixed period, effect of Indian Limitation Act (XV of 1877) S, 5, if applies to Registration Act—Registration, invalidity of, may be impeached by a person interested, though no party to the deed.*

A Registering officer cannot register a document, presented after thirty days of the order passed by the District Registrar, under the first paragraph of S. 75 of the Act, even if the time for such presentation is extended by a subsequent order of the District Registrar which is *ultra vires*.

A document, registered after the said thirty days, is not validly registered, and creates no title (2 I A 210 = 15 B. L. R 228, 4 I. A. 166 = 1 A 465 Dis, 23 A 233 Referred)

S. 5 of the Limitation Act does not apply to such a case, and time for registration cannot be extended under the section.

A third person affected be a deed can impeach its due registration (32 I A 113—271 Distinguished) BABAN SAHAI *v.* UDIT NARAIN *alias* NAND KISHORE LAL, **5. C.L.J. 188.**

108—S. 43 and 49—*Unregistered document compulsorily registrable—Evidence of collateral purpose.*

A will does not require to be registered, although it confers a power to adopt a son. In this case the husband gave by his will to his widow authority to adopt a son.

A document which requires to be registered, in order to affect immovable property, or to confer a power to adopt, may be used for a collateral purpose which does not require registration.—*4 B. L. R.*, 18 (F. B.) *followed.* BACHOO HERKISSONDAS *v.* KHUSHALDAS. **4. B. L. R. 883.**

Sup: Govt. acts (III of 1877) *(Contd.)*

109 s. 47—*Date of operation—Date of execution of the deed.*

On the 11th August, 1898, the defendant No. 1 passed to the plaintiff a *mulgeni* lease, which was registered on the 10th December, 1898. In the meanwhile, the defendant No. 1 passed another *mulgeni* lease, to the defendant No. 2 in respect of the same property on the 17th November, 1898, and got it registered on the 18th November, 1898. On the 5th December, 1898, the defendant No. 1 mortgaged the same property to the defendant No. 2; this deed of mortgage was registered on the 9th December, 1898. Defendant No. 2 obtained possession of the property. The plaintiff then sued to establish his *mulgeni* lease and to recover possession of the lands.

Held that the plaintiff was entitled to recover possession of the lands, for though his deed was registered after the defendant No. 2's deeds, yet the moment it was registered it had operation from the date of its execution by virtue of s. 47 of the Registration Act (III of 1877).

Held, further that it was immaterial whether the defendant No. 2's deeds were or were not with possession. 2. B. 299, 8. B. 182 referred to 11. I. A. 218, 6. B. 380 followed). NARAYAN *v.* LAXUMAN. **6 B. L. R. 786 = 29. B. 42.** *See also S. 17. (b) and 47—29. B. 46 No supra.*

110 s. 47—*See S. 3, 47, 75—3 O. C. 231 No 7 supra.*

111 s. 47—*See S. 17 (b) and 47—29 B. 46 No 58 supra.*

112 S. 47, 49-50—*Competition of registered documents—Priority—Delay in effecting registration—Notice.*

Between two innocent purchasers, both under registered documents of which registration is compulsory, the one whose conveyance was first executed has the prior right without regard to the dates on which the two documents were registered.

Delay in effecting registration, when registration is effected within the period allowed by Law, does not of itself amount to negligence. There is no authority for the proposition that if the subsequent purchaser has no notice of the prior purchase his title will prevail over that of the prior purchaser. 2 B. 343, 8. B 182, 9. B. 427, 7. C. 753, 16. M. 148, 20. M. 250, 10, C. 1073 referred to. MAUNG MYAT THU *v.* MAUNG THA ZAN. **1. L. B. R. 1900-02 P. 293.**

113. s. 48. See Specific Relief Act S. 27 (b) 4. L. B. R. P, 26. No 69 *Supra.*

114. s. 48. See S. 17, 48—4. C. L J. 102—No 48 *Supra.*

115. s. 48 and 50. *Oral agreement—Subsequent registered agreement—Notice—Priority.*

The equitable doctrine that a subsequent registered sale-deed cannot take effect against a prior unregistered document under S. 50 of the Act, if the holder of the registered document has notice of the latter is equally applicable to a prior oral agree-

Sup: Govt acts (III of 1877) *(Contd.)*

ment to sell under S. 48 of the Act. (25 M 1 Referred to)

The provision as to delivery of possession in S. 48 of the Act does not preclude the holder of the oral agreement from relying on the doctrine of notice, when there has been no delivery of possession to him. THIMMAJAMMA *v.* ABDULLA SAHIB, **17 M. L. J. 319.**

116. S. 49. *Agreement to let—Lease unregistered—Admissibility.*

In a suit for specific performance of an agreement to give a lease, the document containing the lease though unregistered is admissible in evidence, where it is only used for the purpose of proving the contract, for the breach of which the suit is brought (17 M. 456 followed). SRINIVASACHARYULU *v.* VENKATARAJU. **17. M. L. J. 218.**

117. S. 49. *Unregistered mortgage with implied personal convenant to repay—Suit for personal obligation—Admissible.*

A mortgage deed, required by law to be registered, can be used in evidence, in a suit to enforce an implied personal covenant to repay the money advanced, although the same could not be used as evidence in a mortgage suit affecting immoveable property. (15 M. 336 (1894) P. T. L. B. 1249 C. 520 fold). MYAT THIN *v.* P. C. Y. E. KASUYIS YANTHAN CHETTY. **4. L. B. R. 52.**

118 S. 49—*Unregistered mortgage—Suit for breach of contract—Evidence.*

B executed an unregistered mortgage-deed of immoveable property for Rs. 800 to A. The deed provided that A ought to be in possession for a certain number of years and enjoy the usufruct in lieu of interest. A's case was that she was in possession under the mortgage for a certain number of years and that, thereafter, she was unlawfully dispossessed by B. B claimed damages as for breach of contract.

Held, that, under S. 49 of the Act, the deed of mortgage being inadmissible in evidence, A was not in a position to prove by other evidence, what the terms of the contract were and that the suit was, consequently, unsustainable. (4 A 232 and 18 B 745 followed and 17 M 456 distinguished). BALAJI TELI *v.* MT. BANA BAI. **1 N. L. R. 47**

119. S. 49.—*Registration.*

An unregistered document affecting immoveable property is admissible to prove a personal obligation where it contains a distinct, *i.e.*, separate admission of liability or personal undertaking to pay and not otherwise 8. B. 745, 19. B. 663, 29. B. 553, 9. C. 520, 26. C. 334, 5. M. 119, 8. M. 182,. P. J. L. B. 125, P. J. L. B. 212, S. J. L. B. 195 referred to—MAUNG KYAN BET *v.* MAUNG LU. DOK.—**U. B. R. 1904. P. I.** *(Registration)*

120 S. 49—See S. 17, 18, 28, 49—29. C. 654 No. 42 and S. 17, 21, 49—7. C. L. J. 149 No. 41 *supra*.

Sup: Govt. acts (III of 1877) *(Contd.)*

121 S. 49—See S. 17, 49—4. B. L. R. 883. No. 48. 30. C. 20. No. 49, 3. M. L. T. 187. No. 50. 11. C. W. N. 342. No. 51, 13. M. L. J. 1903. P. 283 No. 52, 3. N. L. R. 72. No. 53, 7. O. C. 231. No. 54. *supra.*

122 S. 49—See S. 17. (b) and 49—111. P. L. R. 1907. No. 59 *supra.*

123 S. 49—See S. 28, 49—29. C. 6 54 No. 93. *supra.*

124 S. 49—See S. 43. 49—4, B. L R. 883—No. 108 *supra.*

125 S. 49—See S. 47, 49, 50—I. L. B. R. 1900—02. P. 293, No. 112 *supra.*

126—**S. 50**—When a decree or order is obtained upon an unregistered mortgage deed against the mortgagor alone, subsequent to a registered transfer of the mortgaged property section 50 of the registration Act gives priority to the registered transferee.

13 All. 288, 28 Cal. 139, S. C. W. N. Cal. 1901, p. 419 followed; 7 All. 888 overruled. 6 B. 193 *referred to.* BALDEO PRASAD *v.* BALDEO **W. N. All., 1901, p. 112.**

127. S, 50— *Priority—Notice—Onus to prove.*

To check fraud under cover of the provisions of Section 50 of the Registration Act priority is not allowed if the subsequent mortgagee at the time of obtaining his mortgage had notice of the earlier mortgage. The *onus* is upon the party alleging such notice to aver the same in his pleadings and to prove it. CHANNAPPA REDDI *v.* MANICKAVASAGAM CHETTI. **25. M. I.**

128 S. 50—*Conflict between registered and unregistered documents—Long possession by usufructuary mortgagee under an unregistered instrument—Title.*

Defendant and his father had taken possession of certain land as usufructuary mortgagees in 1877, and had held possession of it ever since. The document witnessing the mortgage was never registered. The land was subsequently purchased by them. At a date later than the purchase, plaintiff obtained a mortgage over the land, which was duly registered. Plaintiff now sued to recover possession of the land.

Held that he was not entitled to recover. Defendant had been in possession as usufructuary mortgage, though under an unregistored document, since 1877, and s. 50 of the Registration Act does not affect the operation of the law of limitation in favour of a person who claims under an unregistered document. *Nallamuthu Pillai v. Betha Naicken*, I. L. R., 23 Mad. 37, referred to. BUDANKAYALA BALA KRISHNAMMA SUBUDHI *v.* VINAYAKA RAVA SINGI BISOYI. **I. L. R., 26 M. 72.**

129 S. 50—*Priority—Registered and unregistered document—Purchaser under a registered deed whether entitled to priority over purchaser in execution of a subsequent decree obtained by a prior mortgagee under an unregistered deed.*

Sup. Govt. acts (III of 1877) (*Contd.*)

A purchaser of immoveable property under a registered deed of sale is entitled to priority over a purchaser of the same property in execution of a subsequent decree obtained by a mortgagee under a prior unregistered deed. *Baijnath* v. *Lachman Das*, (I. L. R., 7 All., 888) dissented from.—ISHAN CHANDRA DEY *v.* GONESH CHANDRA PARSI, **5. C. W. N. 419=28. C. 139.**

130. S. 50.—*Registration [illegible] ment—Priority—Notice of possession.*

A vendee is not entitled to claim priority on the ground of his title being under a registered deed as against one who holds possession under an unregistered deed, when the fact of such possession was known to the holder of the registered deed at the time of his purchase. KONDIBA *v.* NANA (SIDRAM) SHIDRAO, **5 B. L. R., 269. =27. B 408.**

131. S. 50.—*Prior and subsequent mortgagees—Prior mortgagee in possession without registration—Notice.*

Where a mortgagee under an unregistered deed, not compulsorily registerable, is in possession of the mortgaged property, the holder of a subsequent registered deed will have no priority under section 50 of the Indian Registration Act, as the holder of the registered deed must be taken to have had notice of such possession, and was affected by any equities which the mortgagee in possession could enforce against the mortgagor—*9 M. I. A. 18; 16 Cal., 414; 16 Mad., 148; 19 All., 145; 20 All., 252 referred to.* BHIKHI RAI *v.* UDIT NARAIN SINGH AND HANWANT RAI. **A. W. N. 1903. P. 81=25. A. 366.**

132. S. 50.—*Competition between registered and unregistered document—Civil procedure Code S. 561—Objection by respondent—Hypothecation of moveable properties.*

In a competition between a document which is compulsorily registerable and registered and one which is optionally registrable and unregistered, the former will prevail, whether the unregistered document be of the same nature as the registered document or not. *Shib Chandra Chakravarty* v. *Johobux* (I. L. R., 7 Cal. 570) relied upon. It is not necessary to entitle a respondent to support a decree upon a particular ground under S. 561 of the Civil Procedure Code that the ground should have been in express terms decided against him. Although no provision has been made either in the transfer of Property Act or in the Contract Act with regard to chattel mortgages or hypothecation of moveable property, it does not follow that such transactions are invalid. In the present case, moveable property was hypothecated in favour of the plaintiff but possession was not delivered. *Held* that the plaintiff had acquired a good title over the property. *Kalka Prosad* v. *Chandan Singh* (I. L. R., 10 All. 20) referred to.—SHRISH CHANDRA ROY *v.* MUNGRI BEWA, **9 C. W. N. 14.**

Sup. Govt. acts (III of 1877) (*Contd.*)

133. S. 50.—*Sale of property comprised in an unregistered mortgage—Purchase with Notice.*

B purchased property which was the subject of A's unregistered mortgage, the registration of which was not compulsory. B had no notice of the mortgage at the time of execution of the sale-deed in his favour, but received notice before the sale-deed was registered. *Held* that A's mortgage was binding on B (19 A 145, 25 A 366 followed) KHIALI RAM *v.* HIMMATA, **A. W. N. 1908 F. P. 99.**

134. S. 50—*Sale certificate not registered—Subsequent sale by the purchaser under registered deed—Unregistered prior mortgage-deeds—Priority between registered sale deed and mortgage-deeds unregistered.*

An absolute occupancy holding was sold in execution of a decree for rent against the original tenant but not free of incumbrances, and purchased by A. at Court sale but his certificate of sale was not registered sale deed to B. C. sued to enforce upon the holding two optionally registrable but unregistered mortgages in his favour of date prior to the execution-sale. The question was as to the priority between C's mortgages and B's sale deed.

Held, a registered conveyance will prevail against an unregistered mortgage none the less because it is itself based upon an unregistered, but optionally registrable, conveyance; for, the object of the Registration Act is to secure subsequent purchasers and mortgagees against prior unknown conveyances and incombrances. B. is entitled to priority over C's mortgages notwithstanding the fact that his vendor held the holding under an unregistered sale-deed. SETH RAMLAL *v.* BHURIA, **I. N. L. R. 125.**

135. S. 50.—*Unregistered mortgage deed—Purchaser having notice of the mortgage—Whether notice of mortgage to pre-emptor necessary.*

A right of pre-emption is a right entitling the pre-emptor to be substituted for the vendee as purchaser, and to stand in his shoes in respect of all the rights, and obligations arising from the sale under which he derives his title. It is not a right of repurchase and the pre-emptor can only get what the vendee bargained for.

S. 50 of the Act does not protect a purchaser who purchased with knowledge of an unregistered encumbrance.

Consequently where a vendee purchases with notice of a prior unregistered encumbrance and the property is pre-empted, the pre emptor takes subject to that mortgage even if the existence of that mortgage was concealed from him. TEJPAL *v.* GIRDHARI LAL, **5 A. L. J. 112**

136. S. 50.—*Retrospective effect of Statutes—Unregistered mortgage of 1861—Subsequent registered mortgage.*

It is a well-established principle of law of the construction of statutes, specially when they affect rights and liabilities of

Sup: Govt acts (III of 1877) *(Contd.)*

the parties that they are not to have retrospective effect unless their language plainly requires such a construction. Where therefore an unregistered mortgage was made in 1861, when registration was not compulsory, and a registered mortgage was made in 1900, *held*, that the former had priority over the latter, because the effect of giving a retrospective effect to S. 50 of the Act, would be prejudicial to the vested rights which the plaintiff had at the date of the passing of that Act. By the repeal of Act XIX of 1843 she had acquired a privilege which she did not possess before, *viz.*, priority for her mortgage over subsequent instruments, whether registered or not registered. 2 M 147, 20 B 390 followed. HARGOVIND *v.* KISHAN KOAR, **3 A. L. J. 320**=**A. W. N. (1906), 113**=**28 A 607**.

137. S. 50—*Registered and unregistered deeds of sale.*

A tenant in possession of a house purchased it from his londlord by an unregistered deed of sale for Rs. 30. The landlord deed after the sale and his representatives sold this house to B by a registered deed. B sued A for possession of the house. There was no allegation by A that B bought with notice of his purchase.

Held, that the transfer having been made after the passing of the Transfer of Property Act no conflict could arise under S. 50 of the Registration Act, and that delivery of tangible immoveable property having taken place the plaintiff could not claim priority for his registered sale-deed. *held, further*, that tangible property means lands, buildings, etc., which immediately or through the medium of tenants may be the subject of possession deliverable by the seller to the buyer.—KHAIRATI *v.* SANDA, **2 O. C. 74**.

138. S. 50—*Priority of mortgage executed after over deed of gift executed before the passing of Registration Act.*

Held, that s. 50 of the Registration Act of 1877 has no retrospective effect affecting titles acquired at a time when there was no law of registration in the Province and that consequently a mortgage-deed executed and registered in 1892 could not take priority over a deed of gift, executed before the passing of the Registration Act of 1877 and not registered,—MUSAMMAT NAZIR SAHIBA *v.* SITARA KHANAM, **7 O. C., 342**. *(See No. 143 infra)*

139 s. 50 See S. 17, 50—27. B. 452 No. 55 *supra*.

139 (a)—s. 50 See S. 18 and 50—25 M. I. *supra* No. 81.

140—s. 50 See S. 47, 49, 50—I. L. B R, 1900-02 P. 293 No. 112 *supra*.

141—s. 50 See S. 48, 50—17. M. L. J. 319. No 115 *supra*.

142—s. 50 Clear notice of unregistered deed.

In the absence of clear proof of notice the holder of a registered instrument shall not be deprived of the advantage which registration would otherwise give him, 2. Atk. 275, 13. R. R. 236 *referred to*. SETH BONDRUSA *v.* SHEO-RAM **16. C. P. L. R. 1903 P. 95**.

143. s. 50—*Competition between an unregistered deed when no Registration Act prevailed and a registered deed under the present Act.*

Although a document registered under Act III of 1877 will take effect against a document executed but not registered while the earlier Acts were in force (2. A. 431) yet S. 50 of the Act of 1877 does not indicate that documents registered under that Act are entitled to priority over documents executed when no registration was in force. 2. M. 147, 20. B. 390 followed. SETH NERBUDDA PRASAD *v.* RAJA SETH GOKAL DAS **I. N. L. R. 158**. *(See No. 138 supra)*

144. s 51. *Release by a co-sharer of transfer See B. T. A. (I of 1903) S. 11 & 12.* HEMAUDRA NATH MUKERJI *v.* KUMAR NATH ROY. **12 C. W. N. 478**.

145. s. 52, 58. 49, 60. *Suit for pre-emption.—Date of registration, meaning of Law Act art 10.*

In a pre-emption suit based on a sale deed, the question for decision was whether the period of limitation, provided by Art. 10 of the Limitation Act began to run on the date on which the dcoument was presented for registration or on the date on which the document was actually registered *i.e.*, the date on which the endorsement "registered" was made by the Registering Officer. *Held*, that time began to run from the date of registration, *i. e.*, the date on which the endorsement 'registered' was made and, not from the date of the presentation for registration (10 P. R. 1881 followed). BHANJAN RAM *v.* GOPALA RAM, **92. P. R. 1906**=**126 P. L. R. 1906**.

146. s. 57. *Certified copy of registered document—Admissibility in evidence of—Evidence Act (I of 1872), ss. 65 (e) and (f) and 74 (2).*

Held, that by registration a private document does not become a public document within the meaning of sec. 74, cl. (2) of the Indian Evidence Act.

Held, also, that the last clause of section 57 of the Registration Act was not intended to override the provisions of the Evidence Act, 7 (O. C., 327, overruled; 22 W. R., 303, referred to).—RAJ GOBARDHAN SINGH *v.* MUSAMMAT NASIBAN, **7 O. C. 365**.—*(See column 188)*.

147. s. 57—*Evidence Act (1 of 1872) S. 65, cl (c) Registration Act (III of 1877) s. 57—Certified copy of a registered deed.*

A sued upon a mortgage-deed which was not produced. He failed to account for the non production of the deed. The question was whether the plantiff can succeed on the certified copy of the deed produced by him.

Held, that a private document which has been registered according to law, becomes un-

Sup: Govt. acts (III of 1877) (*Contd*)

der section 74, cl. (2) of the Evidence Act, a public document and its existence and contents may, under section 65 (*e*), be proved by secondary evidence, without proving the circumstances detailed in section 65 (*a*), (*b*) or (*c*), Evidence Act, section 57, Registration Act, sufficiently bring certified copies within section 65, cl. (*f*) of the Evidence Act. BENI PERSHAD *v.* SHAI LAL, **7 O. C., 327**.—*(Ed. This ruling was overruled by 7 O. C., 365 see No. 146 supra).*

148. s. 58, 59 and 60—*Secondary evidence—Fact mentioned in endorsement.*

Sections 58 59 and 60 of the Registration Act enact that the facts mentioned in the endorsements, may be proved by those endorsements, provided the provisions of section 60 have been complied with.—THAMA *v.* GOVINDBILAL. **9 B. L. R. 401.**

149 s. 58. 59, 60—*See S.* 52, 58 to 60-92 P. R. 1906=126 P. L. R. 1906—No. 145 *supra.*

150 s. 60, 87—*Registration of a document—Omission to seal—Defect of procedure.*

The sealing of a document by a Registering Officer is not an essential part to the act of registration.

The omission of the Registrating Officer to seal a document registered by him is a mere defect of procedure which is covered by the provisions of Section 87 of the Registration Act. SITA NATH BANDOPADHYA *v.* BISSESSUR ROY CHAUDHURI. **6 C. W. N. 1902 P. 528.**

151 s. 60—*See S. 32, 33, 60, 87—6. O. C. 9. No 97. supra.*

152 s. 64—*See S. 3, 64, 65—25. B. 50 No 6 supra.*

153 s. 65—*See S. 3, 64, 65—25. B. 50 No 6 supra.*

154. s. 72, 73, 77.—*Order refusing registration—Appeal—Suit to compel registration.*

A presented a receipt purporting to be executed by B in his favour for Rs. 400, to the Sub Registrar. B denied execution and so registration was refused. A preferred an appeal from the order of the Sub-Registrar to the District Registrar. The appeal was dismissed as no appeal lay. A then brought a suit in the Civil Court for a decree directing the document to be registered.

Held, that there could be no doubt that in this case no appeal lay to the Registrar, and that A should have proceeded under sec. 73 of the Registration Act.

Held, further, that in this case no suit could lie independently of S. 77 of the Indian Registration Act.—GANGA DIN *v.* MATA DIN, **2 O. C., 77.**

155. s. 73.—*See S. 35, 73, 74, 75, 87—5. C. L. J. 188 No. 10 7 supra.*

156. s. 73—*See S. 72, 73, 77—2. O. C. 77. No 154 supra.*

157. s. 73, 74, 75 76. 77.—*Refusal of Sub-Registrar to register on the ground of denial of execution—Application to Registrar to order registration not made within the prescribed time—Suit in Civil Court to compel registration barred.*

Sup: Govt. acts (III of 1877) (*Contd*).

When registration of a document has been refused by a Sub-Registrar under S. 71 of the Registration Act 1877, on the ground of denial of execution by one of the alleged executants, no suit will lie in a Civil Court to compel registration unless an application has been made to the Registrar under S. 73 of the Act to establish the right of the applicant to have the document registered, and made "within thirty days after the making of the order for refusal." In computing the period of thirty days within which such last mentioned application must be made, the applicant is not entitled to the exclusion of the time necessary for obtaining a copy of the Sub-Registrar's reasons for refusing to register. When under these circumstances, an application is made to the Registrar after the time limited has expired, and is rejected on the ground of limitation, such rejection cannot be considered as a refusal to register within the meaning of clause (*b*) of S. 76 of the Act. (3 All 397; 9 Cal 150 9 Cal 851; 11 Cal. 750; 7 Mad 535 and 18 Mad 99 referred to.)—UDIT UPADHIA *v.* IMAM. BANDI BIBI, **A. W. N. 1902. P. 99=24. A. 402. (F. B)**

158. S. 75.—*See S. 3, 47, 75—3. O. C. 231. No 7 supra.*

159. s. 76 and 77. *Suit to compel registration—Grounds for.*

A Registrar refused to register a document upon the ground that there was not sufficient proof that the document was executed by the authority of the alleged executant, and that there was undue and unexplained delay in presenting the document for registration *held* a suit would lie under section 77 of the Act to compel registration.

Held, also that, in a suit under S. 77 of the Act, the Court has to see only the genuineness of the the document sought to be registered, and not its validity. (25 C 93, 24 C 668 *Referred*) KANHAYA LAL *v.* SARDAR SINGH, **A. W N. (1907), 46=4 A. L. J. 171** (*See Nos 164, 165 infra*)

160—s. 77—*Suit to compel registration—Limitation Act (XV of 1877), s. 5, 6.)*

Held that s. 5. of the Limitation Act, 1877, applies to a suit brought under s. 77 of the Indian Registration Act, 1877, for a decree directing the registration of a document. (23 All. 277 followed) SURJA BALI PRASAD *v.* THOMAS,—**A. W. N. 1905, p. 175,=2. A. L. J. 714=28. A. 48.**

161 S. 77—*Limitation Act (XV of 1877), s. 6, 14.—Suit to enforce registration—Period of Limitation, computation of—Registration Act (III of 1877), s. 77.*

An executant of a document not admitting execution, the Sub-Registrar refused to register it. There was an appeal to the Registrar, who also refused to register. Within thirty days of the dismissal of the appeal, an application for review was filed to the Registrar, which was also dismissed. On a suit brought in the

Spu : Govt. acts (III of 1877) *(Contd.)*

Civil Court to enforce the registration of the document, after the dismissal of the said application for review:

Held that S. 14 of the Limitation Act had no application to the present case; and that the suit not having been brought within thirty days from the date of the dismissal of the appeal by the Registrar, it was barred by limitation. 18 Cal. 368 followed in principle; 18 Mad. 99 17 Cal. 263 *referred* to; and 10 Cal. 265 discussed.—ABDUL HAKIM *v.* LATIFUNNESSA KHATUN, **I. L. R. 30 Cal. 532; 7 C. W. N. 550.**

163 S. 77—*Making of the order—Date of the order—Date of communication—Running of time for suit.*

The expression "making of the order," in section 77 of the Registration Act (III of 1877), means not merely recording the order of refusal in writing, but communicating it to the party concerned so as to bind him by it. Hence, a suit brought under the provisions of S. 77 of the Registration Act (III of 1877) for a decree directing a document to be registered, many be filed within thirty days of the date on which the order of refusal was communicated to the party concerned. ABDUL ALI *v.* MIRJA KHAN. **I. L. R., 5 B. L. R., 622=28 B. 8.**

164 S. 77—*Suit to enforce registration of document—Execution admitted—Question of validity of document.*

In a suit to enforce the registration of a document under section 77 of the Registration Act, a Court cannot go into any matter affecting the valid ty of a document apart from its genuineness. *18 Mad., 255; 24 Cal, 668, followed.* HAZURI MAL *v.* KUTAB-UD-DIN. **84 P. L. R. 1903=11 P. R. 1903.**

165 S. 77—*Suit to register document—Scope of enquiry.*

Held that in a suit filed under section 77 of the Registration Act the Court should enquire into nothing more than whether the defendant ostensible execuant signed and delivered to the plaintiff the document in question in the suit. *24 Cal., 668; 11 P. R., 1903, S. C., 84 P. L. R., 1903; 18 Mad., 255, referred to.* NAWAB *v.* ARJAN DAS. **78 P. L. R. 1904=13. P. R. 1904.**

166 S. 77—*Decree directing registration—Decree not providing for period for registration—Non-presentation of document within thirty days of First Court's decree directing registration.*

S. 77 of the Registration Act does not enact that the document, of which registration is directed by a decree made under the section, must be presented for registration within thirty days of the passing of the decree. In a suit under s. 77 of the Registration Act, the decree of the first Court simply directed the document to be registered and said nothing about its presentation for registration within thirty days from the passing of the decree; after an unsuccessful appeal, the document was presented for registration within thirty days from the passing of the decree on apeal and was registered.

Held that the validity of the registration of the document could not be questioned on the ground that the document had not been presented for registration within thirty days of the passing of the first Court's decree, the decree having imposed no condition to that effect. GOPINATH ADHIKARI *v.* GADADHAR DAS. **I. L. R., 33 C. 1020.**

167 S. 77—See S. 17, 18, 21, 24, 77—30. B. 30 21. No. 43 *supra.*

168 S. 77—See S. 23 to 26—1. C. L. J. 126 No. 87 *supra.*

169 S. 77—See S. 72, 73, 77—2 O. C. 77. No. 154 *supra.*

170 S. 77—See S. 73 to 76 and 77—24. A. 402. (F. B.) No 157 *supra.*

171 S. 77—See S. 76, 77—A. W. N. 1907. P. 46=4. A. L. J. 171. No. 159 *suprá.*

172 S. 77—

Held that in Upper Barma a suit lies for a decree directing that a document shall be registered as there is no office of the Registrar, and the Registration Act is not in force in Upper Burma. Therefore S. 77 does not bar such a suit which can lie under the General law S. 11. C. P. C. MAUNG TUN AUNG *v.* MAUNG MAUMG LAT. **U. B. R. 1902. P. 1.** *(Registration).*

173 S. 77—

Suit to direct Registration of a will by which property worth more than Rs. 2,500/- is disposed of. **17. M. L. J. 573.**—*(See Jurisdiction of Munsiff's Court).*

174. S. 81. *False certificate by registrar false declaratoin—Indian Penal Code s 197 General clouses Act S 26, Previous acquittal See Criminal Pro: Code S. 403, 439. Raghubar Dial v. Knig Emperor 6. O. C. 153 (cr)*

175. S. 81 *Misjoinder of charges See Criminal Procedure Code (of 1898) S. 255 —Birandra Lal Bhaduri v. the Emperor 7. C. W. N. 639=30 C 822 (P. C.) (criminal)*

176. S. 82—*Deinal of execution—Prosecution.*

Where a suit for declaring a document to be a forgery by the accused is pending his prosecution for falsely denying execution of a document sanctioned by the Registrar and commenced before a Megistrate should be stayed till the decision of that suit. GOBERDHAN PRAMANICK *v.* ISWER CHUNDER.—**5 C. W. N. 44.**—*(See also 30 C. 382, 7 C. W. N 639 under section 467 Penal Code, 3 L. R. 1906 P. 222. and 5 B. L. R. 138).*

177 S. 82 (c) *False person—Fraudulent intention.*

The offence of false personation under section 82 (c) of the Registration Act is complete without any fraudulent intent when a person falsely personates another before a Registering Officer. EMPEROR *v.* KALYA NAVA PATIL. **5. B L R. 138.**

178. S. 82 (c)—*Unanimous verdict of "not guilty" Question of Judge to Jury after the*

Sup: Govt. acts (III of 1877) *(Contd.)*

verdict—Expert evidence as to the identity of thumb impressions. See criminal Pro: Code S. 303 and 307 EMPEROR v. *ABDUL HAMED 9 C. W. N. 520=2 Cr. L. J, 259=32 C. 759*

179 S 87—See s 7, 30 (a), 87 3. C. L. J 165 No 9 *supra.*

180 s. 87—See s 17, 32, 34, 35, 87, 23. A, 233 =28. I. A. 15 No 46 *supra,*

181—s. 87—See s 32, 33, 60, 87, 6. O. C. 9 No 97 *supra.*

182—s. 87—See s 35, 73 to 75 & 87—5·C. L. J. 188. No 107 *supra.*

183—s. 87—See s 60, 87—6. C. W. N. 1902 P. 528. No 150 *supra.*

(44) Act XV of 1877. *(Limitation Act) See Act I of 1908 (Limitation Act.)*

(45) Act VIII of 1878 *(See Customs Act.)*

1. s. 18, 19 A.—*Powers of Collector of Customs to detain goods bearing counterfeit trade mark.*

S. 18 of the Act enacts that no goods specified in clauses (*a*) to *(f)* shall be brought into British India; and clause (*d*) refers to "goods having applied thereto a counterfeit trade mark within the meaning of the Penal Code, or a false trade description within the meaning of the Merchandise Marks Act, 1889." So, if the goods come within the specification mentioned in the section, it would be the duty of the Collector of Customs, as a representative of Govenment to stop the goods from being brought into British India; and the Collector has this power, although no regulations have been framed by the Governor-General in Council under S. 19 A, sub sec (2) as the power of detention is clearly implied by S. 19 A, apart from the positive words of S. 18 that no goods of the class specified are to be brought into British India. NEMI CHAND *v.* SECRETARY OF STATE FOR INDIA, **34 C. 511.**

46 Act IX of 1879.—*(Court of Ward's Act). Ss. 5, 35, 51—Property not taken charge of.—*

Whether Manager, Court of Wards should be a next friend or guardian of the ward. **5 C. L. J. 434** *(See C. P. C. Ss. 235, 248.)*

47 Act XVII of 1879.—*(Dakhan Agriculturists Relief Act.)*

1. s. 12.—*Suit—Claim.—Meaning of—*

The existence of a dispute as to the amount of the creditor's claim is a preliminary condition of the necessity for the inquiry directed by section 12 of the Dekkhan Agriculturists Relief Act 1879.

The word "claim" in the section means not merely the amount of the principal lent but the aggregate of the sums payable in consequence of the liability created by the terms of the contract of lending embodied in the bond. PATLU *v.* NARU **7. B. L. R. 1905. P. 688.**

2. s. 44.—*Pensions Act (XXIII of 1871), Section 4—Suit—Execution proceedings—Dekkan Agriculturists Relief Act (XVII of 1879), Section 44— Partition—Joint family property—Conciliation agreement—Consent decree—Execution of decree—Executing Court cannot*

Sup: Govt acts (XVII of 1879) *(Contd.)*

question jurisdiction of Court passing decree.

The word "suit" in section 4 of the Pensions Act does not include execution proceedings.

A conciliation agreement was filed, under section 44 of the Dekkan Agriculturists Relief Act. It effected partition of family property between two brothers, *N.* and *A.*, who were joint. One of the items to be partitioned was the income of a Saranjam village. Out of that *A.* was to pay every year Rs 456-0-6 to *N.* They both died. The payment was duly made during their lives and even afterwards by *T.*, son of *A.*, to *N.* The payment was stopped and thereupon *B.*, son of *N.*, filed a *darkhast* to enforce payment. It was contended that *A's* interest having terminated with his death the Saranjam must be considered as a fresh grant to his son, and that the latter was not bound by the decree and liable to continue the yearly payment.

Held, overruling the contention, that *A.* was a trustee in respect of the Rs. 456-0-6 for *N.*, the obligation to pay which was attached to the succeeding holders of Saranjam, and that therefore, *N.*, and his descendants had the right to call upon *A.* and his descendants to account for their management of the Saranjam and pay to them the sum of Rs. 456-0-6 per annum.

Where a decree is passed by consent, it can only be set aside upon the same grounds as an agreement can be set aside, *e.g.*, fraud or mistake or misrepresentation.

Per Batty, J.—A Court executing a decree cannot question the jurisdiction of the Court which passed it. TRIMBAKRAO ANANDRAO *v.* BALWANTRAO NARAYANRAO **7. B. L. R. 1905. P. 659.**

48. Act XVIII of 1879. *Legal Practitioners Act.)*

1. s. 12 *Legal Practitioner—Pleader's clerks, dismissal of.*

Where the Court passed an order upon a legal practitioner to dismiss one of his clerks:

Held that the Court had no jurisdiction to pass such order. If any acts of his is unprofessional or illegal, it may only proceed against him under the Legal Practitioners Act. PROMATHO NATH MAJUMDAR. *In re.* **10 C. W. N. 49.**

2. s. 3, 4. *and 36.*

The sections of the Legal Practitioners Act which enable the Courts to deal with touts are not extended to the Bombay Presidency. Sections 3 and 4 alone are extended to the Bombay Presidency and an order directing the name of a person to be entered in the list of touts is not authorized by those sections. *In re* SHESHGIRI *v.* PHONDBHA. **5. B. L. R. 728.**

3 s. 6, 8. *Power of High Court to revise order of Commissioner of Kumaon refusing admission and enrolment of Vakil.*

The Commissioner of Kumaon is the High Court for the puposes of the legal Practitioners' Act in the Kumaon Division.

Sup: Govt. acts (XVIII of 1879) (*Contd.*)

The High Court for N. W. P. has no jurisdiction to revise the order of the Commissioner of Kumaon refusing the petition of a Vakil to be admitted and enroled as a Pleader of his Court. *In the matter of the petition of* PADMA DAT JOSHI.

Jurisdiction of Court—Valuation—Suit for partition.

The value of a suit for partition, for purposes of jurisdiction, is the value of the share of the plaintiff and not of the entire property sought to be partitioned, though it be alleged in the plaint that the partition should be made by the preparation of lots and separation of the shares of each party. WAJIH-UD-DIN *v.* WALI-ALLAH. **A. W. N. 1902 P. 86=24 A. 381.**

4. s. 6, 12, 13, 27, 28, 29, 30 *Acceptance of back-fee improper—Misconduct—Act 1 of 1846, S. 7—Act XX of 1865—Act IV of 1872, s. 23.*

Held, by a majority (of 7 out of all the 9 judges) that any legal practitioner, accepting a case, on the condition of receiving any portion of his fee or remuneration, on his client's success, wholly or partly, in the litigation, is guilty of grossly improper conduct in the discharge of his professional duty within the meaning of S. 13 of the act (1879) and such a contract is unlawful 5 P. R. 1878 (F. B), *overruled*; 69 P. R. 1894, 21 S. W. R, 297, 4 C. W. N. 104, 5 B. 258, 8 B. 413, 3 B. L. R, 102 3 M. 138, 26 P. R. 1874, 51 P. R. 1895-49, P. R. 1906, 5 S. W. R. 307, 25 A. 509, 1 Bail Court 541. Cordery's Law of Solicitors, 3rd edition, 273, 194 P. R. 1883, 99 P. R. 1901, 96 P. R. 1902, 15 P. R. 1897 (Cr.), 11 C. 233 (257), 29 C. 595, 20 B. 677, 13 C. B. N. S. 677, L. R. House of Lords 500 (507), 11 A. 72, 4 Bengal L R.O.J. 12 and 13, 1 N. W. P. 1, 5. B. 261, Colorada Bar Associations Code of Legal Ethics, Rule 50, New Jersey Court of Errors and Appeals, Law-yer's Annotated Reports, Vol. 58, p. 476 21 law-yer's Annotated Reports 369, Columbia Court of Appeals, Lawyer's Annotated Reports, Vol. 41, p. 526, United States Supreme Courts Reports Lawyer's edition, Vol. 28, pp. 64 and 65, S. 11 of Attorneys and Solicitors Act, 1870, 1 Chancery Division. p. 573, 2 Q. B. 6 L J. K. B. (O.S), 24, 30 L.J.C.P. (N. S.), 217, 32 L. J. Chancery N. S., 731, *Referred to.*

Held, by Chatterji and Lal Chand JJ.—That, so far as back-fee is concerned, this rule cannot apply to pleaders whose rights, duties and remuneration are to be determined under the Act, (1879) which, in fact, is the source of their status; but the accepting or receiving on such condition, a specified share of the proceeds of litigation, which is quite different from back-fee, is undoubtedly objectionable under S. 13 of the said Act 5. P. R. 1878. (F. B.) Appr; GANGA RAM *v.* DEVI DAS, **45 P. W. R. 1907 =33. P. L. R 1907=61. P. R. 1907. (F. B.)**

5 S 8—*See S. 6, 8—24 A. 381 No. 3 supra.*

6 S 13—*Advocate and Pleader—Professional misconduct—Champerty, Pleader & client.*

An Advocate or of a Vakil. who enters into an agreement with a client, to furnish him with funds for a litigation, in consideration of getting a part of the property in litigation, if recovered, is guilty of grossly unprofessional conduct. If a Vakil takes an active interest in a case when pendency in the lower court, & there is an understanding that he will be engaged as Vakil when the case comes up to the High Court, it cannot be said that the relation of pleader and client did not exist between himself and the client before the actual execution and acceptance of the power of attorney. IN THE MATTER OF AN ADVOCATE, A VAKIL, A PLEADER AND A MUKHTEAR, **4 C. L. J. 262.**

7 S. 13—*Subordinate Courts,—Jurisdiction to enquire into offences referred to in S. 13.*

A pleader was found guilty of tempting and inducing two subordinates of the Collector's Office, to allow him to examine the treasury accounts against their duty. The Collector directed a Deputy Collector to charge him & to try the charge. *Held*, that, the Deputy Collector was competent to adjudicate upon the charge. A court subordinate to the High Court can try offences falling under clauses (c to f) of S. 13 of the Act 15 C. 152, & 26 M. 248. referred, 27 C. 1023 Diss. *In the matter of* MUHAMMAD ABDUL HAI, PLEADER, **3 A. L. J. 811=A. W. N. (1906), 268=29 A. 61.**

8—S. 13=*Compromise between client and legal practitioner.*

A legal practitioner, who, believing himself to be under a pecuniary liability to his client, endeavours to get the client to accept a less amount than that for which he is liable is not guilty of "grossly improper conduct in the discharge of his professional duty" within the meaning of S. 13 of the Act. AHSAN ALI, *In the matter of*, **5 A. L. J. 128.**

9—S. 13—*Misconduct—Mukhtar advising his client to absent himself in order that the suit should be dismissed in default.*

A mukhtar advised a client, whose witnesses had not reached the Court on the day fixed for the hearing that client being a plantiff to absent himself in order that the suit should be dismissed in default and not on the merits for lack of evidence.

Held, that the conduct of the *mukhtar* was grossly improper.—IN THE MATTER OF A MUKHTAR, **56 P. R. 1902.**

10 S. 13— *Pleader taking sides against former client—Grossly improper conduct*

A pleader, after his dismissal without misconduct on his part, or after the close of the business, is at liberty to take sides against his former employer, provided always that he has no secrets to carry with him that can be used to his former client's prejudice. But he is not competent to do so when he is neither discharged by his client nor has the business for which he was retained closed.

Where a Mukhtar retained by the complainant defended the accused when

Sup: Govt. acts (XVIII of 1879) (*Contd.*)

the latter was retried after order of his discharge was set aside on revision—

Held, that the conduct of the Mukhtar was grossly improper. 6 *Cal.*, 79; 12 *B.* 95 *referred to.* ALI MUHAMMAD *v* SHAM LAL, MUKHTAR. **45. P. L. R. 1904=2 P. R. 1904 C.**

11 s. 13—*Pleader— Misconduct.*

It is misconduct on the part of a legal practitioner to stipulate with his client to share in the results of litigation. *In the Matter of a Pleader.* **141. P. L. R. 1904=69 P. R. 1904.**

II (a) S. 13. *Professional Misconduct—Appropriation of client's money by Pleader.*

A pleader, by virtue of a power-of-attorney given to him by his client, drew out a certain decretal amount from Court, and applied the same to his own purpose. When the client asked for the money, the pleader promised to pay at a subsequent date. On that date, the amount was not paid, but he gave a promissory note to his client for the sum. Ultimately the client had to bring an action for the money.

Held, that such conduct on the part of the pleader was grossly improper in the discharge of his professional duties within the meaning of s. 13 of the Legal Practitioner's Act. *In the matter of a Solicitor*, (11) T. L. R. 169), dissented from. *In re* PURNA CHANDRA DUTT, **7. C. W. N. 373=31. C. 44.**

12 S. 13—(b) *Pleader—Professional conduct—Disciplinary jurisdiction—Pleader making use in later proceeding, against A of information obtained by him in an earlier case in which A was his client.*

With regard to its disciplinary jurisdiction over pleaders, the High Court of Bombay will follow the rule laid down by Blackburn, J., in the case of *In re Cutts* which was as follows: "Those things which an attorney learns from his client, or in consequence of his employment by his client, he is forbidden to disclose, and any betrayal of his confidence would be visited by the Court of gross misconduct. But if he learns matters relating to his client under such circumstances, that if questioned about them in a court of justice he could not refuse to answer them, he is not within our jurisdiction." This rule should not be taken by pleaders as the standard by which to regulate their professional behaviour. It serves only to indicate the extreme low-water mark of professional conduct.—DAMODAR VENKATESH *v.* BHAVANISHANKAR MANGESH, **4. B. L. R. 67 =23. B. 423**

13 S. 13—(b) *Legal Practitioner—Advocate—Professional misconduct—Hindu Law Agreement —Compromise.*

In proceedings for administration of the estate of a Hindu who died intestate, the appellant, an Advocate in the Court of the Resident in Mysore, acted as legal

Sup: Govt. acts (XVIII of 1879) (*Contd.*)

adviser for two groups of persons, whose succession depended on whether the property of the deceased was separate or joint, in the former case, one of his clients was exclusively entitled to the whole estate; in the latter the members of both groups were entitled to divide the estate equally. By two agreements executed on 17th May and 22nd August 1899, the persons composing the two groups bound themselves to treat the estate as joint property and divide it accordingly; and both agreements were attested by the appellant.

On 29th March 1900, the person, who would if the estate were separate property, be exclusively entitled being then dead, letters of administration of the estate were granted to his two sons. Shortly afterwards one of the second group of persons, relying on the agreements, sued the administrators for a share of the estate and for partition. The case of the administrators as to the agreements was that they had been entered into under mutual mistake of fact, namely, under the belief that all the parties to them were entitled to share in the estates, and that there was no consideration for them. The District Judge, and on appeal the Resident, held that the estate was separate property, but the Courts differed as to the arrangements, the Resident holding that the compromises embodied in them were valid and binding. Charges of professional misconduct were made against the appellant in respect of the agreements to the effect that, knowing them to be invalid he had allowed his clients to execute them and had even attested them himself, without warning them that they were invalid, and that he knew that the father of the administrators and his sons after him were alone entitled to the estate and yet allowed those clients to give away their rights by compromises. The appellant admitted that at the time the agreements were executed, he thought them to be invalid. The charges were held to be proved and the appellant was suspended from practice for four months.

Held, that the charges could not be sustained. At the time the agreements were made and up to the decision on appeal that the property was separate, it was a matter of opinion whether they were invalid or not, and they were eventually held to be valid. There was nothing to show that the appellant had any knowledge or means of knowledge which his clients did not possess; they were fully aware of their legal position, and were, under no mistake, but deliberately accepted the compromise to avoid further litigation. LUBECK*In re*, **10 C. W. N. 57;=7. B. L. R. 894=32. I. A. 217, (P. C)=33 C 151 P. C.**

14 S. 13—(1) *Misconduct—Mukhtar's writing an objectionable letter to the presiding officer of a Court—Apology—Suspension.*

Held, that the conduct of a Mukhtar, who writes for another person a letter to the address of a presiding officer of a Court, on the supervision of Court's subordinate to his Court, and uses highly objectionable language in it, comes within the terms of section 13 (*b*) of the Legal Practitioners Act. For such misconduct the Chief Court suspended a Mukhtar from practice for a period of three mouths and declined to accept apology tendered by him before the presiding officer of the Court concerned and the Chief Court. IN THE MATTER OF A MUKHTAR. **166, P. L. R. 1901.=9. P. R. 1902**

15 S. 13—*Legal Practitioners Act (XVIII of 1879 as amended by Act XI of 1896), Section 13, Clause (f)—Any other reasonable cause.*

Held by the Full Bench (Ghose, J., *dissenting*), that the words 'for any other reasonable cause,' in Clause (*f*) of Section 13 of the Legal Practitioners Act, mean any reasonable cause of any kind, and are not limited to any other resaonable cause *ejusdem generis*.

The words are large enough to embrace all causes, whether professional or otherwise, which would afford reasonable grouud for debarring a practitioner from exercising his profession, either temporarily or permanently.

A practitioner who, prior to his admission, has committed an offence which; if it had been committed after his admission, would render him amenable to the provisions of Section 13, can be dealt with by the Court under that Section.—*5 C W. N., 48, overruled; 4 C. W. N., 339; S. C., I. L. R., 27 Cal., 1023, approved.* GHOSE J. *Contra*. IN THE MATTER OF SYED WAJID HOSSAIN, A MUKHTAR. **6 C. W. N. 556=28. C. 890.**

16 S. 13. (C)—"*Other reasonable cause*"—*Sending anonymous letter to an officer conducting an enquiry to prejudice him.*

When a pleader sent an anonymous letter to an officer, who was conducting an enquiry into a charge of bribery against a Revenue Inspector, in which letter he made allegations which were inteuded to prejudice the mind of the officer in connection with the matter which he was investigating—

Held, that the pleader was guilty of grossly improper conduct and the case fell within the purview os clause (*c*) of section 13 of the Legal Practitioners Act —27 *Cal.*, 1023 *followed. In the matter of* A PLEADER (*Sub-nom*) THE SUB COLLECTOR OF NORTH ARCOT *v.* V. O. SESHAHCARIAR. **13 M. L. J., 1903, p. 65.=26. M. 448.**

17 S. 13—(f) *Reasonable cause—Slander of Officer of Court—Professional misconduct.*

This Act is aimed against the misconduct of Legal Proctitioners in relation to their professional duties and not in relation to other matters. The words reasonable cause in S. 13 should therefore be read *ejusdem generis* as referring to professional misconduct. Where a pleader as a defendant in a suit and not as a pleader alleged that the plantiffs had bribed some officer of the Record room to tamper with certain documents produced at the instance of the plaintiffs:

Held, that this did not amount to professional misconduct JOGENDRA NARAYAN BOSE, *in the matter of*. **5. C. W. N. 48.**

18. S. 13, 14.—*Payment to witness—To give evidence &c—Professional misconduct.*

It is a professional miscouduct for a pleader to pay or offer to pay a witness for giving true evidence in favour of his client or to suggest such payment to his client, though it may not amouut to a criminal offence. It is grossly improper and puuishable as a serious professional misconduct to advise a client to pay a witness for keeping back unfavourable evidence. Likewise sending a false letter to a clieut to expedite remittance would amount to misconduct—NRITYA GOPAL SEN, *In the matter of*. **5. C. W. N. 45.**

19. S. 13, 14.—*Petition, containing disrespectful language presented by co-plaintiff who was also a pleader in the Court—Act committed by a suitor.*

Two persons filed a suit as co-plaintiffs in a district Court of which one of them was a first-grade pleader. The District Judge, doubting the *bona fides* of the claim, took evidence from the plaintiffs and others, and passed proceedings, giving in detail the reasons for his doubts and ordering that the Official Assignee should be added as a defendant in the suit. The pleader and his co-plaintiff thereupon filed a petition objecting to their having been *prima facie* condemned, and traversing the statements of fact and inferences made against them in the proceedings. Certain passages in the petition were disrespectful, and after some delay and other proceedings, a charge was brought against the pleader under the Legal Practitioners Act, 1879. The pleader, while disclaiming any intention to be disrespectful, contended that no offence had been committed under the Legal Practitioners' Act inasmuch as he had, in writing the petition, acted as a party and not as a pleader. On the case being referred to the High Court:

Held that steps should not have been taken against the pleader under the Legal Practitioners' Act, so long as it was possible to take notice of his behaviour in auy other way as one committed by a suitor. *In re Wallace* (L. R. I. P. C., 283), referred to.—*In the Matter of a* FIRST-GRADE PLEADER, **I. L. R., 24 M. 17.**

20. S. 13 and 14.—*Unprofessional conduct—Refusal of brief for political reasons—Reasons for refusal need not be stated—Pleader's right to move High Court to quash proceedings when called upon to show cause.*

Sup: Govt. acts (XVIII of 1879) *(Contd).*

A pleader is not bound to accept a brief offered to him not to state his reasons for refusing to accept it.

A pleader, having refused a brief offered to him, was subjected to a stringent examination to disclose his reasons, and, on its appearing that his reasons were political, proceedings were started against him under the Act and he was called upon to show cause why he should not be reported to the High Court for unprofessional conduct. Without waiting to show cause, pleader at once moved the High Court to quash the proceedings.

Held—That he was entitled do so.

That there was no rule of procedure to justify the examination to which he was subjected. *In the matter of* NABIN CHANDRA DAS GUPTA, **12 C. W. N. 381.**

21. S. 13, 14, 40.—*Suspension from practice without opportunity to defend.*

Two charges were, on 30th December 1899, framed by a District Judge against a pleader under S. 14 of the Legal Practitioners' Act, and it was directed that they should be heard on 24th January 1900. On the day on which the charges were framed, namely, 30th December 1899, the District Judge passed an order suspending the pleader from practice as from 1st January 1900, pending the disposal of the charges. With regard to one of the charges, no opportunity was given to the pleader to defend himself before the order of suspension was made. With regard to the second charge, the Judge had, prior to the date upon which the charges were framed, made an observation, in the course of a judgment, reflecting in general terms upon the conduct of the pleader, in consequence of which the pleader had written a letter and filed an affidavit by way of explanation:

Held that the order suspending the pleader was irregular and must be set aside.—*In the matter of a* SECOND-GRADE PLEADER, **I. L. R., 24 M. 83.**

22. S. 13, 28—*Agreement between pleader and client for payment of a share of property in suit - Unprofession conduct of pleader.*

A sued in 1891. About the same time A executed an agreement in favour of his pleader, that "whereas A was not in a position to pay the pleader's fee at the time owing to poverty and whereas he wished to bring a suit, he promised that if he won the case he would pay one *lac* to the pleader; and if only a part of the claim, the amount would be reduced in proportion and would be payable whether the case was amicably settled or decided by the Court," The agreement was filed in Court soon after its execution.

Held, that, it was in effect an agreement by which the pleader became entitled to a share of the property in suit, and that in accepting such an agreement he was guilty of gross unprofessional conduct. As the agreement was entered into long ago and there had been delay in calling on the pleader to explain and as he had acted openly, it was *held* sufficient to censure the pleader.—**4. O. C., 229 = B. R., 134.**

23 17 S. 14—

A District Judge refused the renewal of certificate of practice of a Mukhtar who was being tried for perjury. The High Court directed the District Judge to renew the certificate unless he was of opinion that the Mukhtar was guilty of any misconduct in connection with the case resulting in his prosecution, and in that case the Judge should take action under section 14 of the Legal Practitioners Act. IN THE MATTER OF THE PETITION OF ALAMDAR HUSAIN, **W. N. A., 1901, p. 60.**

24 18 S. 14—*Professional misconduct—Charge before a Joint Magistrate—His transfer before inquiry to another division—Right of District Magistrate to transfer the case to him in the other Division—Pleader accusing Magistrate as acting maliciously, vexatiously and with a vindictive spirit, whether amounts to professional misconduct.*

A pleader was charged with professional misconduct for the alteration of the date in a certain petition, which was presented to a Sub-Magistrate. The case came before the Joint Magistrate of that division for inquiry, who, before the date of the inquiry, was transferred to another division. The District Magistrate ordered transfer of the charge to the same Joint Magistrate, on the ground that he had dealt with the matter in the first instance.

Held that the order of the District Magistrate transferring the charge to the joint Magistrate of a different division was unauthorised, and should be set aside.

There is no provision of law which authorises the issue of either a summons or a warrant against a pleader who fails to appear in answer to a charge preferred against him under S. 14 of the Legal Practitioners' Act.

Where a Magistrate issued a warrant against a pleader in such a case, and the pleader attached a written statement to the warrant in which he stated that the Magistrate, in issuing the warrant, had acted maliciously, vexatiously, and with a vindictive spirit, it was held, that such language, though to the last degree improper, did not amount to fraudulent, or grossly improper conduct in the discharge of his professional duty, within the meaning of S. 14 of the Legal Practitioners' Act, (4 R. R. P. C. 283, 24 M 17 followed) K. R. RAMACHANDRA IYER, *In re,* **3. M. L. T. 237**

25 S. 14—*Jurisdiction to enquire into misconduct.*

Held, that the first clause of Section 14 of the Legal Practitioners Act empowers any court in which a pleader practises to

Sup: Govt. acts (XVIII of 1879) (Contd).

consider a charge of misconduct made against him in such court. The section does not limit the consideration of a charge to the court in which the misconduct is alleged to have been committed. IN THE MATTER OF BABU HET RAM. 188 P. L. R. 1901

26 s. 14—*See S 13 and 14—5. C. W. N. 45 No 18, 24. M 17 No 19, 12 C. W. N. 381 No. 21, 24, M. 83, No. 21 supra.*

27 s. 27—*Pleader's fee, how to be calculated —Market value of the suit for redemption —Act XVIII of 1879, s. 27.*

Held, that in a redemption suit the pleader's fee should be calculated on the amount which is the value of the subject-matter of the suit for the purpose of jurisdiction of the Court, namely, the amount of the principal sum expressed to be secured by the mortgage deed—SHEO RAJ SINGH *v.* MADARI, **6. O. C, 130.**

28—S. 27, 28—*Agreement not filed in Court—Contract Act. (IX of 1872) S. 217, 218 —Lien.*

The Legal Practitioners Act does not enact that no claim by a pleader for professional services rendered or for recovery of outfees advanced shall be sustainable unless an agreement in writing for the same has been entered into with the client and filed in Court, but only that an agreement, if any, in respect thereto, shall be void unless the same has been reduced to writing and filed in court. A pleader (as the Court found), at the request of his client disbursed moneys for out-fees in a suit in which he was retained, and took a promissory-note for the amount of the disbursements.

Held that the promissary-note was, within the meaning of s. 28 of the Legal Practitioners Act, an agreement respecting the amount of payment for charges incurred or disbursements made by the pleader in respect of the suit in which he had been retained, and as it had not been filed in Court as required by the section, it was invalid. But that, independently of the promissory-note, the pleader was entitled to recover the out-fees advanced by him, and under s. 217 of the Contract Act, he was entitled to retain the same out of the sums received by him to the credit of his client. *Razi-ud-din* v. *Korim Bakhsh*, (I. L. R., 12 All. 169), and *Sarat Chunder Roy Chowdhry* v. *Chundra Kanta Roy*, (I. L. R., 25 Cal. 805), commented on SUBBA PILLAI *v.* RAMASAMI AYYAR. **14 M. L. J. 274=27 M. 512.**

29 s. 27, 28—*Suit for fee when no agreement made—Remuneration when several practitioners engaged.*

When there is no agreement between a pleader and his client as to the fees that should be paid to the pleader, section 28 of the Legal Practitioners Act does not bar a claim for fees on account of work done by the pleader for the client.

In case more than one pleader is employed, the fees allowed under the rules should be equally divided among them. SARAT CHANDRA ROY CHOWDRY *v.* CHANDI CHARAN MITRA. **7. C. W. N. 300.**

30 s. 27 to 30—*See S. 6, 12, 13, 27 to 30—61. P. R. 1907. (F. B.).*

31 s. 28—*Pleader's fee - Reasonable remuneration—Rate fixed by Judicial Commissioner's Court.*

Held, that in the absence of any agreement a pleader can not claim more than reasonable remuneration for his services. He has no right to payment at the rate fixed by this Court for determining the amount of pleader's fees payable as costs between party and party. MANOHAR LAL *v.* RAJA JANG BAHADUR KHAN. **4 O. C., 345.**

32 s. 28—*Agreement to pay full legal fee must be in writing and filed.*

The agent of B made A a pleader draft a plaint agreeing to engage him to conduct the case and to pay a full legal fee. A drew up the plaint and handed it over to the agent, who filed it through another pleader. A sued B for damages.

Held, that the agreement being regarding the amount of payment for service and not being written, signed and filed as provided by S. 28 of the Act was invalid and unenforcible, and the suit should fail (12 A 169 9 M 375, 25 C 805 and 27 M 512 Ref). RAGHUNATH SARAN SINGH *v.* SRI RAM. **3 A. L. J. 579 (F. B.)=A. W. N. (1906) 235=1 M. L. T. 242.**

33—S. 28—*Special agreement—Agreement in vakalatnama—Misjoinder.*

A pleader borrowed money from B and there was an agreement that the loan would be set off against fees in B's cases in which A would appear and file certificates. B brought a suit for recovery of the loan, and A with his brother C sued B for declaration that the debt was satisfied. It was found that A & C had rendered professional services and had filed certificates in cases in which they had appeared.

Held, that A was entitled to a deduction of his fees from the loan as the fact of the engagement was proved by the *vakalatnama* which provided that he was to be remunerated. (12 A 169 Distinguished).

Held, further, that the fact that A's brother appeared as a co-plaintiff did not prejudice B and the suit should not be dismissed for misjoinder of parties. CHHANNU LAL *v.* ASHARFI LAL, **4 A. L. J. 535=A. W. N. 1907 P. 230=29 A. 649.**

34—S. 28—*See S. 13, 28—4 O. C. 229 No. 22 supra.*

35—S. 28—*See S. 27, 28—27 M. 512 No. 28, 7 C. W. N. 300 No. 29 supra.*

36—S. 32—*Pleader—Practising without a license.*

When a person appears in Court to defend an accused person and represents himself as a pleader when in fact he is not he may be dealt with under section 32 of the

Sup: Govt. acts (XVIII of 1879) (*Contd.*)

Legal Practitioners Act.—EMPEROR *v.* BENI BAHADUR.—**W. N. A., 1904, P. 56 = 26 A. 380.**

37—S. 32—*Right of Mukhtars in Civil Courts—Rules of the High Courts—Special permission to act as pleader—Implied permission.*

Special leave must be obtained by a mukhtear for offering any legal argument or examining any witness in a civil case from the Court in the particular case in which he may be engaged. This rule should be strictly observed. Such permission ought to be given in exceptional cases and for sufficient reason. When the mukhtears had been acting in contravention of the above rule for some time past, they had either express or implied permission of the Court and therefore no proceedings should be taken against them under the Legal Practitioners Act.—RAJ MOHAN MUKHOPADHYA *v.* BASHIRUDDIN AHMED **8. C. W. N. 401.**

38 S. 36—*Legal Practitioners—Touts—Application to have persons declared as touts—Hearing an affidavits—Validity—Operation of order limited to Sessions District.*

Where application is made to a Court to declare persons to be touts, under section 36 of the Legal Practitioners Act, it is desirable that the Court should hear oral evidence, though it is open to the Court to act on affidavits. The operation of such an order is limited to the Judge's own Court and Courts subordinate to him. BAVU SAHIB *v.* THE DISTRICT JUDGE OF MADURA. **13 M. L. J. 272 = 26 M. 596.**

39 S. 36—*Legal Practitioner—Vakil—Rules framed under the Act—Vakil's fee in suit for declaration.*

A suit for a declaration of right in respect of immoveable property is not a suit in which "the subject-matter of the claim does not admit of valuation" within the meaning of Rule 35 of the rules framed under the Legal Practitioners Act. Such a suit falls within Rule 31, and the fee to be allowed to a vakil engaged therein is limited to a sum not exceeding the maximum fee allowable in a suit for the possession of the same property. ACHUTA BHATTA *v.* MANJUNATHAYYA. **I. L. R., 26 M. 654, F. B.**

40 S. 36—*Touts—Evidence—Officer empowered to make lists—Delegation of power of enquiry.*

Section 36 of the Legal Practitioners Act requires that the persons to be entered in the list of touts should be proved, to the satisfaction of the officer empowered to make such list, by evidence of general repute or otherwise, habitually to act as touts.

The evidence must be adduced before the officer himself, and it is not open to him to delegate the task of making the enquiry or taking evidence to an officer subordinate to himself. *In the matter of* MADHU PERSHAD & OTHERS. **6 C. W. N. 289.**

41 S. 36—*Tout—Court competent to declare—Punjab Courts Act (XVIII of 1884), Section 23.*

Sup: Govt. acts (XVIII of 1879) (*Contd.*)

A District judge in the Punjab is not competent to declare a person a law-tout under section 36 of the Legal Practitioners Act, for under the Punjab Courts Act, section 23, the Local Government has notified the Divisional Judge to be the District Court for purposes of the Legal Practitioners Act. *Bawa* LACHHMAN DAS *v.* THE DISTRICT JUDGE GURDASPUR. **108 P. L. R. 1904 = 22 P. R. 1904 C.**

42 S. 38—*See S. 3, 4, 36—5 B. L. R. 728 No. 2 supra.*

43 S. 40—*See S. 13, 14, 40—24 M. 83 No. 21 supra.*

44 S. 41—*Improper conduct—Advocate—Privilege as a suitor.*

Although any action clearly taken as a private individual in the prosecution of a case, or the setting up of a defence would not, under ordinary circumstances, justify the High Court in taking notice of such action as a breach of professional good conduct merely because the individual concerned happened to be an Advocate, yet conduct which is in itself indefensible and amounts to gross misconduct in an Advocate is not taken out of the purview of Section 41 of the Legal Practitioners Act by a mere colourable pretence that it was the conduct of a suitor, defendant, or accused in that capacity. *Privy Council Appeals Vol. I p. 283, referred to. In the Matter of Mr.*—— BARRISTER-AT-LAW. **148 P. L. R., 1901 = 5 P. R. 1902.**

(49) Act. V. of 1881 (*Probate and Administration Act*)

1 *Revocation of Probate—Special citation not served—Onus.*

Mere omission to serve a special citation on a person entitled to it will not be a sufficient ground for revoking the grant of a probate, if he had knowledge of the probate application. The burden of proving the existence of such a knowledge lies on the person alleging it.

The person applying for revocation of a probate need not prove that no notice was served on him and that he had no knowledge of the application and proceedings for probate.

Mere omission of a grantee of a probate to file an inventory or account is not a sufficient ground for revoking a probate, unless the omission was wilful or without reasonable cause.

When a District Judge is satisfied that a summary grant of probate should be recalled for want of special citation, he should call upon the applicant for the grant, to prove his right in solemn form but should not revoke the grant directly. PREMCHAND DAS *v.* SURENDRA NATH SAHA, **9 C. W. N. 190.**

(2) *A legatee having only a life interest in the income of a portion of the testator's estate is not entitled to probate or Letters of Ad-*

Sup: Govt. acts (XVIII of 1879) (*Contd.*)

ministration with the will annexed—Amendment of application for Probate to one for Letters of Administration.

A left by will the income of a portion of his immoveable property, for life, to his two widows B. & C. As to the rest of his property, he died intestate. B. applied for Probate of the will. B. was not named as executrix in the will.

Held, that (1) B. being neither an executrix in the will nor by necessary implication, was not entitled to get Probate;

(2) Under both Indian and English Law universal legatees are entitled to Letters of Administration with the will annexed and not to Probate;

(3) A legatee, who is bequeathed only a life interest in the income of a fractional part of the testator's property, is not, as such, entitled to ask either for Probate or for Letters of Administration with the will annexed and, under these circumstances, a prayer for grant of Probate cannot be altered to one for obtaining Letters of Administration;

(4) The grant of Probate does not give the grantee possession of the property to which it relates, but only the right to sue for its possession (15 M. 360 & 19 C. 582 Referred 22 W R (Eng) 874 Distiugnished Mehar CHAND *v.* MUSSAMMAT LACHHMI, **15 P. W. R 1907.**

3. s. 1 *Court's duty to see the compliance of the Act.*

It is the duty of the Courts to see that the provisions of the Act are properly complied with. B. G TILAK *v.* SAKWAR BAI **4. B L. R. 637=26. B 792** (*See S. 50.* No. *31 infra*).

4 s. 1—*Will*—Shebait *appointing his successor.*

Where the *shebait* of a certain endowment executed a document which purported to appoint a manager (*adhyakha*) for the due performance of the *shebas* and *pujahs* and other rites and ceremonies appertaining to the *akhara* in question, after the death of the former.

Held, that the document was not a Will, and probate of such a document can not be applied for under the Probate and Administration Act. CHAITANYA GOBINDA PUJARI ADHICARI *v.* DAYAL GOBINDA ADHICARI. **A. W. N. 1021=32 C. 1082.**

5 s. 2—*Applicability of Sikhs—Brahmos—Effect of lapse from orthodox practices—"Hindu"*

A Sikh is included in the term Hindu as used in the Probate and Administration Act, 1881—*L. R., 5 I. A. 87*; *L. R., 6 I. A., 15; 2 Morley's Digest, 22*; *9 M. I. A., 195, referred to.*

A Sikh or Hindu by becoming a Brahmo does not necessarily cease to belong to the community in which he was born.

Where it was objected that the deceased testator in matters of diet and ceremonial observcence had departed so far from the standard of orthodoxy binding upon him as a Hindu or Sikh as to exclude him from the term Hindu as used in the Letters of Admnistration Act.—

Held, that such lapses from orthodox practices assuming them to be established, could not have the effect of excluding from the category of Hindu in the Act one who was born within it, and who never became otherwise separated from the religious communion in which he was born. *Rani* BHAGWAN KAUAR *v.* BOSE & OTHERS. **7 W. N. C., 895,=135 P. L. R., 1903,=84 P. R. 1903,=5 B L R 845,=13 M. L. J. 381=301 I. A. 249 (P.C.)**

5. (a) s. 3—*Hindu Law—Will.*

Held that probate may be granted of a nuncupative will made by a Hindu. *In re the will of Haji Mahamed Abba,* (I. L. R, 24 Bom. 8) followed. GOKUL CHAND *v.* MANGAL SEN. **I. L. R., 25 A., 313 A. W. N. 1903. P. 63.**

6 s. 3, & 7,—*Testator authorizing executor to appoint future executors.*

A testator may by his Will authorize the executor named therein by him to appoint another person as executor to the Will and the nominee of the executor will be entitled to probate when his appointment takes effect, the Probate and Administration Act does not prohibit such an appointment. MOOSA HAJI JOONAS NOORANI *v.* HAJI ABDUL RAHIM HAJI AHMED. **5 B. L. R. 639.**

7 s. 3 and 7—*Bequest to idol* shebait's *right probate—Executor by implication.*

A testator bequeathed the bulk of his estate for the *sheba* of a *thakur* and made certain other dispositions of the rest of the property.

Held, on the construction of the Will that his wife, whom he had appointed *shebait* having been confided with the execution of the Will, was executor by implication, and as such entitled to take out probate of the Will 6 C. W. N. 310 Refd to. KRIPAMOYEE DASSI *v.* MOHIM CHANDRA DUTT. **10 C. W. N. 232.**

8.—s 4, 12, 59.88, 90—*See Mohammadan Law—Will—9. C. W. N. 938.*

9—S 4, 64, 71—*See Limitation Act Art. 178—4. O. C. 224.*

10—s 4, 82—*Probate and Administration—Legal representative of deceased—Right of other party than executor to sue for debts due to estate—*

Under section 4 of the Act, the executor or administrator is ordinarily the only persons entitled to sue for recovery of property belonging to the deceased's estate. But where there is collusion between the executor or administrator and a debtor to the estate, a party interested in the estate may sue both the administrator and the debtor for the recovery of the debt. *Oriental Bank Corporation* v, *Gobindlall Seal,* (1884) I. L. R., 10 Cal.. 713. MAUNG BWA *v.* MA THI. **3 L. B. R. 1906. P. 192**

11. s. 6, 19, 84 and 90 *Probate granted by mistake—Power of executor under such probate*

Sup: Govt. acts (XVIII of 1879) *(Contd).*

—Fraud—Question raised for the first time in appeal—Equity.

Probate can be granted only to an executor appointed by the Will.

When no executo is appointed by the Will, the Universal legatee is only entitled to a grant of letters of administration with a copy of the Will annexed.

When a probate is granted by mistake instead of a letters of administration, the executor so appointed is not empowered to exercise any of the powers conferred on executors under the Act.

When a Will is declared to be a forgery and the Probate is revoked, it is void *ab initio.* All acts done under any title created by such a Will are void in law.

When no allegation of fraud is made in the written statement and no issue is raised as to fraud in the original Court, a party is not entitled to raise the question of fraud for the first time in the Appellate Court.

Under the second clause of section 84 of the Act a person who has obtained probate of a forged Will, which has been revoked, is entitled to reimburse himself out of the estate of the testator in respect of lawful payments made by him while acting under the revoked probate. PANDIT PRAYRAG RAJ *v* GOUKARAN PARSHAD **6. C. W. N. 737.**

12—s. 6—*See s. 3, 6, 7—5. B. L. R. 639—No 6 supra.*

13 s. 6, 7 *Universal legatees—Application for probate—*

A universal legatee under a will applied for the probate of the deceased's will:

Held that under S. 6 and 7 of the Act a probate could be granted only to an executor expressly or impliedly appointed by the will and that as the applicant was only a universal ligatee and the will gave him no functions of an executor he was not an executor by necessary implication usually known as an "executor according to the tenor" such as is authorised to pay the debts of the deceased or to administer the states and was not, therefore, entitled to the probate applied for—25. C. 65, 26, B. 571 referred to. RADHA KISHAN *v.* MT. SONA BAI, **1. N. L. R. 164.**

14. S 7 and 90.—*Will—Construction of —Appointment of executor by impliction—Osees —Osees power of control.*

Where the testatrix appointed by her will a person as *Shebait* and others as *Osees*:

Held on construction of the Will, as to the powers given to the *Shebait* thereby, that the *Shebait* was appointed executor of her Will by necessary implication within the meaning of Section 7 of the Act, and the *Osees* were appointed, as a consultive body, to give advice and superintend. BROJO CHUNDER GOSWAMI *v.* RAJ KUMAR ROY. **6. C. W. N. 310.**

15. s. 7.—*See S. 3, 6, 7—5. B. L. R. 639 No 6 and 10. C. W. N. 232. No 7 supra.*

Sup: Govt. acts (XVIII of 1879) *(Contd)*

16. s. 12.—*See Mohammadan Law—Will—9. C. W. N. 938.*

17. S. 17.—*Application by official trustee —Intention to renounce.*

An official trustee merely wrote a letter to a certain person intimating his intention of renouncing probate, but subsequently that intention was withdrawn before the matter came before the Court and no such renunciation was made before the Court. Held that there was no formal renunciation in that case, and that the official trustee was not precluded from applying for the probate L. R. 3. P. & D. 151, C. W. N. (Notes), clv. 25 C. 795, L. R. 3 P. & D. 113, R.

Held, also, there was nothing in the official Trustees Act prohibiting the official trustee from being appointed as an executor and acting as such. IN THE GOODS OF MANICK LAL SEAL, **35 C. 156.**

18 s. 19.

Where the testator bequeathed to the petitioners such interest as should thereafter accrue on the testator's estate up to his death, the amount of which was not ascertained and a provision was made in the will as to the disposal of all the domestic furniture and metal untensils (*Jumla asbab)* existing in the testator's house at his death whereby the petitioners became owners of such property on the death of the daughter and the wife of the testator *held* that the petitioners were not appointed residuary legatees by implication and were not entitled to have letters of administration to the estate of the testator under section 19 of the Act, CHUNNI LAL *v.* MOTI LAL **W. N. A. 1901 p. 808.**

19. s. 19.—*See S. 6, 19—6. C. W. N. 757 No 11 supra.*

20. S. 20, 24.—*Lost Will—Presuption of revocation—Secondary evidence—Onus of proof.*

If a will, shewn to have been in the custody of the testator, is not forth coming at the time of his death, it is presumed to have been destroyed by him, unless there is sufficient evidence to rebut the presumption. But such presumption of revocation does not arise, unless there is evidence to satisfy the Court that the will was not in existence at the time of the testator's death. Having regard to the habits of the people of this country and specially those of wandering *fakirs,* another presumption may well arise, namely, that, when such a document is not forthcoming after the testator's death it has been mislaid. If a will is found to have been validly executed and not been revoked, and yet is not forthcoming, it may be proved by a certified copy, and letters of administration, limited, until the original will is produced, may be granted.—ANWAR HOSSEIN *v.* SECRETARY OF STATE FOR INDIA, **8 C. W. N. 821.=31. C. 885.**

21. S. 23, 41.—*Letters of Administration —Rival claimants—*

Sup. Govt. acts (XVIII of 1879) (*Cont.*)

Under S. 23 of the Act administration of the estate of an intestate may be granted to any person who would be entitled to the whole or any part of the deceased's estate. The Court under this section must ascertain whether the applicant is so entitled. It is not enough that the applicant may possibly have an interest in the estate. 1902. L. R. 29. 1. A. 17 and 21. C. 697 referred to. MA THI *v.* SHWE HLWA. **1. L. B. R. 1900-02-P. 284.**

22 S. **24**—*See S. 20, 24, 31 C. 885, No. 20 supra.*

23 S. **30, 34 and 53**—*C. P. Code, S. 499—Application for grant of letters of administration—Nazir ordered to take possession of preperty—Claim to property in the hands of administrator, dismissed—Apeal.*

A, as guardian of a minor applied to a District Judge under S. 30 of the Act for Letters of Administration with the will of the testator annexed. The District Judge ordered the Nazir to take possession of the property after taking an inventory of the same. The Nazir took possession of some of the moveable property. Subsequently, under action 34 of the Act, the Nazir was appointed administrator *pendente lite* and no complaint was made against this order by A, A made an application to the District Judge for restoration to him of some of the property in the hands of the administrator which was refused. *Held*, the appellant might have appealed against, or applied for revision of, the order directing the Nazir to take possession of the property. If the Nazir was in wrongful possession of his property, he had his remedy against him according to law. *Held*, also, that, assuming that an appeal lay against the present order, which was doubtful, it was not one that could be interfered with on appeal. KASHI NATH SINGH *v.* SHEOSHANKER PANDE, **A. W. N. (1905), 127.**

24 S. **31 and 32**—*Administrator-General's Act (II of 1874), S. 17—Conflict between Administrator-General and Court of Wards.*

The Court of Wards. as such, cannot be appointed Administrator. However, this Court can in certain circumstances, *e. g.*, in this case, where the testator wished the minor's estate to be entrusted to the Court of Wards appoint the nominee of the Court of Wards (in most instances the Manager) Administrator of the testator's estate, with the Will annexed, under S. 31 of the Act.

Held, on the facts of this case, that the Administrator-General's taking possession of the estate of the testator was illegal. NRITTYA GOPAL BISWAS *v.* ADMINISTRATOR-GENERAL OF BENGAL, **10 C. W. N. 241.**

25 S. 33—*Minor wife—grant of letters to her husband for her use.*

The husband of a minor wife, before he applies for the grant of letters of administration to him, for the use and benefit of the minor, must get himself duly appointed guardian for the purpose of applying for such grant as such assigned guardian. IN THE GOODS OF SREMUTTY NEROJINIDABI, **II C. W. N. 697 = 34. C. 706.**

26 S. 34—*See S. 30, 34, 53—A. W. N. 1905. P. 127 No 23 supra.*

27 S. **41**—*Application by executor's son—Discretion.*

A testator bequeathed the whole of his property to an idol and appointed his wives and son executrices and executor, who, however, did not take out any probate, but the son mortgaged the property. After the property was sold in execution of a decree on the mortgage, the testator's grandsons under the guardianship of their mother applied for probate of the will.

Held, they being not executors were not entitled to probate, and the case was not a fit one for grant of probate under S. 41 of the Act, the mother being a pardanashin lady, the father, the defaulting executor, would manage the whole business. NARENDRA KUMAR PRAMANICK *v.* CHARU CHUNDAR PRAMANICK. **7 C.L.J. 558.**

28 S. **41**—*See S. 23 and 41—1. L. B. R. 1900-02. P. 284 No 21 supra.*

29 S. **45**—*Grant of effects unadministered—Long lapse of time—Presumption that estate has been administered—Property held as* shebait, *if part of estate.*

A testator died in 1884, appointing his widow executrix by his will. He bequeathed the whole of his ancestral and self-acquired properties to her. The Will directed the widow to perform the *sheba* of certain *thakurs*, of which the testator was a *shebait* and that, after her death, "he who may remain as my heir, as *shebait*, shall perform the *sheba*. . . . . from the income of the estates of the *debsheba*." The widow took out probate in 1885 and died in 1902. Upon an application by the reversioner for Letters of Administration, the District Judge held that, as the last-mentioned direction in the Will contemplated some administration after the death of the widow, the petitioner was entitled to take out Letters of Administration.

Held, that the order of the District Judge was erroneous.

The Court may properly presume, in the absence of anything to the contrary and after this long lapse of time, that the estate has been administered.

The direction as to *sheba* upon which the order was based did not relate to the testator's own property. CHANDI CHARAN MANDAL *v.* BANKE BEHARI MANDAL, **10 C. W. N. 432.**

30 S. 47—*Letters of Administration* de bonis non.

Where the widow was appointed administratrix pending the minority of her infant son, and the son died during minority before the estate was fully administered, *held*, that the estate being still

Sup: Govt. acts (XVIII of 1879) (Contd.)

unadministered, the widow was entitled to administration *de bonis non* to the estate. IN THE GOODS OF GIRIS CHANDRA MITTER **6 C. W. N. 581.**

31. s. 50—*Revocation of probate—Just cause—Omission to file accounts.*

The grant of probate is decisive only of the genuineness of the Will propounded, and the right of the executors thereby appointed to respresent the estate of the testator. It in no respect decides any question as to the disposing power of the testator, or as to the existence of any disposable property.

The works "become useless and inoperative," in Explanation IV to section 50 of the Probate and Administration Act, imply the discovery of something which, if known at the date of the grant, would have been a ground for refusing it; such for instance, as the discovery of a later Will, or codicil or subsequent discovery that Will was forged, or that the alleged testator is still living.

A mere omission to submit accounts is no ground for revocation of grant of probate.

Where the widow of the testator prayed for a revocation of probate on the ground that she gave birth to a son, who died after the grant of probate, leaving her heiress of her son, and that the opponents appointed by the Will of her deceased husband to administer his estate, had failed to exercise due diligence, and had, by their conduct, shown themselves unfit to act as trustees—

Held, that no sufficient cause was shown, within the meaning of section 50 of the Probate and Administration Act, for revoking the grant of probate. The mere fact that the estate had devolved on the widow as heir of her deceased son did not by itself render any revocation of the probate necessary, as the widow was an liberty to apply for letters of administration to the estate of her deceased son. B. G. TILAK *v.* SAKWARBAI, **4 B. L. R. 637.=26. B. 792.**

32. s. 50.

The petitioner, sister's son of the deceased, applied under section 50 of the Probate and Administration Act, to set aside letters of administration granted to the opposite party, on the ground that she had submitted a false inventorty and had been wasting the estate of the deceased.

The District Judge held that the petitioner had no *locus standi* to apply.

On appeal to the High Court—

Held, that the petitioner as the next presumptive reversioner to the property was justified in applying for revocation of the letters of administration.—*8 Cal., 570; 21 Cal., 539, followed; 28 Cal., 441, referred to.* BEPIN BEHARI SHAHA *v.* MANODA DASI, **6. C. W. N. 912.**

33. s. 50—*Will—Validity of will—Proof in common form—Probate, delay in taking out—Application for revocation—Will in solemn form—Onus of proof—"Just cause".*

A will was executed the day before the death of the testator in 1878, and probate was obtained in 1884 in common form with issue of citations. On an application made in 1896 by the appellants for revocation of probate on the ground that the will was not genuine, the District Judge placed the onus on the respondents to prove the will, and, holding that the evidence was unreliable and insufficient, granted the application for revocation. The High Court reversed that order, being of opinion that, if the application were regarded as one to obtain proof of the will in solemn form, it was without precedent after so long an interval from the date of probate. That the appellants should at least have shown when they became aware of the probate, and that considering the difficulty of proving the will in solemn form after the long time that had elapsed, there was sufficient evidence of its due execution. Also that, if the application was one under s. 50 of the Probate and Administration Act (V of 1881), in which case it was doubtful whether the burden of proof was not on the appellants to show that the will was fictitious, no "just cause" had been shown for revoking the probate.

Held "on the evidence, that under the circumstances of the case there was no ground for differing from the decision of the High Court.—KALI DAS CHUKKERBUTTY *v.* ISHAN CHUNDER CHUCKERBUTTY, **9 C W N 49;=31 C 9 14 (P C).**

34. S. 50. *Revocation Issues in such proceeding Just cause—Order against, Hidu widow binds reversioners*

A applie for revocation of Letters of Administration, with the Will of the deceased annexed, and prayed that the Will should be proved before A.

Held, that until A made out a case for revocation, the question of the genuineness of the Will could be gone into.

English practice and practice of mofussil Courts in India distinguished.

Held, further, that a previous application for revocation by the widow of the deceased having failed, that decision bound a reversioner and the latter's application for revocation could not succeed except on proof that the previous proceeding had been collusive and fraudulent. 9 M. I. A. 539, 604 and 11 C 186 referred. DURGAGATI DEBI *v.* SOURABINI DEBI, **10 C W. N. 955.=33. C. 1001.**

35. S. 50. *Revocation—Proof in Solemn form.*

A will was proved by an executrix in who was the sole legatte in common and not in solemn form without issuing citation to the next reversioner. On her death her heir took possession of the property as heir!

Held that the heir of the executrix may be ordered to prove the will in solemn form

Sup: Govt. acts (XVIII of 1879) *(Contd.)*

in the presence of the next reversioner. In default, the probate was revoked. IN THE GOODS OF GOPI MOHAN BYSACK AND IN THE MATTER OF THE PETITION OF NEMAI CHAND BYSACK, **5** C. L. J. 500.

36 S. 50. *Citation on minor through guardianship of applicant—Revocation.*

Where an applicant for probate of a will took out citation upon a minor, who was represented by the applicant herself as guardian.

Held, that the proceedings to obtain the grant were defective in substance and the grant should be revoked

The fact that the petitioner for revocation of probate was acting in concert with somebody else could not take away the right which she otherwise possessed of applying for revocation. SHOROSHIBALA DEBI *v.* ANANDAMOYEE DEAI 12 C. W. N. 6.

37. S. 50. *Oral will— Grant of Letters of Administration.*

A *Saraugi* died of plague leaving property, and a grant of Letters of Administration was made in favour of B. Afterwards C and D alleging themselves to be managers of a Saraugi temple, applied for revocation of the said grant on the ground that A before his death, had bequeathed a shop and *havelli* out of the property to the said temple.

Held that, as the oral will was established the grant of Letters of Administration was rightly revoked under para 3 of S. 50 of the Act *qua*, the *shop*, and *havelie*. MANGTU *v.* TU MAUNG. **P. W. R. 1907.**

38 S. 50. 4, 5—26 B. 792.—*See S. 50—No. 31 supra.*

39 s. 50 (5)—*False statement regarding the rate of interest charged—Prevocation of Probate.*

S. 50 cl (5) of the Act is not applicable where the probate holder only makes a false statement as to the rate of interest charged; nor the mere filing of an incorrect inventory is enough to justify the revocation of a probate. It must be untrue in material respects to justify the revocation. GOKAL DAS *v.* PURSHOTTAM.—**4. B. L. R. 909.**

40 S. 50, 55, 69, 83—*Will—Civil Procedure Code (Act XIV of 1882), s. 588—Order rejecting an application under s. 50 is a decree and appealable—Order under s. 86 effect of Assignee from the legatee—Locus standi for revocation of the Will.*

An application under s. 50 of the Probate and Administration Act praying for revocation of a Probate must be treated under the provisions of s. 55, 83, as a suit and the order passed on that application must be regarded as an order passed in a suit. The order dismissing such an application amounts to a decree and against such an order there lies an appeal under the law. The expression "order" in s. 86 does not mean such an order only as is *referred to* in s. 588 of the Civil Procedure Code. A person interested by assignment from the legatee in the estate of the deceased may where a Will has been set up and proved at variance with his interests apply for the revocation of the Will so set up. (4 C. 360) and (20 C. 37) followed SHEIKH AZIM *v.* CHANDRANATH, **3 C. W. N. 748.**

41 S 50, 60—*Application by purchaser from heir to revoke Letters of Administration.*

Held, that a purchaser of the property of the deceased from his hier can make an application for revocation of Letters of Administration granted in respect of the property of the deceased.—4 *C.*, 360, *and* 20 *C.*, 37, *referred to.* LALIT MOHAN BHUTTACHARJEE *v.* NAVADIP CHANDRA KAPARIA. **28 C., 587.**

42 S. 50 and 83—

A suit should be brought in the Court by which the probate was granted to revoke it on the ground of the invalidity of the will, form of plaint No. 115 to be used by the plaintiff. But when an application is made to recall the grant of probate on the ground of some irregularity in making the grant, it will be properly made by motion. 4 *C.*. 360, *referred to.* IN THE GOODS OF HARENDRA KRISHNA MUKERJEE, DECEASED. **5 W. N. C., p. 333.**

43 S. 50 and 87—*Revocation of probate.*

The expression 'High Court' in section 87 of the Probate and administration Act is not intended merely to be confined to the High Court in its appellate jurisdiction, but also includes the High Court exercising original jurisdiction under section 87. The High Court exercising origiual jurisdiction has concurrent jurisdiction with the District Judge for the purpose of exercising all powers provided by that Act.

An applicatian under section 50 and not a suit should be filed to have the probate revoked on the ground of forgery. Proceeding of this kind ought not to be initiated by rule but by notice. The rule ought to be confined to urgent applications. The duty of the Judge upon an application being made under this section depends upon what has passed on the previous grant of probate. 4 *C.*, 360, *referred to.*

IN THE GOODS OF MOHENDRA NARAIN ROY DECEASED. **5 W. N. C., p. 377.**

44 S. 50, 98—*Will—Probate, revocation of Account—Commission—District Judge, powers of.*

A District Judge has no power to institute an audit of the inventory and account submitted by an executor under s. 98 of the Probate and Administration Act, undertaking elaborate and expensive proceedings for that purpose; nor does the section empower him to hold, of his own motion, a judicial inquiry into that matter and make the executor pay the costs of it; nor can such an authority be implied from the provisions of the Civil Procedure Code as to the appointment of a Commissioner to

examine such accounts. All that the District Judge has to do under the section is to see that the inventory and account *prima facie* satisfy its requirements. In 1899, an executor exhibited in the Court of the District Judge, under s. 98 of the Probate and Administration Act, an account of the estate of the testator, for one year from the grant of probate; and the then District Judge recorded the order—"Accounts checked and reported to be correct"—on it. No further action was taken with regard to it until 1902, when a new District Judge ordered the executor to file a revised account for that year, and also further accounts for the subsequent years:

Held that the proceedings of the new District Judge to reopen the matter in 1902 in connection with the accounts were *ultra vires* and illegal. A District Judge has no power to commence proceedings to revoke a probate under s. 50 of the Probate and Administration Act on his own motion. SARAT SUNDARI BARMANI *v.* UMA PROSADROY CHOWDHRY. **8 C. W. N. 578 =31 C. 628.**

45 S. **51. 69**—*Grant of probate and Letters of Administration—Will—Caveat.*

No person is entitled to enter a caveat against a grant of probate or letters of administration unless he can show that he has an interest in the property and that such interest is prejudiced by the will set up.

When an application for probate is made it is not within the province of the District Judge to determine any questions of title regarding the property, which the will purports to dispose of. Under the Act probate or letters of administration may be granted even when the will is unsigned. 4. C. I. 12. B. 164, 18. B. 749, 19 A. 458. cited, 24 B. 8 followed. GOPAL DAS *v.* Mt. BANDAN **15 C. P. L. R. 1902. P. 101.**

46 s. 51 & 76—*Letters of administration—merits of parties to be considered in granting.*

A was the stepson and B. the sister of C. the deceased to whose estate A applied for letters of administration. The case was dealt with as if it had been a suit to determine which of the parties was entitled to C's inheritance instead of being merely an application for the grant of letters of administration. The District Court decided against the present appellant A on the ground that it was proved that after his father D's death the separate property of D and the jointly acquired property of him and his wife C. were devided between A and C and consequently A had no further claim to the part left by C on her death. It was pointed out that a step-son succeeds to the estate of a step-mother (save in the case of certain ancestral property of hers) in preference to the collateral blood relatives.

Held that the appellant A not only should have been admitted by the District Court to have a claim to inherit and therefore to be entitled to letters of administration, but to have a claim superior to that of the respondent who was apperantly excluded altogether from sharing in the inheritance. U. B. R. 1897-98 inheritance P. 1 and P. R. val.=35. P. 327. *referred to* NGA SON *v.* MA NYO. **U.B.R. 1901. p. 3.** (*probate and administration*)

47 s. 51 and 76—*Decision between rival claimants.*

On the death of a female proprietor her son D and one M who alleged herself to be the adapted daughter of the deceased applied for letters of administration. M admitted that D was the son of the deceased but rejoined that having been obedient to his mother and having lived apart from her he was not entitled to inherit her property nor was he entitled to the latter's claim. D denied this and also denied M's adoption by his mother. The adoption was not proved. Held that as M lived with the deceased up to the time of her death and assisted her in the conduct of her affairs, and as D, though entitled to inherit, had for long lived apart from his mother and has had independent interest there is no doubt that the estate is likely to be administered better by M than by D. MA MYA ME *v.* MAUNG BA DUN. **L. B. R. 1904. p. 224.**

48 s. 51—*Chinese Law—Chinaman marrying foreign woman of different religion, and claiming to administer her estate after her death.*

Plaintiff, a Chinaman, had two Chinese wives whom he had married in succession. On coming to Rangoon, he went through a ceremony of marriage with one MA Bi, a Burmese (Zerbadi) woman, who lived with him and was recognised by the community as a wife. Plaintiff was a follower of Confucius; Ma Bi was either a Buddhist, or a Mahommedan. On Ma Bi's death, plaintiff applied for letters of administration to her estate. Defendants failed to establish any rights as *caveators.*

Held after consideration of the legality of the marriage, and of the rights which it gave to plaintiff in Ma Bi's estate after her death, that in the circumstances plaintiff's claim was just and reasonable, and *ordered* accordingly. Civil Regular No. 21 of 1900, *Ma Yin* v. *Kai Ya and another* (unreported); *Fone Lon* v. *Ma Jet and others*, (1903) 2 L. B. R., 95; *referred to.* PAI BENG TENG *v.* KO MAUNG AND ONE **2. L. B. R. 1904. P. 231.**

49. s. 51, 78.—*Surety—Discharge of—Contract Act, 1872. Section 130—Administration-bond.*

Where an application was made to the District Judge by a surety in an administration bond to call upon the administratrix to furnish a new surety and to release him from the liability under the security-bond, on the ground of mal-administration of the executrix, *held*, that upon general equitable principles and under Section 130

Sup: Govt acts (XVIII of 1879) (*Contd.*)

of the Contract Act the surety on proving his allegations had the right to be discharged from his suretyship as regards future transactions--*L. R. 13. Eq. Cas.*, 450; *19 Bom.*, *245. referred to.* RAJ NARAIN MOOKERJEE *v.* FUL KUMARI DEBI. **6 W. N., C. 7.=29 C. 68.**

50. s. 53. See S. 30, 34, 53—A W. N 1907. P. 127 no 23 supra.

51. s. 55. See S. 50, 55, 69 83.—8. C. W. N. 448 No. 40 supra.

52. s. 59.

The creditor of one of the heirs of the deceased opposed the grant of the probate, alleging that the will was a forgery which had been set up at the instance of the brothers of the deceased so as to put the property of the deceased beyond his reach, if the property had descended to the heirs of the deceased, as it would have done if there had been no will, then the property would have been liable to be attach d in execution of his debt against the heir

Held, that the creditor had a *locus standi* to come in and to oppose the grant of probate. The words 'claiming to have any interest in the estate ef the deceased.' in Section 69 of the Probate and Administration Act, mean 'claiming to have an interest in the property left by the deceased. 6 *Cal.*, 429, 10 *Cal.*, 19, *referred to.* KISHEN DAI. *v.* SATYENDRA NTAH DUTT. **28 C. 441.**

53. s. 59. See Mohammadan Law--Will —9 C. W. N. 938.

54. S. 64—*Letters of administration. Objector himself asking for.*

When a caveator files a petition objecting to the grant of letters of administration and concluding with a prayer that letters may be granted to him, this does not constitute a sufficient application for letters within the meaning of S. 64. of the Act. No order entitling a petitioner to letters ought to be made until he has filed a valuation of the property under S. 19 cl. (1) Court-fees Act and paid the proper fee. When an objector asks for letters himself he should be required to put in a petition setting out the facts required in S. 64 of the Act together with a proper valuation of the estate—MAUNG PO *v.* MAUNG KYA YAING, **1. L. B. R. 1900—02 P. 178.**

55 S. 64—*Application an heir*—

Held that when an applicant is entitled to inherit and is under no positive disqualification, and there is no application by any other person, the application should not be refused. Living apart from parents and not attending in illness does not of itself rupture family ties or disqualify children from inheriting. 2. U, B. R. 192-96 P. 184. *referred to.* MAUNG SA SO *v.* MA PAW. **U. B. R. 1903. P. 7** (*Probate and administration*)

56 S. 64—*See S. 4., 64, 71—See Limitation Act Art. 178—4. O. C. 224. No 9 supra.*

Sup: Govt. acts (XVIII of 1879) (*Contd.*)

57 S. 69—*See S. 50 and 69—8. C. W. N. 748 No 40 and 28. C. 587 No 41 supra.*

58 S. 69—*See S. 51, 69—15. C. P. L. R. 1902. P. 101 No 51 supra.*

59 S. 69 and 71—*Application for probate of the will of a Hindu widow Husband's reversioner's objection that widow had no power to dispose of huband's property by will invalid.*

An executor by implication applied for the probate of the will of a deceased Hindu widow, The reversionary heirs of her husband objected to the grant of the probate, mainly, on the ground that the widow had no power to make a will disposing of the property of her husband.

Held, the objectors, not being persons claiming to have any interest in the estate of the testatrix, within the meaning of section 69 of the Probate Act, had not right to chalenge the will set up. Their claim, as reversionary heirs of the husband of the testatrix was outside, and independent of, the will. If the widow had no power of will the objectors were not hurt. If the property was theirs, they could bring a suit to recover it. BAISTAB CHARAN SHAHA *v.* GANGA SAGAR SAHA ROY. **1. C. L. J. 258.**

60. S. 70, 71.—*Objection to application—Caveat.*

Opposition to an application under this Act should be made in the form of a written statement signed and verified as required by S. 114 and 115 C. P. C. No caveat is necessary when an application for probate or letters of administration has already been made. The form of caveat provided in S. 71 of the Act s one which, as S. 70 of the Act, shows may be lodged at any time after the d ath of a person by any one who claims to be interested in the estate of the deceased. The object of provisions of such form of caveat is to enable such person to ensure that no grant of probate of any will of the deceased or letters of administration to his estate shall be granted without notice to him. MOOTHOO COOMARA SAWMI *v.* JANKI AMMALL. **1. L. B. R. 1900—02. P. 212.**

61 S. 71—*Letters of Administration—Scope of enquiry prior to grant—Practice.*

On the hearing of a petition for issue of Letters of Administration to the estate of a deceased person, it is not the province of the Court to go into questions of title to the property to which the Letters of Administration refer.—OCHAVARAM NANABHAI *v.* DOLATRAM JAMIETRAM, **I. L. R., 28 B. 644 6. B. L. R. 966=28. B. 644.**

62 S. 71—*See S. 4, 64, 71—See Limitation Act Art 178—4 O. C. 224—No 9 supra.*

63 S. 71—*See S. 69 and 71—I. C. L. J. 258 No 59 and S. 70 71—I. L. B. R. 1900 ---02 P. 212 No 60 supra.*

64 s. 76—*See S. 51 and 76—U. B. R. 1901-P-3 No 46 and L.B.R. 1904. P. 224 No 47 supra.*

Sup: Govt acts (XVIII of 1879) *(Contd)*

65 s. 77.—98 and 117—*Probate and Administration.*

A co-heir cannot sue the administrator for partition of the estate when letters of administration been obtained to the estate of an intestate have—but must prosecute his claim in the manner provided by the Probate and Administration Act MA HMYIN MAUNG PO KIN *v.* MA OHN GAING AND OTHERS. **U.B.R 1902 P.I.** *(Probate and administration)*

66 s. 78—*Will—Security-bond.*

Under s. 78 of the Probate and Administration Act, a District Judge is not competent to call upon the executor (to whom probate has already been granted) to furnish security at any time *after* the grant of the probate.—GIRIBALA DASSI *v.* BAJOY KRISHNA HALDAR, **I.L.R., 31 C. 688, 8 C. W. N. 668.**

67 S. 78—*Application for Probat - Executor to furnish security before granting probate —Amount of security—Discretion.*

A applied for probate of a will executed by her husband appointing her the sole executrix. The District Judge granted Probate but demanded security for Rs. 20, 000 with two sureties in the same amount each.

Held, that, under S. 78 of the Act, the District Judge could demand security even from an executor. Security is only required to guard against malpractices; and security is enough if it affords reasonable protection against malpractices which require time to be carried out. Security for three or four months' income is a sufficient safeguard against serious or continuous mismanagement. MAHAMAYA DEBI CHOWDHURANI *v.* GANGAMOYI DEBI CHOWDHURANI **1 C. L. J. 180.**

68 s. 78—*Administration bond—Surety—Suing to be discharged from liability charges of mismanagement against administrator.—28 M. 161—(See Contract Act s 130.).*

69 s. 78—*See S. 51, 78—29. C. 68. No. 49 supra.*

70 s. 78 and 102—*Expense in administering estate—Consideration to surety for the due administration is such expense within S. 102 and a first charge against the estate.*

Held, that the consideration paid to a person to induce him to become surety for due administration of estate must be included in the expenses of obtaining Letters of Administration within the purview of S. 102 of the Act and must, therefore, be regarded as a first charge against the estate. The result of holding otherwise would be that where security cannot be obtained gratis, Letters of Administration would not be granted and the estate might be wasted (1 P. R. 1889 (F.B.) and 31 C. 253 Distinguished and L. R. 10 Ch. D. 316 appr. IMAM BAKHSH *v.* PURAN MAL. **31 P. R. 1906 =133 P. L. R., 1906.**

71 S. 82—*See S. 4, 82—3 L. B. R. 1906. P. 192 No. 10 supra.*

72 S. 83—*See S. 50, 55, and 83—8 C. W. N. P. 748 No. 40 supra.*

Sup. Govt. acts (XVIII of 1879) *(Contd)*

73 S. 83—*See S. 50 and 83—5 C. W. N. P. 383 No. 42 supra.*

74. s. 83—*Form of proceedings in case where there is contention—Objector's right no prejudiced.*

In all applications for letters of administration which are contested the district Courts should follow the procedure of chapter XI C. P. C. In proceedings to decide whether the applicant has the first claim to be clothed with the right to represent the deceased, the bulk of the estate and the deceased's right therein and whether it was in the objector's possession are not matters which should be gone into. It is not the province of the Court to go into questions of title and the grant of the letters of administration does not in any way prejudice the objector's rights if the property really belonging to him and not to the deceased. The grant of probate or letters of administration only perfects the representative character of the grantee to the property which did in fact belong to the deceased at the time of his death, and enables the grantee to sue in a regular suit for property which he alleges to have belonged to the deceased at his death although others claim it as theirs. *4. C, 1. and 8. C. 287 followed.* **1. L. B. R. 1900—02. P. 155.**

75. S. 84.—*See S. 19. and 84—6. C. W. N, 787. No. 11 supra.*

76. S. 85.—*Budhist Chins and non Budhist Chins—Indian Succession Act, S 332 and 190.*

If Chins are Budhists they will be governed by Act V of 1881. Under S. 85 of this Act it is open to a judge to refuse letters of administration. There is no counter part of S. 190 of the Succession Act in Act V of 1881. A suit regarding the property of an intestate Budhist Chin can be maintained without letters of administration having first been granted. An application for letters of administration can not be converted into an application under the Guardians and Wards Act VIII of 1890. There are no rules under S. 332 Succession Act exempting chins from the provisions of that Act. MA HLA *v.* MAUNG PYIN. **1. L. B. R. 1900-02 P. 193.**

77. S. 86, 90.—*Appeal.*

An appeal lies against an order passed by a District Judge granting permission to the executor to dispose of immoveable property. The expression 'hereby' in section 86 of the Probate and Administration Act means 'by the whole Act' and not merely by the chapter in which the section appears. UMA CHARN DAS *v.* MUKTA KESHI DASI. **5 W. N., C. p. 443.=28. C. 144.**

78. S. 86.—*Probate—Waste by executor—Surety—Right of surety to be discharged—Revocation of probate—Appeal—*

In probate cases a surety seeing the person for whom he is surety wasting the estate while he is powerless to interfere by

Sup: Govt. acts (XXVI of 1881) (*Contd.*)

suit, not being a beneficiary in the estate, should, upon general equitable principles, have the right of being discharged from his liability as regards future transactions.

The surety is entitled to protection against the executor if it be shown that the latter is wasting the estate, and there by rendering the former liable on his surety-bond. The course to be adopted, on waste by the executor being established by the surety, is to call on the executor to furnish other security, and, on his doing so, to discharge the original surety in respect of further waste. Should the executor fail to furnish other security, the probate should be revoked and the surety discharged.—*I. L. R., 19 Bom., 245; 29 Cal., 68, referred to.*

An order to revoke probate, if security is not furnished, is appealable. Section 86 of the Probate and Administration Act does not mean that only those orders which are appealable, under Section 588 of the Code of Civil Procedure can be applied—*2 C. L. R., 589; I. L. R., 17 Cal., 48; 21 Cal., 539; 29 Cal 60 68 referred to.* SHAHAB-UD-DIN *v.* FAZAL DIN, **89 P. L. R., 1902 = 52 P. R. 1902.**

79. s. 86 *Application—Order of District Judge in proceeding under the Act Appeal.*

A applied for Letters of Administration with a copy of the will. The District Judge ordered that no further proceedings on the application could be taken unless Court-fees were paid under art. 11, sch. I of the Court-Fees Act, On appeal, *held*, that S. 86 of Act V of 1881 allows appeals from an order under the Act, where an appeal would lie under the rules contained in the Code of Civil Procedure from a similar order; and that the order appealed against was not such an order. (2 C.L.R., 589; 17 Cal., 48 and 21 Cal., 539, followed). KADIR JAHAN BEGAM *v.* UDIT NARAIN. **4 O. C., 84 = 3 B. R., 44.**

80. s. 86. See S. 50, 55 &c.—8 C. W. N. 748. No. 40 *supra.*

81. s. 87. See S. 50 and 87—5 C. W. N. 377 No. 43 *supra.*

82. s. 88. See Mohammadan Law—Will —9 C. W. N. 938,

83. S. 89. Suit for damages for malacious prosecution—See malacious prosecution. 8 C. W. N. 329 and 8 C. W: N. 745 = 31 C, 993.

84. S. 90. *Will—Power to mortgage when there is direction for sale.*

Where the will gave the Executor power to sell the testator's properties, to pay off debts incurred by him or if the property was a losing concern and where there was no prohibition in the will against mortgaging it:

Held, that the executor had the power of mortgage under s. 90 of the Probate and Administration Act. *Kanti Chundra Chattopadhya* v. *Kristo Churn Acharjee*, (3 C. W. N. 515) distinguished and *In the goods of Nundo Lall Mullick*, (I. L. R., 23 Cal. 908) and *Rajani Nath* v. *Ramanath* (3 C. W. N. 483) followed. PURNA CHUNDRA BAKSHI *v.* NOBIN CHUNDRA BAKSHI. **8 C W. N. 362.**

Sup: Govt. acts XXVI (of 1881) (*Contd*).

85 s. 90—*Will restricting alienations—Mortgage by Executor—Void—Voidable—Restitution—Consent of beneficiaries.*

A died having executed a Will, which directed that "if it became necessary to borrow more than Rs. 1,000 or to alienate any property of a greater value to grant any *pattah* for any greater amount, then it might be done with the consent of B or failing him with the consent of C and the widows of the testator." The widows in possession as executriea, executed a mortgage for Rs. 35,000 in favour of D without the assent of B and without the leave of the Court. D instituted the present suit which was dismissed by the Subordinate Judge on the ground that the mortgage was not valid and binding on the estate, because it was not assented to by B whose consent was, under the will necessary to validate the transaction.

Held on appeal by D that B was neither an executor by implication nor a mere overseer, but his assent was intended to validate certain classes of transactions, as the testator had confidence in his judgement and integrity. The testator could impose restrictions upon the powers and discretion of an executor and if, in practice, such restrictions proved injurious to the actual administration of the estate, the executor could apply for suitable directions to the Court.

Held, that the phrase "power to dispose' in S. 90 included any sort of transfer even a gift. In this case the widows act must be taken to be one in contravention of clause 2, S. 90 of the Act.

An executor can mortgage the property of the testator unless prohibited by the terms of the will (23 C 908, 3 C. W. N. 483, 8 C. W. N. 362, 16 Ch D 151, fol. and 3 C. W. N. 515 exp).

An alienation by an executor or administrator without leave of the Court, where such leave is necessary under S. 90 of the Act, is not void but merely voidable (8 C. W. N. 64 followed)

No person can avoid a transaction in such a manner as to recover the property, and at the same to keep the money or other advantages which he has obtained under it. 22 M. 289, 25 A. 59, 15 B. L. R. 150, 9 A. 340, 24 C. 668, 18 A. 373, 29 C. 473, 30 C. 539, 26 A. 342, 9 W. R. 108, 11 B. L. R. 416, 8 M. 92, 5 B. 450, 2 C. 341, L. R. 7 Ex. 26, 7 App. Cas. 345 (360), 162 Ill. 232, 31 Am. Dec. 452, 30 Am. Dec. 174 and 29 Wis. 169, *Refd to* (*d*).

The maxim that "he who seeks equity must do equity" is applicable to a defendant as well as to a plaintiff. 134 U. S. 530, L. R. 2 H. L. 325, 3 App case 1218, L. R. 1 P. C. 219 Ref.

If a mortgage is effected by an executor with the written consent of every beneficiary, it may fairly be regarded as in substance a mortgage by the beneficiaries themselves. 140 N. y 394, and 151 Ny. 204

Sup: Govt. acts (XXVI of 1881) *(Contd)*

followed. THE EASTERN MORTGAGE & AGENCY Co., Ld. *v.* REBATI KUMAR RAY. **3 C. L. J. 260**

86 s. 90—*Suit for following property in the hands of persons to whom it had been distributed.*

A suit for partition was brought against the administrator and other heirs, 5 months after the issue of letters of administration. The administrator admitted that the property had been finally divided between himself and other heirs.

Held that it was a suit following the property in the possession of persons to whom it had been distributed by the administrator and that the fact that only 5 months had elapsed since the issue of letters of administration did not invalidate the suit. There was no need of joining the other co-sharers of the undivided property as parties, but regarding the undivided property the decree should have merely specified the share of the deceased's interest therein to which the plaintiff was entitled. U. B. R. 1902. P. 1. (Probate and dministration and U. B. R. 1902 P. 1 Gift, referred to) MA YA BYANING *v.* MA MIN U. B. R. 1902. P. 3 *(Probate and administration)*

87 S. 90 *See Hindu Law joint family. 9 C. W. N. 923.*

88 S. 90—*See Mohammadan Law will 9. C. W. N. 938.*

89 S. 90—*See S. 6. 19. 84—6. C. W. N. 787 No. 11 supra.*

90 S. 90—*See S. 7 and 90—6. C. W. N. 310 No 14 supra.*

91 S. 90—*See S. 86—28. C. 149 No 77 supra.*

92 S. 90 (4)—*Lease for more than 5 years granted by administrator, valid.*

A lease for more than 5 years granted by an administrator, is as between the lessor and the lessee good and valid.—SUBHADRA DASSEA *v.* CHANDRA KUMAR NAG. **8. C. W. N. 54.**

93 s. 92—*and C. P. C. S. 231—Execution of decree—One of several joint decree-holders cannot give a full discharge for the amount of the decree—*

Held, that one of several joint decree-holders cannot give a valid discharge for the amount of the joint decree, and his position in this respect is not affected by the fact that he and his fellow decree-holders are co-executors 26 A 318 and 26 A 334 followed LUCHMAN DAS *v.* CHATURBHUJ DAS, **A. W. N. (1906), 16=3 A. L. J. 49=28 A. 252.**

94 S. 98 *See S. 50, 90—31. C. 628* No *44 supra.*

95 s. 98—*See S. 77. 98, 114—U. B. R. 1902. No. 65 supra.*

96. S. 102—*See S. 78 and 102—31. P. R. 1906=133. P. L. R., 1906. No. 70 supra.*

97. S. 105 and 108.—*Will directing payment of debts—Charge on property given by will.*

A decree in favour of a creditor to the estate of a deceased testator is a mere money-decree, and does not create a charge upon the property—A direction in the will for the payment of the testator's debt is only a general direction to pay and does not create any charge upon his estate.

A purchaser in an execution of such a decree cannot claim a valid charge upon the property as against a mortgagee from the specific legatee.

A mortgage created by specific legatee before the debts of the deceased testator are paid off, is not altogether invalid in law. AMBIKA CHARAN DUTT *v.* MUKTA KISHORI, **2 C. L. J. 138.=10. C. W. N. 38.**

98. S. 108.—*See S. 105, 108—10. C. W N. 38 No. 97 supra.*

99. S. 113.—*Effect of dealing with bequeathed property—Assent to bequests—Divesting of executor's interest—Mortgage by guardian—Necessity.*

A widow appointed an executrix, under her husband's will mortgaged the properties bequeathed to her minor sons, discribing herself as their guardian.

Held that her this act showed that she, as an executrix, assented to the bequests, and the effect of her so assenting was to divest her of all interest therein as executrix.

Held also that there was no proof in that case to enable the Court to hold that the mortgagee advanced the money to the guardian of the minor, believing honestly in the existence of a reasonably credited necessity (6 M. I. A. 393 applied) VIJAYARANGAM PILLAI *v.* DEVAKIAMMAL, **2 M. L. T. 343.**

100. S. 117.—*See S. 77, 98, 117—U. B. R. 1902. P. 1. No. 65 supra.*

101 S. 128, 130, 131.—*Demonstrative legacies—Interest.*

S. 128 of the Act entitles the legatee to the produce of a specific legacy and S. 130 and 131 entitle legatees to interest on general legacies. The absence of a provition in regard to payment of interest on demonstrative legacies dves not imply an intention to disallow interest on them. As to interest, demonstrative legacies are to be viewed as of the nature of the general legacies carrying interest at 6 % *per annum* from the expiry of one year from the death of the testator, such interest being payable out of the income or profits from which the principal amount of the legacies has been made payable. CHINNAM RAJAMANNAR *v.* TADIKONDA RAMACHANDRA RAO, **29 M. 155.**

S. 130 and 131.—*See S. 128, 130, 131—29 M. 155 No. 101 supra.*

(50)—Act XXVI of 1881 *(Negotiable Instruments Act).*

1. *Want of consideration for a pro-note.* A bona fide holder in due course for consideration unaware of want of consideration is entitled to a decree on the note. —*See Promissory Note.*—SANTHAMA GO-

Sup: Govt. acts (XXVI of 1881) (*Contd.*)

PALA SAWMI *v.* SUNDRA SAWMI. **1. M. L. T. 393.**

2. *Negotiable instruments-Assignment. How may be made—Right of assignee to suc—Re-endorsement—Agent's signature whether on behalf of himself or principal—Evidence. Oral evidence as to written document.*

There is nothing in the Negotiable Instruments Act to restrict the transfer of negotiable Instrument's to transfer by endorsement only.

A promissory note, whether nogotiable or not, is nevertheless a chose in action and is subject to the incidents attaching to It in that aspect, so long as the rules of the law merchant are not departed from. The rules in regard to choses in action prior to the Negotiable Instruments Act do not cease to be any the less applicable to them by the passing of the Act unless its provisions expressly or impliedly affect those rules. The Act leaves untouched the rules of general law which regulate the transmission of bills by Act of law and their transfer as choses in action or chattels according to the general law. The absence of saving provisions in the Indian Act similar to those contained in the English Act does not warrant the view that the Act abolished rules previously established, even though they are in no way inconsistent with any of its provisions.

When a prior endorser takes up a note on payment to his immediate endorsee and discharges his liability under the contract arising by the endorsement, there is no provision either in the Negotiable Instrument Act or elsewhere prescribing the mode in which such 'taking up' of the note is to be established. The possession of a note by the maker or by the payee or by any subsequent iodorser is *prima facie* evidence that he is the true and lawful owner thereof, and that he has acquired the full title thereto.

The question whether an agent endorsed a negotiable instrument for himself or on behalf of his principal is one of fact to be decided with reference to the evidence in the case. The reception of *parol* evidence in regard to such a matter is subject to much the same rules as govern written contracts generally. MUTHAR SAHIB MARAIKAR *v.* KADIR SAHIB MARAIKER. **M. T. J., 1905 p. 384. 28. M. 544.**

2 a. S. 1.—*See S. 94—26 M. 256 No. 48 Infra.*

3. S. 4, 5.—*Promissory note—Agreement to pay a certain amount on demand with interest. 4. B. L. R. 912—See Stamp Act Sch. I. Art. 5.*

4. s. 4, 13.—*Negotiable instrument—Promissory note made payable to a specified person is not negotiable—Transfer of such promissory note by endorsement,*

Held that a promissory note made payable to a specified person not being a negotiable instrument cannot be transferred by mere endorsement, and the transferee by mere endorsement is not competent to sue thereon. PARFITT *v.* CHAIN SUKH. **144. P. R. 1906.**

Sup: Govt. acts (XXVI of 1881) (*Contd*)

5 s. 4, 26, 27 and 28—*Pro-note executed by the karta of a joint Hindu family for family necessity—Other members liable.*

The Karta of a joint Hindu family borrowed money or pro-notes, for a joint family business or to meet a joint family necessity.

Held the creditor could recover the money from all the joint family members, although they were no party to the notes. S. 26 to 28 of the Act refer to cases of ordinary agency—23. M. 597 and 7. C. W. N. 725 referred to. BAISONAB CHANDRA DE *v.* RAMDHON DHOR. **11 C. W. N. 139.**

6 s. 5—*See S. 4, 5—4 B. L. R 912 supra No. 3.*

7 s. 7, 32, 53, 64, 115 and 134—*Bills of exchange—Acceptance by drawee—Accept on copies of bills not valid—Drawee in case of need—Holder in due course—The drawee can sue without disclosing his principal, as a holder in due course—Liability of acceptor at maturity of the bills.*

A sued B on certain bills drawn on B and endorsed over to A on B's failure to pay them. In one of the suits, the acceptance by B was signed upon the original bill but in others it was merely on copies of the bills. The lower appellate Court dismissed the first suit on the grounds that A was suing as agent for the London firm, Fracis Times & Co., without disclosing his principals, so the suit was defective in form: and, secondly, that the suit was not maintainable as the bills had never been dishonoured and protested. The other suit were dismissed as the acceptance was written on copies of the bill-alone.

Held, (1) that the bills were endorsed over to A by the Banks in whose favour they were drawn, so that he was a holder deriving title from the holder in due course; and as such he was competent to sue under S. 53 of the Act.

(2) That the bills were made payable in Bombay, and, consequently, under S. 134 & 32 of the Act, the acceptor became liable at the maturity of the bills. Presentment is not necessary to charge the acceptor. The acceptor was the principal debtor and his liability was independent of presentment.

(3) That S. 7 of the Act requires that the acceptance shall be signed either upon the bill or upon one of its parts, the defendant's assent was signed only upon copies of the bills; and thus a material requirement of the law was omitted with the result that there was no valid acceptance. ARDESHIR PORABSHA MOOS *v.* KUSHALDAS GOKULDAS. **10 B. L. R. 268.**

8 s. 8, 27, 78—*Plea that the holder is a mere benamidar and not entitled to sue invalid—Undisclosed principals cannot sue or be sued*

Sup: Govt. acts (XXVI of 1881) (*Contd.*)

on a negotiable instrument—Law Merchant—Bills of Exchange Act, 1882—Contract Act, 1872.

S. 78, provides that "payment must, in order to dsicharge the maker, be made to the holder" and is imperative and precludes the maker, when sued on the insirument, from pleading discharge by payment to any one but "the holder." The words "entitled in his own name in the definition of "holder" in S. 8, prevent any one from claiming the rights of a "holder" under the Act, on the ground that the ostensible holder was mere *benamidar*. Under S. 72 also, a principal can only be made liable, through his agent, on a negotiable instrument, when the agent signs as such. An undisclosed principal cannot be sued on a negotiable instrument; because, in the case of such instrument, passing from hand to hand, usage and policy require that the real contract should appeal on the face of the instrument.

The Contract Act as to rights and liabilities of undisclosed principal does not alter the well-established rules as to negotiable instruments, which continued to be governed by the Law Merchant reproduced in the Negotiable Instruments Act. Ss. 2, 7 (1), 23, 59, Bills of Exchange Act, are also in accordance with the above view. Second Appeal No. 182 of 1891, Madras (Unreported); 21 M. 30 and 28 M. 205, *Appr.* C. R. P. No. 578 of 1895, 17 M. L. J. 64 and 21 M. 391, *overruled.* 23 M. 597, *explained.* 2 C. W. N. 286; L. R. 9 Ch. 635; (1865) L. R. 1 Q. B. 97, (1848) 5 C. B. 583, Ref to. SUBBA NARAYANA VATHIYAR *v.* K. RAMASAWMI IYER. **1 M. L. T. (F. B.) 377=16 M. L. J. 508 30 M. 88.**

9 s. 8 and 46—*Endorsement for collection—Bill Returned without collection—Right of indorser to sue.*

One, who endorses a bill to another for purposes of collection, is entitled, on the return of the bill without collection, to strike out his endorsement and to make himself the last endorse the holder under S. 8 of the Act, and is entitled to receive payment and to sue (2 C and M 416, 3 wheaten 172, 28 M 544) referred.

An endorsement for collection does not as between the endorser and the endorsee, pass the property in the bill to the endorsee, though it puts him in a position to make title for a subsequent holder in due course (15 Q. B 995 *referred to.*

An endorsee for collection, after returning the bill to his endorser, does not become a holder under S. 8 and cannot sue.

The holder as defined in S. 8 means any person entitled as such on the face of the bill. (30 M 93 *referred to.*)

The Act contains no provisions as to striking out endorsement but if a drawer or endorser takes up a bill by paying the holder. he is entitled to maintain a suit on the bill against the parties antecedent to himself and to strike out subsequent parties who, by reason of his payment,

Sup: Govt. acts (XXVI of 1881) (*Contd.*)

have ceased to have any rights os liabilities under the bill. By such a payment he is considered to acquire a fresh cause of action, being subrogated to the holder as regards all parties antecedent to himself (17 M 197, 28 M 544 *referred to*) SUBRAHMANIAN CHETTY *v.* ALAGAPPA CHETTY, **17 M. L. J. 414=30 M. 441**

10 s. 8 and 54—A promissory note may be endorsed in blank and delivered to any person, so as to convert the pronote into one payable to bearer. Endorsement and delivery in such a way to an agent and attorney of a principal, entitles the principal to the possession of the promissory note and to recover the amount due thereon from the maker. NANAK CHAND *v.* DURANT, **9 P. R. 1906=19 P. L. R. 1906.**

11 S 9—*Forged endorsement—Endorsers bogus Innocent transferee gets no title.*

Plaintiffs, the payees ot two *hundis*, employed a broker to sell them. B represented to the plaintiffs that the firm of H, wanted to purchase thec *hundis*, whereupon the plaintiffs endorsed the *hundis*, in favour of H. B then forged an endorsement from in favour of a firm which had no existence, and then another endorsement, purporting to be from this fictitious firm in favour of another, which too had no existence. The defendants purchased these *Hundis* in good faith and for value (B again forging an endorsement from the second fictitious firm in favour of the defendants) Upon the plaintiffs, the payees suing for money, *held*, that they were entitled to succeed, even if the defendants were transferees in good faith and for consideration. S. 9 of the Act contemplates a person who is the payee or the endorsee of an instrument. There is a distinction between the case of a *bona fide* purchaser for value, who acquires a defective title to a negotiable instrument and a purchaser, who acquires no title whatever. 24 B. 65 followed L. R. I. C. P. 578 *referred to*) JAI NARAIN *v.* MAHBUB BAKHSH, **3 A. L. J. 293=A. W. N. (1906), 77=28 A. 428.**

12. s. 9, 56, 78.

Holder in due course of a promissory note—Necessary for him to have for consideration become the payee or endorsee before the amount mentioned in the note became payable. Immaterial whether holder acts in his own interest entirely or merely as the banker of a third party Holder who derives his title from holder in due course has the rights of that holder in due course. *See* Negotiable Instruments D. BISHEN CHUND *v.* MAUNG PO THWE. **U. B. R. 1901. P. 1** *(Negotiable instruments.)*

13. s. 9, 58.—*Liability of the holder of government pro-note to real owner of note—See S. 5 8, 9 infra No 35. Rani Chandra Kalli Debi* v. *Edmund Pelly Chapman. 9. C. W. N.453-32 C. 799.*

Sup: Govt. acts (XXVI of 1881) *(Contd).*

14. s. 10.—*Shahjog hundi.*

A *Shahjog hundi* was drawn by a firm at Agra on their branch at Bombay. The payees endorsed the *hundi* to the plaintiff who sent it to their agent at Bombay for collection. The agent died suddenly and the plaintiff induced the drawers to send a telegram to Bombay to stop the payment of the *hundi*. The telegram was duly delivered. Notwithstanding this payment was made to one C, who had in some way obtained possession of the *hundi*. The plaintiff brought this suit for the recovery of the amount payable under the *hundi*.

Held that the plaintiff was entitled to a decree inasmuch as the drawees having had the telegram, failed to exercise any proper discretion and did not made payment in due course within the meaning of S. 10 of the Negotiable Instruments Act. *Bhupat Ram* v. *Hari Prio Coach* (5 C. W. N. 313) referred to. *Held* also that a *Shahjog hundi* is not a *hundi* payable to bearer but is payable to a *respectable* bearer.—LALLA MALL *v.* KESHO DAS, **A. W. N., 1904, p. 100=26 A. 493.**

15. s. 13.—*Endorsement on pro-note intending to effect a transfer—See Pro-note—Ramaiyan* v. *Venkata chellam Patter. 1. M. L. T. 329=16. M. L. J. 354.*

16. s. 13.—*See S. 4, 13, 144. P. R. 1906. supra No. 4.*

17. s. 14, 46, 48. *Government Promissory Note—Transfer of interest in.*

A the plaintiff endorsed some Government Promissory Motes to the Secretary of State for India as security for one B, a Government treasurer. Two months after this A presented an application to the Deputy Commissioner, in whioh he estated that he had sold the notes to C that he would endorse the notes to C when required to do so, that C. had purchased the notes subject to the Secretary of stat's lien, etc. On the following day, C presented a corresponding petition to the Deputy Commissioner, in which he stated that he had purchased the notes and had a lien on them subject to the Secretary of State's claim. About the same time, the plaintiff, by a letter, requested C to discount certain *hundis* in the name of certain firms and C discounted some of them. Subsequently, the plaintiff brought a suit for declaration that the notes were not liable to attachment in execution of the decree of the first defendant, allahabad Bank, against the defendant C.

Held, that the interest of the plaintiff in the notes was transferred to C that the transfer was purely of a *chose in action*, to which the Negotiable Instruments Act did not apply, and that the plaintiff's suit was not maintainable. 11 M. 290, 17 M. 461, 28 M. 544, 24 M. 657. (notes) referred to. JAGAN NATH *v* THE ALLAHABAD BANK, LD., LUCKNOW, **9 O. C. 174 (B).**

18 S. 26, 27, 28 *See S. 4, 26–28 -11 C. W. N. 139. supra No 5.* **15** *(a) S 27 and 830 M 88 see supra No. 8*

Sup: Govt. acts (XXVI of 1881) *(Contd).*

19 s. 27, 87—Power of husband to act on behalf of his wife does not include the right to sign promissory notes–SANPE *v.* MAUNG KYAN. **2. 1** *B.* **R. 1904.** *(P. 324–See Promissory note.*

20 s. 28 *See 4, 26–28. 11. C. W. N, 139 supra No 5.*

21 s. 30, 39 and 86 *Hundi payable at sight first accepted Holde (agrees with, acceptor for deferred payment—Notice of dishonour, not given—drawer discharged.*

The acceptor of a hundi payable at sight at first accepted the *hundi* unconditionally, but subsequently said he would pay in three days' time, and the holder agreed to this arrangement, and did not give any notice to the drawer. The acceptor having failed to pay the amount of the *hundi* within the three days the holder did not give notice of dishonour till after 10 days.

Held, that the conduct of the holder discharged the drawer from his liability under the terms of S. 30, 39, and 86 of the Act. ASKARAN BAID *v.* PIYAR BUX, **12 C. W. N. 644.**

22. s. 30, 93, 98. *Notice of dishonour —Hundi—Liability of drawer.*

In order to make the drawer of a *hundi* liable in case of dishonour by the drawee or acceptor thereof, it is necessary for the plaintiff to shew that due notice of dishonour was given to the drawer, or that he (the drawer) did not suffer any damage for want of such a notice. *Krishnashed Bin Ganshet Shetye* v. *Hari Valji Bhatye*, (I. L. R., 20 Bom. 438 and *Moti Lal* v. *Moti Lal*, I. L. R. 6 All. 78), referred to. AMIRUDDI BEPARI *v.* BAHADOOR KHAN, **7 C. W. N. 878. =30 C. 977.**

23. s. 30, 94, 98 (c) and (e) and 106. *Notice of dishonor—Contract Act (IX of 1872) Section 134—Forbearance to sue acceptor—Effect against drawer.*

A notice of dishonor under section 30 of the Negotiable Instruments Act must be given within a reasonable time. Under section 98 (c) no notice is necessary when the parties charged could not suffer damage for want of notice. The *onus* is on the plaintiff who relies upon this exception to establish and prove that the defendant could not have suffered damage.

The mere fact that the drawer and the drawee happen to be partners cannot lead to any presumption that they are partners in respect of the drawing of every bill of exchange drawn by either of them or that a bill drawn up by one of them was on behalf of both.

A suit against the drawer of a bill of exchange is not barred undersection 134 of the Contract Act merely by reason of the fact that the acceptor was impleaded as a defendant after the expiry of the period of limitation. RAMASVAMY BHAGAVATHAR *v.* SUNDARAJA CHETTY, **12. M. L. J. 267 =26. M. 239.** *(See also S. 94).*

Sup: Govt. acts (XXVI of 1881) *(Contd.)*

24 S. 31—*Construction of Hundi—Holder and a Banker.*

Held that there is no privity between the holder of a cheque as such, and the Banker on whom it is drawn. A having L 100 at his banker's draws a cheque on them for that sum infavaur of C. The cheque is dishonoured. C has no remedy against the Bankers. (Chalmer's Bills of Exchange P. 179 S. 53. referred to). MAUNG PE *v.* CHELLAPPA CHETTY. **U. B. R. 1902. P. 5.** *(Negotiable Instrument).*

25 S. **32**—*See S. 7, 32, 53, 64, 115, 134,—10. B. L. R., 268. supra No 7.*

26 S. **39**—*See S. 30, 39, 86—12 C. W. N. 644 supra No 21.*

27 S. **46**—*See S. 8. 46—30 M. 441 supra No 9.*

28 S. **46**—*See S. 14, 46, 48—9 O. C. 174 supra No 17.*

29 S. **48**—*See S. 14, 46, 48—9 O. C. 174 supra No. 17.*

30 S. 51—*Promissary note in favour of two payees—Endorsement by one in favour of the other—suit by endorsee as such—Maintainability—Suit by endorsee as assignee of chose in action—Endorsement evidence ef assignment.*

Where a promissory note has been made in favour of two payees, one of whom endorses it to the other, the endorsee cannot sue on the note as endorsee or as one of two joint payees. He may, however, maintain A suit in respect of the amount due under the note as assignee of the chose in action. Though such an endorsement cannot operate as an endorsement under the law merchant, it may be relied on as evidence of an assignment by way of release in favour of the endorsee. Rule 428 of the Rules of procedure of the Presidency Small Cause Court is not *ultra vires.* MUHAMMAD KHUMARALI *v.* RANGA RAO. **I. L. R., 24 M. 654.**

31. S. 53. *See S. 7, 32, 53, 64, 115, 134—10. B. L. R. 268 supra No 7.*

32. S. 54. *See S. 8, 54—19. P. L. R. 1906 supra No 10.*

33. S. 56. *See S. 9, 56, 78—U. B. R. 1901 P. 1. supra No 12.*

34. S. 58. *Fund in Court—Secretary of State and Court officers, if trustees—Forget endorsement on Government promissory notes—Holder in due course—Defect of title of holder. L. A. S. 10 and Art. 148.*

By a consent decree dated 1829, certain Government promissory notes valued at Rs. 60,000 were paid into Court for the benefit of X and others. X died in 1834, leaving two sons, both of whom afterwards died unmarried. Subsequently Y applied for a subdivision of the notes, which was done by the Registrar of the Sudder Dewany Adalut. Thereafter one of the notes was lost. Y died without issue, but left two widows, A and B. In 1885, A and B brought a suit against the registrar to recover the lost note and the Registrar was directed to recover and retain the lost note. The Registrar then stopped the circulation of the note, and

Sup: Govt. acts (XVIII of 1879) *(Contd.*

from an enquiry made at the Comptroller-General's office, ascertained that the note stood in the name of C. A subsequently died in 1894, and afterwards in 1898 B brought the present suit against the Registrar. Secretary of State, and C, alleging fraud on the part of the servants of the Comptoller-General's office.

Held that the Government was not a trustee for B. and that the negligence committed by the Comptoller-General in 1853 was barred by limitation. *Hansraj* v. *Ruttonji,* (I. L. R., 24 Bom. 65) distinguished. CHANDRA KALI DABEE *v.* E. P. CHAPMAN, **9 C. W. N. 43=342 C. 799.**

35 S. 58—*See S. 9, 58—32 C. 799 supra No. 13.*

36 S. 64—*Cause of action—Promissory note. suit on—"Drawer." Legal representatives of.*

Section 64 of the Negotiable Instruments Act is not applicable to a suit based on a promissory note payable on demand and not payable at a specified place. P. R., 148 of 1883 referred to. The word "drawer" in the section includes the legal representatives of a drawer. HARI SINGH *v.* NARAIN SINGH **120 P. L. R. 1903=60 P. R. 1903.**

36 (a) S. 64—*See S. 7, 32, 53, 64, 115, 134—10 B. L. R. 268 supra No. 7.*

37 S. 78, 120—*Promissory Note—Suit by payee—Defence by maker—Payee not true owner of note—Parol evidence to support plea.*

The plaintiff sued the defendant to recover the amount due on a promissory note made payable to the plaintiff or his order by the defendant. The defendant pleaded that the consideration for the note was not advanced by the plaintiff, but by a third party on whose account the note was taken, with the name of the plaintiff as payee, and that as the amount had already been re-paid to the party entitled to it, the suit was fraudulent and unsustainable.

Held, per Subrahmania Ayyar, J—that the plea was sustainable. Parol evidence is admissible in a suit on a promissible note to show that the plaintiff is not the true owner of the note, if such proof would enable the defendant to establish a defence, valid as against the true owner.

Per Davies, J.—That the defendant was precluded from pleading the *"jus tertii"* of a person who was not even a party to the record. SUBBA NARAYANA VATHIYAR *v.* RAMASWAMI AYYAR. **23 M. 244.**

38 S. 78 *See S. 27, 78—30. M. 88—supra No. 8.*

39 S. 78 *See S. 9. 56, 78—U B. R. 1901. P. 1. supra No 12.*

40 S. 80 *Hundi. suit on—Interest—Presentment—Appeal—Ground urged for the first time at the hearing of appeal—Negotiable Instruments Act (XXVI of 1881), Section 80—Interests on negotiable instruments*

In a suit based upon a a *hundi,* when execution of the *hundi* is admitted, the *onus* of proving the special acts absolving the executant from liability lies on him.

Upon the hearing of an appeal against a decree passed upon *hundis*, the appellants filed two additional grounds *viz.* (1) that the suit did not lie, as no presentation of the *hundis* for payment was proved, and (2) that no interest should have been allowed. On the objection of the respondents counsel, the Chief Court refused leave to add the grounds.,

In the absence of evidence to show that a particular rate of interest was agreed upon between parties to a suit based on *hundis* the plaintiffs are only entitled to receive the rate allowed by section 80 of the Negotiable Instrument Act, *viz.*, 6 per cent per annum. RAM DAS *v.* MATHRA DAS. **6. P. L R. 1905.**

41 S. 80 *Interest—Collateral agreement as to interest at 30 p. c.—Custom.*

S. 80 of the Act does not deprive those dealing with such instruments of the freedom of contract possessed by other contracting parties. It purports to confer a right to interest not to take away such a right otherwise existing. To read the section as depriving one of a contractual right of interest would be to read into it something which it does not say and which cannot reasonably be implied from it language. A sued upon hundis drawn by defendant B upon himself in A's favour. The hundis were silent as to interest. But there was a collateral agreement in writing that interest should be paid at 30 p. c. per annum; and it was found that dealing with interest by a callateral agreement was in accordance with the custom of the district.

Held, that S. 80 of the Act did not affect the agreement as to the payment of interest and that the same was enforceable. GHANSHIAM LAL JI *v.* RAMNARAIN. **11 C. W. N 105 = 9 B. L. R. 1 = 1 M L. T. 427 = 17 M. L. J. 35 = 5 C. L. J. 7 = 4. A. L. J. 29 = 34. I. A. 6 P. C. = 29 A. 33 (P.C.)**

42. S. 80—*Interest when Pro-note is silent —Oral evidence.*

Where a pro-note is silent as to the rate of interest, interest at 6 per cent. per annum is payable under S. 80 of this Act and oral evidence is in admissible under S. 92 Proviso 2 Evidence Act to prove a contemporaneous agreement to pay interest at a particular rate 30 C. 446 distinguished FATUMA BIBI *v.* HANUMANTHA RAW. **17 M. L. J. 296.**

43 S. 86 *See S. 30, 39, 86—12. C. W. N. 644 supra No 21.*

44 S. 87 *Addition of name in a pro-note —Material alteration.*

To certain pro-notes which ran as follows:—"We the undersigned A and B jointly and severally promise to pay on demand ......and C," and which were executed by A and B, the signature of C and the cross mark of D were added on a date subsequent to the dates of execution of the notes.

Held that the addition of the names of C and D to the notes was not a material alteration thereof. By the bodies of the

notes A and B were the only promissors and, according to the terms of those bodies, no one else could be a promissor unless his name was also added in the bodies of the notes, and the addition of C's and D's names, had no effect as regards making them liable. P. J. L. B. 343 distinguished (1856) 5. E and B 83 and (1867) L. R. 3. Q. B. 573 referred to. MA SHWE YU *v.* K. K. N. K. RAMEN CHETTY. **1. L. B. R. 1900 02. P. 252.**

45. S. 87.—*Material alteration.*

Held that if a pro-note payable to order runs "I, John Brown, promise to pay" and it is signed by Brown and subsequently before negotiation signed by smith, smith is not a Co. maker, and the addition of smith's name is not a material alteration which renders the note void under S. 87 of the Act.

Held that there is no provition in this Act Similar to S. 56 of English Bills of Exchange Act, which renders a stranger (i. e. neither a maker nor a holder) who signes a pro-note, liable as an indorser to a holder in due course. U. B. R. 1992-96 P. 593 Chalmer's Bill's of. Exchange Act S. 56. and pages 188 and 267 referred to. MA KIN *v.* C. T. L. ADAGAPPA CHETTY. **U. B. R. 1902. P. 1.** *(Negotiable instruments).*

46. S. 87.—See S. 27, 87. 2 L. B. R., 1904, p. 324, *supra* No. 19.

47. S. 93.—See S. 30, 93, 98. 30 C. 977 *supra* No. 22.

48. S. 1, 94.—*Local usage—Applicability, of Act to Natives of India—Notice of dishonour to drawer where drawee has failed to accept—Acceptance of hundi as conditional or absolute payment.*

In a suit for the amount due on account of goods sold and delivered and money lent, the defence was that plaintiff had accepted hundis in discharge of the debt and was, in consequence, debarred from suing on the original consideration and that his remedy, if he had one, was on the hundis. It was also contended that the hundis had been accepted as cash payment, in consideration of a discount of 2½ per cent., and that in consequence plaintiff had no cause of action either on the original debt or upon the hundis, as he had taken the risk of latter being dishonoured by the drawee.

Held, that it is a question of fact, with regard to promissory notes or bills or hundis, whether the parties intended them to operate as absolute or conditional payment, and the presumption is that the effect of giving and taking a note or bill is that the debt is conditionally paid.

Held, also, on the evidence, that plaintiff had accepted the hundis unconditionally, and was, in consequence, precluded from suing on the original debt. S. 94 of the Negotiable Instruments Act recognises that the person to whom notice of dishonour is given should be informed, not only that the instrument has been dishonoured and in what way, but also that he will be held liable

Sup. Govt. acts (XXVI of 1881) (*Cont.*)

thereon. So where a drawee of a bill of exchange does not accept it, though the drawer is primarily liable, the payee should give notice of dishonour to the drawer. The provisions of the Negotiable Instruments Act are strictly applicable to natives. Where any local usage is relied on under section 1 of the Act, it should be alleged and established by the party who relies upon it. JAMBU CHETTY *v.* PALANIAPPA CHETTIAR. **13 M. L. J. 252=23, M. 256.**

49. S. 94.—See Ss. 30, 94, 98, 106. 26 M. 239 *supra* No. 23.

50. S. 98.—See Ss. 30, 93, 98. 30 C. 977 *supra* No. 22.

51. S. **98 (c) (e).**—See Ss. 30, 94, 98. 26 M. 239 *supra* No. 23.

52. S. **106.**—Ditto ditto.

53. S. **115.**—See Ss. 7, 32, 53, 64, 115, 134. 10 B. L. R. 268, *supra* No. 7.

54. S. **120.**—See Ss. 78, 120. 28 M. 244 *supra* No. 37.

55. S. 134.—See Ss. 7, 32, 53, 64, 115, 134. 10 B. L. R. 268 *supra* No 7.

51. Act II of 1882 (Trust Act.)

1. S. 1 *Guardian's possession with regard to minor's property—See guardian and mino r—In re Cassumali Javerbhai Pirbhai 8. B. L. R. 883=30. C. 591.*

2 S. 1 *Trust-deed=construction and formalities—Settlement on great grand children by way of remainder, if valid under Hindu Law or void under rule against perpetuities—T. P. A. S. 14, 15 and 2 (d).*

One R and his wife conveyed certain lands by a trust deed to trustees in trust to pay certain monthly allowance during the lives of R and his wife and on the death of the survivor of them, to pay the same allowance to the two grand-daughters of R. On the death of the survivor of the grand-daughters, the trustees were to hold the property in trust for the sons of the grand-daughters, who attain the age of eighteen and the daughters of the grand daughters, who attain that age or marry, such that each child of the grand-daughter was to take his or her share of the *corpus* on coming of age if a male or, if a female, on being married. On the question whether such gift to the children of the grand-daughters was good under Hindu Law or bad for remoteness, or on any other ground, it was *held* that since the trust in favour of the children of a grand-child was an event which was to happen upon the death of the grand-child or of the widow, which-ever should last happen, and the parties, to whom an estate for life was conveyed were in being at the date of the settlement, the gift in remainder to the children of the grand-daughters was good and valid under Hindu Law, and did not contravene the rule against perpetuities, as S. 2 (d) of the Transfer of Property Act provides that nothing in the second chapter of that Act shall be deemed to affect any rule of Hindu Law.

Sup: Govt. acts (II of 1882) (*Cont.*)

Held, also that there is nothing in S. 6 of the Trusts Act to suggest that trust-property cannot be effectively transferred by a registered instrument. Under S. 123 of the Transfer of Property Act, transfer, by way of gift, of immoveable property can be effected by a registered instrument and, there being no reason for holding that what is sufficient in the case of a gift of land is not sufficient in the case of conveyance of land in trust, the deed in question operates as a valid declaration of trust and an effective transfer of the property, though possession was not given. 9 M I. A 134, 9 B L. R. 337, 32 C 392 and 12 C 663 *Refered to.* RANGANATHA MUDALIAR *v.* BAGHIRATHI AMMAL, **1. M. L. T. 227.**

3. S. 1, 5.—*Trust of immoveable property. Creation of—Endowments by Hindus—Gift of debt—Right of debtor to object that gift was incomplete.*

A mortgagee of certain immoveable property made an oral gift of the principle and interest due on the mortgage along with other debts in favoure of a religious society on the condition that the interest that may be realized by the society be applied to *sada bart i.e.*, the charitable distribution of food to the needy. The society brought a suit to enforce the mortgage. The suit was dismissed on appeal on the ground that under section 5 of the Trusts Act, a trust of immoveable property can only be created by a document in writing and registered in accordence with law. The donor when examined in the case supported the gift.

Held, that the provisions of section 5 of the Trusts Act were not applicable to the case for section 1 expressly exempts public or private, religious or charitable endowments from the operation of the Act.

Held, also that the gift was not void for uncertainty.

Held, further, that when in such cases the title or ownership of the donee is established and the donor supports the gift the debtor has no *locus standi* to urge that the gift was incomplete. SANATAN DHARM SABHA HOSHIARPUR *v. Mussammat* SOBHI. **175. P. L. R. 1903=75 P. R, 1903.**

4. S. 1, 5.—*Trust—Public religious purpose=Gift—Transfer of Property Act (IV of 1882), Section 122—*

When the plaintiff under a document dedicated certain land of his to an idol so that a temple may be built on it, and the document provided that "in case a permanent temple is built thereon for the idol, neither he nor his heirs will raise any dispute"—

Held, (1) that the document amounted only to a declaration of trust in relation to immoveable property for a public religious purpose. and did not require registration.

Sup: Govt. acts (II of 1882) *(Contd.)*

(2). That the dedication of the idol and land to the public was not a gift within the definition of that terms in Section 122 of the Transfer of Property Act, and the word "donee" was not applicable to the public,

(3). That the Indian Trusts Act, 1882, being inapplicable to religious endowments the document was not governed by Section 5 of that Act. PALLAYYA *v.* RAMAVADHANULU. MALLAYYA *v.* RAMAVADHANULU. **13. M. L. J. 364.**

5. S. 5. *See S. 1 and 5 75. P. R. 1903 No 3 and 13. M. L. J. 364 No 4 supra.*

6. S. 5, 81, 83—*Bequest instructions suprests—position of legatee—See will—Louis Kunha* v. *Coelho 18. M. L. J. 158.*

7. S. 6.—*Creation of trust—Trust property. Transfer of—Debtor conveying property to be converted into money—Presumption—Estoppel—Repr sentation of an intention—Representation* de futuro—*Promise.*

One of the essentails to the creation of a trust under section 6 of the Indian Trusts Act, 1882, is that the auther of the trust should transfer the trust-property to the trustee.

When a debtor conveys property in order that it may be converted into money by sale or mortgage and that the money raised may be applied in discharge of debts, the presumption is that, whether the deed is for payment of creditors generally or of specified credito.s, it is merely intended by the debtor to direct the mode in which his property is to be applied for his own convenience.

A mere representation of an intention cannot amount to an estoppel. An estoppel must be a representation of an existing fact. If binding at all a representation *de futuro* must amount to a promise, DHONDO GOVIND *v.* KESHAV BHASKER. **7. B. L. R. 179.**

8. S. 6.—*Creotion of Trust*—See Mohommadan Law Creation of Trust. ABDUL CADER *v.* TAJOODIN. **6 B. L. R. 263.**

9. S. 6, 94.—*Will declaring a Trust.*—A trust declared by Will is created when the testator indicates, with reasonable certainty by any words or acts, an intention on his part to create thereby a trust, the beneficiary and the trust property. Yet where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be) to the extent necessary to satisfy thier just demands, for then there is a constructive trust.

Held, upon construction of the Will, that the property inherited by the legatee under the w ll was not subject to any trust, express, implied or constructive.

As it is a maxim that execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control; so that the administration of it can be reviewed by the Court; or if the trustee dies, the Court itself can execute the trust; a trust, therefore, which in case of mal-administration could be reformed and a due administration directed; and then unless the subject and the objects can be ascertained, upon principles familiar in other cases, it must be decided that the Court can neither reform mal-administration nor direct a due administration. AMBA LAL GOWRI SHANKER *v.* BAI REWA. **5 B. L. R. 334.**

Sup: Govt. acts (II of 1882) *(Contd.)*

10. S. 8.—*Appointment of a manager till the majority of the son*—See Hindu Law joint family. HARILAL BAPUJI *v.* BAI MANI. **7 B. L. R. 255 = 29 B. 351.**

11. S. 11.—*Will—Trust—Discretionary power—Exercise of discretion—Interference by Court.*

Where discretion is given to the trustees, the Court shall not deprive them of the discretionary power, when a proper and honest discretion is exercised by them. MAWJIBHAI HERJEE *v.* MULJIBHOY RAHIMBHAI. **4 B. L. R. 199.**

12. S. 11.—*Trust—Gift to Mission Society for establishing Native Christian hamlet—House in hamlet let out to Notice Christian tenant—Right to object—Notice to quit not state reasons—Trust perpetual—Beneficiaries.*

The donor made a gift of certain permises to the Baptist Mission Society of England for the purpose of establishing a hamlet of Native Christians of the Baptist community and she appointed certain persons by name as Trustees for aiding and assisting in establishing the said hamlet. The Baptist Mission Society then built several houses on the land by subscriptions raised from the members of the Baptist Christian community. In one of these houses the defendant, a Native Christian, lived on payment of a monthly rent since 1898. Two notices to quit the house were served upon him by the Trustees. The defendant did not comply with the requisition of the said notices, and set up an adverse title in himself. The trustees brought the present suit for his ejectment.

Held, that the trust was not discharged and the functions of the Trustees did not come to an end when certain houses were built and certain Members of the Native Christian Community were settled as tenants. It was something like a perpetual trust. And for the purpose of carrying out the object for which the gift was made, the Trustees had a power of management of the trust, and in the exercise of such power, they had also the power to eject a tenant.

Held also, that the Trustees were not bound to disclose the reasons why they considered the defendant to be unfit to occupy any particular house in the Mission compound. PARMANAND KARAN *v.* BAPTIST MISSION SOCIETY. **8 C. W. N. 918 at 921.**

13. S. 15, 20, 30.—*Trustee's duty to invest money of* cestui que trust—*Guardian's power*

to make remission of rent—Right to demand release from cestui que trust—*Costs.*

A minor after attaining his majority sued his guardian for recovery of trust property. The guardian had made certain remissions to tenants which the plaintiff contended the guardian was not justified in making. The plaintiff also claimed interest on money which the defendant had kept with himself instead of investing it on interest.

Held, that the defendant was not justified in making remissions after the plaintiff had attained majority as then the defendant was wrong-doer in improperly retaining possession of the plaintiff's property; but as to earliar remissions granted long before relations between the parties were strained the claim was not valid as they seemed to have heen made on good grounds.

Held, also that as a ruled where the trust property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trusty is bound to invest the money for the benefit of the *cestui que trust.* But the defendant having kept the trust money for a few months only to defray necessary a expenses of the plaintiff could not be made liable to pay interest.

A question arose whether the defendant should not pay the plaintiff's costs. It was pleaded for the defendant that he was not bound to pay costs as the plaintiff had refused to give him a full discharge as regards his trustee-ship.

Held, that a trustee is not justified in insisting on *cestue que trust* giving him a release as a condition precedent to his delivering the trust property to him and a *bona fide* belief on the trustee's part that such was his right is immaterial as affecting the question of costs, which is necessitated by his unlawful refusal. The obtaining a release is solely for the personal benefit of the trustee and is not in any sense, an act done in execution of the trust. RAJA RAM DEVAI *v.* LAKSHMI SANKARA. **13 M. L. J. 206**.

14—s. 20—See s 15, 20, 30 13. M. L. J. 206 *supra No 13.*

15 S. 26—*Defaults by contrustees—Liability of trustee.*

The general rule is that trustees and executors are not chargeable with each other's defaults: but the benefit of this rule is denied to a trustee or executor who has been guilty of negligence(1862) 3 D T. V. S. 335 *v.* (1829 3 Sim 265 followed, by law trustees must show an active and vigilant prudence, and a trustee must if a breach of trust is only threatened prevent it by obtaining an injunction.

Where a trustee stands by for four years while the trust funds are retained by his co-trustees,and makes no inquiry but passively acquiesces in the disappearance of the funds, he is liable to the beneficiary for the default of his co-trustees. MAHMOOD AHMED *v.* PEDRO SALVADORE RODRIGUES. **7 B. L. R., 691.**

16 s. 30—*Want of diligence—Liability for mismanagement of co-executor.*

Held, that the defendants accutors were liable to render accounts to the plaintiff who was a beneficiary under the will and must make good the loss sustained, if any, owing to their negligence, want of proper care and mismanagement.

If they could not produce the fund entrusted to them for another at the appointed time, *prima facie* they were liable for the loss.

An executor could not he relieved of his liability on the ground that his duties were merely advisory, that he was one of the many, that he was not specially entrusted with the management of the trust property and that the management was carried under the votes of the majority. One, who undertook a duty, was bound to know what his duty required. Where there was want of proper care and diligence on the part of a trustee not only in the appointment of an agent to carry on the trust business, but also in the supervision of the agent, there was a clear breach of duty and that the trustee was liable for breach of trust. Section 30 of the Act was inapplicable to such a case. LAKHMICHAND NEMCHAND *v.* JAJ KUVARBAI, **6 B. L. R. 907=29. B. 170.**

17 s. 30 *See S. 15, 20,* 30—*13. M. L. J. 206 supra Mo. 13.*

18 s. 32, *Trust—Debts incurred by trustee—Trustee's right of indemnity—Creditor's right to stand in the place of trustee.*).

A. the owner of an hotel, on the occasion of her marriage with B, appointed B trustee by a deed of settlement. trust-deed gave the trustee power through managers to carry on the business of the hotel, and settled the net profits on A for life with reversion to her son. The plaintiffs brought a suit against B, the trustee, for goods supplied to the hotel and claimed B's right of indemnity;

Held that the plaintiffs were entitled in equity to stand in the place of the trustee, if the trustee had not through his own default lost his right of indemnity. 28 C. 574 *referred to*)—T. E. MADDEN *v.* ALFRED JOHN BRIDGE, **9 C. W. N. =31 C. 1084.**

19 s. 32, 35, 72 *Civil Procedure Code Section 2—Decree—Execution.*

The discharged trustees brought a suit against the new trustees for a certain amount as a first charge on the trust directed by the Court of the District Judge to be paid to them. It was contended that the suit did not lie as the order was a decree within the meaning of Section 2 of the Civil Procedure Code.

Held, overruling the contention, that the order was not a decree and the suit was not barred. CHARLES BENTINCK BARCLAY *v.* ROBERT STANES. 11 M. L. J., **1908, p. 188.**

20 s. 35 *See S. 32, 35, 72—11 M. L. J. 1901. P. 188. supra No. 19.*

Sup: Govt. acts (II of 1882) (*Contd.*)

21 s. 53 *Scope of*—
S. 53 of the Act prohibits transactions entered into by a trustee for his own profit after he has become a trustee and while he is performing the duties of the office. But it does not render void a mortgage, in favour of a person, created before becomes trustee of the property by the deed of trust itself as a condition of the trust imposed by the settlor.

The Act, does not prevent a *cestui que trust* from being appointed a trustee. He is not as such incapacitated from being a trustee for himself and others; but, as a general rule, he is not an altogether fit person for the office in consequence of the probability of a conflict between his interest and his duty. ASHIDBAI *v.* ABDULLA HAJI MAHOMED, **8 B. L. R. 652.=31. B. 271.**

22 s. 53 and 88 *Purchase of property, at court auction by Guardian without permission of Court.*
A sued B for possession of certain land on the allegation that he had purchased it at auction-sale in execution of a decree against B. contended that A who was then the guardian of B purchased the property *ism farzi* for and that the purchase of A was invalid under S. 53 and 88 of the Act.

Held, that, if A as guardian of the property of the minor was a trustee, on the property in suit being attached in execution of a decree, he ceased to hold it in trust and it ceased to be trust property in his hands.

Held, therefore, that there was nothing in section 53 to bar the purchase of the property in suit by A and that under section 88, it could not be held that A held the property after the purchase for the benefi of P.

Held also, that A did not purchase the property *ism farzi* for B the appellant. MAHARAJ SINGH *v.* MAULVI W LI ULLAH. **6 O. C., 252.** (*But See No. 32 infra* 9. *B. L. R.* 606).

23 s. 75—Power of appointing new trustee in place of a dying trustee—See Registration Act S. 17 (h) No 75 FATMA BIBI *v.* SHAIKH HASSAN. **9 B L R., 1071.**

24 s. 81, 83—See Limitation Act of 1877 S. 10. MATHRADAS *v.* VANDRA—VENDAS. **8 B L R., 328.**

25 s. 82—*Transfer to A for consideration paid by B—Public policy.*
S. 82 can not authorize a Court to give effect to an agreement of which the object is unlawful—See Contract Act S. 23. SHEO NARAIN *v.* MATA PRASAD. **A. W. N. 1904 P. 167=1 A. L. J. 412=27 A. 73.**

26 s. 83. See ss. 81, 83—8. B. L. R. 328 supra No. 24.

27. s. 84. *No right to recover even where unlawful agreement only partly carried out—Decision not bad although no distinct issue when parties not taken b surprise. y*

Sup: Govt. acts (II of 1882) (*Contd.*)

The rule that a person *in pari delicot* cannot recover, is applicable not only where the unlawful agreement has been fully carried out but also where there has been part performance of a subtantial character of such agreement. This is the construction which ought to be placed on the words 'not carried into execution' in s. 84 of the Trusts Act. Where a point, on which there is no distinct issue, is present to the minds of the parties, the decision on such point cannot be impeached on the ground that there was no issue raised. MUTHURAMAN CHETTY *v.* KRISHNA PILLAI **15 M. L. J. 478=29. M. 72.**

28. s. 84. Transfer for illegal purpose See Transfer—REGHO AMARAM *v.* PURSHOTAM JAIRAM.—**4. N. L. R. 26.**

29. S. 88.—*Mortgage—Lease. Renewal of—Effect on rights of mortgagor.*
If a trustee or mortgagee obtains a lease during the continuance of the trust or mortgage, the benefit of the lease taken by the mortgagee or trustee enures to the benefit of the *cestui que* trust or the mortgagor. The above rule is equally applicable in the case of the mortgagee of a *jote.* BAIJ NATH SINGH *v.* HARIKISHEN BHAGAT, **6. C. W. N. 372.**

30 s. 88. *See S. 53, 88—6. O. C. 252 supra No 22.*

31 s. 88 and 90 Mortgage purchasing mortgagor's rights in execution of decree of a third party—Transfer of property Act S. 99 and C. P. C. 1882. S. 294—See Mortgage—THAKAR DURGA SINGH *v.* SETH JAY DAYAL. **7. O. C. 307.**

32 s. 88, 96 *Trustee—Surviving partner's liability to account to the legal representative of the deceased partner—Their relations—Transfer of business to the surviving partner—good faith: Survival of good will.*
Under S. 88 of the Act, an executor or a partner, must hold for the benefit of the person whose interests he is bound to protect, every pecuniary advantage he has gained by availing himself of either character, or, by entering into any dealings, under circumstances, in which his own interests are or ever may be adverse to those which he is bound to protect. S. 88 by itself, does not validate a purchase by an executor of the trust property, either for the *bona fide* assent by his co-executor or of good faith in the executor himself, who, under the section, could not retain an advantage, even though unconsciously obtained in the transaction, where his interest and duty were in conflict.

A surviving partner holds the property by virtue of a contract, and may buy the property in trade of his deceased co-partner, under provico (*b*) to S. 95 of the Trusts Act: but as his interests in the transaction may conflict with his duty, he is even then precluded by S. 88 from retaining for himself any advantage, he may have acquired by the bargain. hatT is, t-

Sup: Govt acts (II of 1882) *(Contd.)*

must give full value or what he could reasonably believe to by full value. The only saving clause, which protects the executor or surviving partner transgressing those limits from the liabilities attaching to an ordinary trustee, is that contained in S, 96.

S. 96 of the Act applies to all constructive trustees described in Ch. IX, and differentiates them from trustees properly so called, by declaring that nothing in the chapter relating to them shall impair the rights of transferees in good faith for consideration. And that is the only provision that saves an executor buying his testator's assets from liability for advantage gained unwittingly in the bargain, and a surviving partner purchasing under provisio (b) of S. 95 is yet subject to the latter part of S. 88 and could only retain an advantage thereby gained, on proof of good faith as well as of consideration. The good faith must be his good faith in the transferee. The good faith of a co-executor will not avail him.

S. 88 ill (f) of the Act, demands from a surviving partner the same *uberrima fides* as regards the interests of a deceased partner as was due before death had dissolved the partnership, so far as the profits arising from the capital of the deceased are concerned. For these he must account to his legal representative. He is under liability to account, and is evidently within the meaning of the phrase which classes him with "other persons bound in a fiduciary character to protect the interest of another."

The Indian Trusts Act, does not class the surviving partners with trustees; but they are subjëct to obligations in the nature of a trust and are classed with persons bound in a fiduciary character to protect the interests of others, and the same duties, liabilities, and disabilities, so far as may be, attach to them as to trustees, subject to the provisos in S. 95 and the saving provisions of S. 96 of the act.

S. 111 of the Indian Evidence Act applies to good faith arising under S. 96 of the Indian Trusts Act.

But for an agreement the good will of a business does not survived 1 ch 378 *followed*) HASSANALI MAHOMED ALI *v.* ESMAILJI SULEMANJI, **9 B. L. R. 606.**

33 s. 90 *Advantage gained by qualified owner*—See N. W. P. Rent Act S. 9 and U. P. Tenancy Act S. 20—KESHAR *v.* HASAN ALI KHAN. **2 A. L. J. 583**

34 S. 90 *See S. 88, 90—7. O. C. 307 supra No 31.*

35 s. 91 *See transfer of property Act* (IV of 1882) S. 40 -KAMESWARAMA *v.* SITARAMANUJA CHARLU. **29 M. 177**

36 S. 94 *See S. 6, 94—5. B. L. R. 334- supra No 9.*

Sup: Govt. acts (II of 1882) *(Contd).*

37. s. 96 *See S. 88, 96—9. B. L. R. 606. supra No. 32.*

(51) Act IV of 1882. *(Transfer of Property Act.).*

1 *Transfer of immoveable property orally in compromise of claim not invalid—Registration.*

Where property was allowed by the brothers to be retained and enjoyed by the sister by way of compromise of her claim in respect of the land belonging to her which they had sole.

Held, that the transaction was not a gift, nor a sale nor an exchange under the Transfer of Property Act, and was not invalid by reason that it was not in writing registered. K. THIRUNENGIDACHARIAR *v.* RANGANATHA AIYANGAR. **13 M. L. J. 500.**

2 S. 2, 92 and 93.

Held, that section 2 of the Transfer of Property Act 1882 preserves the rights of parties to a mortgage but the procedure for enforcing those rights is governed by its provisions.

In this suit plaintiff was allowed to redeem within a certain time, but nothing was stated in the decree as to what was to happen if he did not pay the money within the time prescribed.

Held, that the mortgagee was entitled to an order under section 93 of the Transfer of Property Act although a proper decree under section 92 had not been drawn up. MURLIDHAR *versus* PARSHARAM.—**25 B. 101.**

3 S. 2, (c)—See Land lord and tenant —PARAMESHRI *v.* VITTAPPA SHANBAGA. **12 M. L. J. 189 = 26 M. 157.**

4 2 (d)—Trust Act S. 6—See Mahommadan Law. ABDULCADER *v.* TAJOODIN. **6 B. L. R. 263.**

5 S. 2 (d), 36—*Landlord and tenant—Rent—Apportionment—Transfer of lessor's interest by operation of law.*

R was *hikim* and as such was entitled to certain *mauzas*, which were held by M as mortgagee inpossession under him. On the 7th Sraban 1307 *fusli*, R ceased to be *hikim* and plaintiff became *hikim* and took possession of the *mauzas* by ousting M. M had collected from the tenants of the *mauzas* the entire rent for the year 1307, and plaintiff brought this suit for a refund of the rent for the period from the 7th Sraban to the end of the year 1307.

Held that s. 36 the Transfer of Property Act being inapplicable to the case, having regard to s. 2 (*d*) of that Act, the plaintiff's claim was not sustainable. *Satyendra Nath Thacur* v. *Nilkanta singha* (I. L. R. 21 Cal. 383) and *Lakshminarnappa* v. *Melothraman Nair* (I. L. R. 26 Mad. 540) referred to. MATHEWSON *v.* SHYAM SUNDER SINHA **I. L. R., 33 C. 786.**

6. S. 3.—

The rule in this conntry as to the assignability of an executory contract for the purchase and sale of goods is that the benefit of

such a contract can be assigned, understanding, by benefit the beneficial interest under the contract and the right to enforce it. This rule is subject to certain qualifications, *viz.*, (1) that the benefit is not coupled with a liability, (2) that the nature of the contract has not been affected by personal considerations. Such a contract falls within the rule which is in existence and the force in this country as to assignment of contracts. Such a contract, though perhaps contingent in character, comes within the definition of actionable claim in the Transfer of property Act, S. 3.

An assignment made under such circumstances as to amount to a fraud of the Bankruptcy Law falls clearly within S. 6, cl. (h) of the Transfer of property Act and is void. JAFER MEHER ALI *v.* THE BUDGE THE BUDGE JUTE MILLS CO., LD. **10 C. W. N. 755 = 33 C. 702.**

7. s. **3.**—See Lease—Construction of—RAMPAL SINGH *v.* BALBHADRA SINGH. **25 A. 1 = 29 I. A. 203 = 6 C. W. 849.**

8. s. **3.**—*Meaning of fixtures—Liability of assignee of a lease to keep premises in repairs—Ownership of fixtures errected by tenant*—See Landlord and tenant. CHATURBHUJ MORAJI *v.* THOMAS BENNETT. **29 B. 323.**

9. s. **3, 4, 123.**—*Gift, it must be registered by the donor himself—Gift to wife—Death of donor—Registration at the instance of the widow, effect of.*

It is not necessary for the validity of a deed of gift that it should be registered by the donor himself.

When a Hindu executed a deed of gift in favour of his wife and died and the deed was subsequently registered at the instance of the widow.

Held, that it was a valid deed of gift within the provisions of S. 123 of the Act. *20 A. 392 referred to.* BHABATOSH BANERJEE *v.* SHAIKH SOLEMAN. **10 C. W. N. 717 = 4 C. L. J. 340 = 33 C. 584.**

10. s. **3, 6.**—*Benefit of an executory contract, if actionable claim—Insolvent Act (11 and 12 Vict., c. 21), S. 7—Benefit of executory contract, if can vest in Official Assignee under S. 7.*

The benefit of an executory contract is an actionable claim within the meaning of S. 3 of the transfer of Property Act. It is such property as would vest in the Official Assignee under S. 7 of the Indian Insolvent Act. JAFFER MEHER ALI *v.* THE BUDGE BUDGE JUTE MILLS & CO. **11 C. W. N. 566 = 34 C. 289.**

11. S. **3, 35, 55 (4) (b) and 56 (6).**—*Vendor's lien for unpaid price. Deed of sale acknowledging full receipt—Mortgagee taking without notice of unpaid price—Estoppel.*—See sale. PEHIL RAM GIRDHARIDAS *v.* KASHI B I. **10 B. L. R. 403.**

12 s. **3, 58, 59,** *and Registration Act S. 17, 48*—

Mortgage by deposing title deeds—Submortgage by depositing mortgage deed valid-property in mofussil—See Mortgage equitable mortgage RAJA GOKALDAS *v.* THE EASTERN MORTGAGE AND AGENCY CO. LD. C. L. J. 102 = **10 C. W. N. 276 = 33. C. 410.**

13 s. **3. 69** *Constructive notice—solicitor's knowledge prior to employment—English mortgage—Power of sale, Irregularity—Condition of sale depricatory—Purchase with notice—Trying Court's appreciation of evidence—Interference on appeal—*

Knowledge of an agent or solicitor not acquired in the matter for which he was agent, but acquired before his employment as such, cannot be imputed to a principal and used to upset a transaction of a date before the agency commenced.

A sale, purported to be held under a power of sale contained in an English mortgage, provided that "the purchaser" shall not be bound to see or inquire whether default has been made or otherwise, as to the necessity or expediency of the sale, or that the sale is otherwise improper or irregular," and that any such irregularity should not invalidate the purchaser's title, and that the "remedy of the mortgagor shall be in damages only," It was found, however, by the Court of first instance, upon a careful consideration of the evidence which was both voluminous and conflicting, that the mortgagees or their agents so conducted themselves with reference to the sale that would-be-bidders at it were induced to leave, and that the purchaser had notice of these circumstances within the meaning of S. 3 of the Transfer of Property Act.

Held that the case was peculiary one, in which Judicial Committee would be reluctent to reject the finding of the Judge who tried the case, provided there was sufficient evidcuce to support his finding and that the sale, was not a *bona fide* auction sale, and the purchaser having purchased with notice, it should be set aside. CHABILDAS LALOOBHAI *v.* DAYAL MOWJI. **11 C. W. N. 1109 (C.P.) = 9. B. L. R. 1062 = 17 M. L. J. 465 = 4. A.L.J. 750 = 6 C. T. J. 674 = 2 M. T. J. 394 = 31 B. 566 (P. C.)**

14 **S. 3, 81**—*Registration—Notice of prior incumbrance—Marshalling of securities.*

Registration of a sale or mortgage is in itself notice to subsequent purchasers or mortgagees. This doctrine is as applicable since the introduction of the Transfer of Property Act (IV of 1882) as it was before. DINA *v.* NATHU. **4 B. L. R. 253 = 26 B. 538.**

See also 6. B. L. R. 1043, 29. B. 199 and 30 C. 599 at 607.

15 **s. 4**—See S. 3, 4, 123—33 C. 584. No. 9 *supra.*

16 **S. 5**—See S. 6, 41, 58, 5—U. B. R. 1906 P. 1 (sub mortgage), No. 32 *infra.*

Sup: Govt. acts (IV of 1882) (*Contd.*)

17 s. 6—See under-proprietor's suit for arrears of rent—interest. KESHOSINGH *v.* MAHOMMED AZAM. **3 O. C. 108.**

18 s. 6—Will construction of a deed—Contract to dispose of property by will, if valid—Mere right of succession expectant on the death of a testator is not transferable See Will. PRAGDAT *v.* CHOTESINGH. **9 O. C. 55.**

19 S 6—*Transfer of right of reversionary heir before reversion falls in.*

The right of a presumptive reversionary heir under the Hindu Law is no more than a *spes successions* or expectation of succeeding to the property. Such right cannot be transferred.

The fact that the transfer was in fovour of the widow in possession at the time of the transfer cannot make any difference so as to enlarge her limited estate into an absolute estate 24 A. 94 refd to. NARASIMHAM *v.* MADHAVARAYUDU. **18 M. L. J. 323.**

20 s. 6—*Reversionary right, nature of.*

The right of a presumptive reversionary heir under Hindu Law is no more then a *spes successionis* or expectancy of succeding to the property. Such expectancy cannot be transferred under s. 6 of the Transfer of Property Act. MANICKAM PILLAI *v.* RAMALINGA PILLAI. **I. L. R. 29 M. 120.**

21 S. 6—*Babuana allowance if transferable.*

The allowance called Babuana which is a species of maintenance graut is transferable. CHHOTENARAIN SINGH *v.* Mt. RAMESHWAR KAER. **6 C. W. N. 796.**

22. s. 6.—*Reversionary interest non-transferable—Unregistered document, where value of property not specified in the deed, but exceeds Rs. 100 invalid.*

Held, that the transfer of a merely reversionary interest is invalid under S. 6 of the Transfer of property Act. (29 C. 355, 21 A. 71 P. C., 24 A. 94 *referred to.*)

Held, further, that a document by which property exceeding Rs. 100 in value is transferred is invalid if not registered, although the value of the property is not specified in the deed. SRI GOVIND *v.* BALBHADDAR. **10 O. C. 277.**

23. s. 6.—*Divided brothers agreeing as regards estate of a deceased divided brother—deased's widow not a party to the agreement. (L. A. 1877). Art. 144, specific performance*—See Hindu Law Reversioners. SOORAPARAJU *v.* BIRABHADRA JU. **17 M. L. J. 505.**

24. s. 6—See S. 3, 6. 34 C. 289 No. 10 *supra.*

25. s. 6 (a).—*Mortgage—Hindu reversioner's contingent right—Mortgage of such, right validity of.*

The interest of a Hindu reversioner expectant upon the death of a Hindu female cannot be validly mortgaged by the reversioner. (25 Cal. 778) aver-ruled by (L. R. 25 I. A. 183). NUND KISHORE LAL *v.* KANEE RAM TEWARY. 29 **C. 355.**

Sup: Govt. acts (IV of 1882) (*Contd.*)

26. s. 6 (a) 19 & 21.—*Succession—Right of heir to inherit—Vested or contingent interest.*

That the right of a heir of a person to inherit that the person's property on his death is not an estate in remainder or in reversion in immoveable property or an estate otherwise deferred in enjoyment. It is neither a vested nor a contingent righgt. It does not come within the definitions of a "vested interest" in section 19, or of "contingent interest" in section 21 of the Transfer of Property Act and section 107 of the Indian Succession Act. So far from being a vested or contingent right, a right in present or in future, it is, in the language of clause (*a*) of section 6 of the Trasfer of Property Act "the chance of an heir apparent succeeding to an estate" or "a mere possibility of succession which cannot be transferred." ABDUL HOOSEIN MULLA *v.* GOOLAM HOOSEIN ALLY. **7 B. L. R. 742 at 743.**

27. S. 6 a. *Relinquishment by reversioners of their rights to succed on widows death is a transfer of an expectency and is null and void under this section—Dhoorjeti Subbayyar* v. *Dhoorjeti venkayya. 2. M. L. T. 184. See Hindu Law adoption.*

28. s. 6 a. *Spes successionis i.e., chance of an heir apparent's succession is not transferable—See Mahommedan Law succession—Shumsuddin Ghulam hussain v. Abdul Husain. 8. B. L. R. 781=31. B. 165.*

29. s. 6 d. *Property restricted to the owner presonally—Jajmani bahis.*

Held that "jajmani bahis" are not property and their sale in execution of a decree is obnoxious to the provisions of S 6 (*d*) of the Transfer of Property Act, 1882; and the sale of such books will not carry with it the right to act as the hereditary guide of the pilgrims whose names are therein recorded GOPI NATH *v.* JHANDU. **1907 A. W. N. 282; 4 A. L. J. 712.**

30. S. 6 d. Mohammadan widow in possession of property in lieu of dower—Her right not alinable. See Mahommedan Law—Dower—MUZAFFER ALI KHAN *v.* PARBATI. **A. W. N. 1905. P. 221=4, A. L. J. 521=29. A. 640.**

30 a. S. 6 i Mortgagee purchasing half share of martgaged property—Subject to entire mortgage debt—purchase of equity of redemption by mortgagee, sale in execution of a money decree Mortgagor's suit for possession See mortgage—AMIR HUSAN KHAN *v.* CHODHRI HADI HUSAN. **4 O. C. 341.**

31. S. 6 (i)—Effect of usufructuar mortgage by tenant having no transferable right in land, its effect against landlord—See mortgage. JANG BAHADUR *v.* RAI RAJA. **7-O. C. 765.**

32. s. 6, 5, 41, 58.—*Sub-mortgage.*

Held, a mortgagee sub-mortgage—there is privity between a mortgagor and his sub-mortgagee—If payment of the original mortgage debt is made to the original mortgagee, without notice of the sub-mortgage the sub-mortgage is extinguished, and the sub-mort-

Sup:-Govt. acts (IV of 1882) *(Contd)*

gagee cannot hold the property against the original mortgagor. If otherwise, the sub-mortgagee can hold the property against the original mortgagor, till the sub-mortgage is redeemed. 18 A. 113, 15, B 692, 20 B. 549. 2 M. 212, 20 M. 35, P. R. 12 of 1895, *referred to*, NGA KYE *v.* NGA PO MIN. **U. B. R. 1906. P. 1 (Sub-mortgage).**

33. s. **6, 67**.—*Mortgage of a zamindari which is impartible by the holder thereof and the members of his family—Suit for sale of mortgage property—Consent decree, C. P. C. S. 274, 503.*

A zimindar who was then in possession of an impartible zimindari and four members his family who stood in the line of succession to the zimindari, mortgaged the zimindari; and the mortgagee sued them all under S. 67 T. P. A. for sale of the mortgaged property. A consent decree was passed against them all which provided that the decree debt shall be paid by instalments, and that in default the plaintiff should be at liberty to realise the amount with interest from defendants and the mortgaged property, and that if the decree remained unsatisfied during the lifetime of defendant No. 1 and he should be succeeded by a person not a party to the suit and such a successor should decline to pay, the balance with interest should be paid by whichever of the defendants Nos. 2 to 5 should succeed to the zimindari at whatever period and in default all the defendantt and the mortgaged property should stand liable.

The zimindar died and the decreeholder applied for execution of the decree against defendants 2 to 5 and prayed for sale of the mortgaged property and the appointment of a receiver pending sale.

Held that the interests which defendants Nos. 2 to 5 had purported to transfer, were in the nature of a mere chance of succession; and S. 6 (*a*) T. P. A. rendered such transfers unlawful on grounds of public policy. The Courts could not allow them to be enforced by means of consent decrees, which must be construed according to law. (8 B. L. R. 781, approved, 18 M. 291, 10 A. 272, (1899) A, C. 114, 8 B. L. R. 813, 26 M. 31, 8 I. A. 123, 11 B. 537, 28 M. 355 *referred to.*

Held, therefore that the Lower Court's directing the sale of the zimindari should be set aside. RAMA SAMI NAIK *v.* RAMA SAMI CHETTY. 2 **M. L. T. 167=17 M. L. J. 201=30 M. 255.**

34. S. 6 and 135.—*Actionable claim—Notice necessary.*

The following endorsements were separately made on the back of two contracts:—(*a*) "As to the whole of my right (and) interest in this contract, I have sold the same to ..."—(*b*) "I have sold the whole of my right and interest in this contract and (in) the goods mentioned there in to..."

Held, that what was transferred thereby was property; that none of the exceptions to S. 6 of the Transfer of Property Act applied; and that the subject of transfer was an actionable claim, requiring notice, under S. 135 of the transfer of Property Act, on the part of the transferee, to prevent any dealings prejudicial to himself. HUNSRAJ MORARJI *v.* NATHOO GANGARAM, **9 B. L. R. 338.**

35. S. 8. *Res Judicata—Decision in former suit—Parties in subsequent suit all claiming under one party only in former suit—Deeds, construction of—*

The decision in a suit by one of two zemindars against the other as to the right to the profit rental of a bazar was held not to be *res judicata* in a subsequent suit for possession of a share of the bazar in which suit all the parties, plaintiffs and defendants, claimed under the plaintiff in the former suit. Such a plea, however, might well be a defence to a hostile claim by persons asserting a title under the defendant-zemindar in the former suit against those claiming under the plaintiff-zemindar in that suit:

Held on the true construction of deeds of mortgage, and of sale, and a certificate of sale, of shares in a zemindari, where the documents contained no words of exception or reservation that they conveyed all the interests of the mortgagor, vendor and judgement -debtor respectively in zemindari-Their interests in the houses on the land and in the profit rents derived from them passed in the absevence of any words showing an intention to retain or exclude them.—ASGHAR REZA KHAN *v.* MAHOMED MEHDI HOSSEIN KHAN, **7 C. W. N. 482; P. C.=30. I. A. 71. (P. C.)=30. C. 556.**

36. S. 8. *See S. 36, 8—14 C. P. L. R. 1901–P. 84. infra No. 50.*

37. S. 8 *No distinction between lease hold and free hold See S. 70 infra No 296—6. B. L. R. 996.*

38. S. 8, 130, 135. *Set off—Mortgagee—Principal and surety—Estoppel by conduct:-*

The word "debt" in Cl. 5. of S. 8 of the Transfer of property Act cannot be taken to be used in its widest sense but is confined to debts that fall within the category of actionable claims. The plaintiff as assignee of the lessor's right to receive a monthly allowance of Rs. 500 from the lessees sued the defendant-lessees for the amount due to then for a certain period. The defence was, *inter alia*, that the lessees were entitled to a set off of the amount due to them on the date of assignment by the lessor in respect of a mortgage of a priod date. Subsequent to the mortgage the mortgagor by a deed of trust transferred all the property except those leased to the mortgagees to a trustee in trust for his son after the payment of all his debts inscluding the mortgage debt. The mortgagees had in conjunction with the trustee by "a postponment deed" placer themselves in the position of second mortgagees with reference to some other creditors of the mortgagor and the mortgagor was a consenting party to the arrangement.

Sup: Govt. acts (IV of 1882) (*Contd.*)

Held, (1) that the defendants would, under ordinary circumstances, be entitled to a set off. (2) That but for the waiver by the defendants, the mortgagees, they would not be debarred from relying on the mortgagor's personal liability to pay the debt. (3). That the mortgagor and his trustee did not occupy the position of surety and principal and consequently the grant of time by the mortgagee to the trustee did not entail the loss of the mortgagor's personal liability on the mortgage. (4) But that having regard to the special circumstances of the particular case the mortgagee had, by his conduct, given up his right to proceed against the mortgagor personally and was therefore, not entitled to the set off claimed.

Held, also that the defendants cannot rely on any possible equity to which they might be entitled to a pending action by the mortgagor's son to set aside the lease, in case a decree was to be passed in favour of the plaintiff therein setting aside the lease, as a defence or even as a temporary bar to the present action by the assignees of the lessor. ARUNACHELAM CHETTI *v.* SUBRAMANIA CHETTI. **17 M. L. J. 87.**

39. S. 10.—*Restriction against alienation of absolute estate.*

A sued B for possession of a village. The parties entered into a compromise which provided that the village shall remain in possession of A as owner for ever, that A and his male issue shall always remain in possession but there shall be no power to sell, mortgage or transfer to a stranger, as the village was sold by B's father to A's grandfather. A decree was passed in the terms of the compromise. Subsequently A mortgaged the village and afterwards the mortgagee obtained decree against A for the sale of the village. A's son objected to the sale but his objections were disallowed. He then sued the mortgagee and his father for a declaration that the mortgage was illegal, and void, and that the village was not liable to be sold in execution of the decree or in the alternative for a declaration that the sale of the village would be void beyond the lifetime of A. The question was whether A acquired under the compromise an absolute interest in the village and whether the condition in restraint of alienation in the compromise was void.

Held, that under the terms of the compromise, A acquired in the village an absolute estate and that the condition in restraint of alienation except to the *talukdar* was one in absolute restrain of alienation and was void.

Held, therefore, that the mortgage made by A in favour of the mortgagee was a legal and valid transfer.—FAIYAZ HUSAIN KHAN *v.* NILKANTH, **4 O. C., 163.**

40. S. 10.—*See Land lord and tenant Parmeshri* v. *vittappa Shanbaga 12. M. L. 189=26. M. 157.*

Sup: Govt. acts (IV of 1882) (*Contd.*)

41. S. 10. -*Alienation. Restrictions against, by decree passed on comprom se.*

Where by a compromise the plaintiff consented to the transfer of a house to the defendant on the condition that the defendant should not alienate it without first obtaining his consent and a decree was passed in terms of the compromise—

Held, that the condition was void not binding on the plaintiff. *7 All., 516 referred to.* KHIALI RAM *v.* RAGHUNATH PRASAD. **3 A. L. J., 621.=A. W. N. 190 P. 214.**

42. S. 10.—*Restriction upon anticipation—Decree passed against separate property of married woman—Attachment—Income of property—Subject to restraint upon anticipation.* See married Woman's Property Act III of 1874, S. 8. G. GOUDOIN *v.* P. A. VENKATESA MUDALI. **17 M. L. J. 363=2 M. L. J 322=30 M. 378.**

43. S. 10, 12, 126.—*Construction of deed—Gift made subject to revocation.*

The plaintiff's predecessor sold their share in the village zamindari to the predecessors in title of the defendants. The vendees then made over to the vendors 5 bighas of land to be held by them and their heirs for maintenance, subject to the condition that the land would be liable to be taken back in the event of the donees transferring it.

Held, that this was a valid condition, not repugnant to the original transfer, and the donees had no right to a decree declaring that they were proprictors of the land. THAKUR PRASAD *v.* RAJRUP SINGH. **1907 A. W. N. 278.**

44. S. 10, 12, 126.—*Gift made subject to revocation.*

The defendants made gift of certain property to the plaintiffs on the condition that the land would be liable to be taken back on the plaintiffs' transfering it.

Held, that the gift was subject to a power of revocation and was not repugnant to the original transfer under Ss 10 and 12 of the Transfer of Property Act. The plaintiffs therefore were not the proprietors of the land and could not transfer it. MUKUND PRASAD AND OTHERS *v.* RAJRUP SINGH AND OTHERS. **4 A. L. J. 708.**

45. S. 10 & 110 (g).—*Perpetual lease—Covenant against alienation without covenant for re-entry—Construction of document.*

Where a perpetual lease of a village to the lessee and his heirs contained a covenant against alienation by the lessee, but no covenant giving to the lessor a right of re-entry upon breach of the former covenant, it was *held* that the successors in title of the lessor could not recover the propery the subject of the lease from the alienees of the successors in title to the lessee. *Nil Madhab Sikdar* v. *Narattam Sikdar* (I. L. R., 17 Cal 826), and *Parameshri Vittappa Shabaga*, (I L R, 26 Mad., 157), followed. NETRAPAL SINGH *v.* KALYAN DAS. **3 A. L. J. 196=28 A. 400.**

Sup: Govt. acts (IV of 1882) (*Contd*).

46. **S. 12.**—See Ss. 10, 12, 126—A. W. N., 1907, P. 278. No. 43, and 4 A. L. J. 708 No. 44 *supra*.

47. **S. 19 & 21.**—See Ss. 6 (*a*), 19, 21. 7 B. L. R., 742. No. 26 *supra*.

48. **S. 34.**—*Specific performance of such contract—Circumstances justifying sale—Debts of father—Burden of proof of justifying circumstances.*

The principle laid down by S. 34 of the Transfer of Property Act (IV of 1882) has no application where the transaction is still incomplete, for it presupposes an actual transfer for consideration. JAMSETJI N. TATA *v.* KASHINATH. **26 B. 326.**

49. **S. 35**—See Ss. 3, 35, &c. a—10 B. L. R. 403, No. 11 *supra*.

50. **S. 368.**—*Profits—Appointment of—Share in a village.*

The profits derived from a share in a village are not apportionable in the manner indicated by S. 36 of this Act. "Periodical payments" can only refer to payments *ejusdem generis* with rents, &c., and does not include profits due to a co-sharer at the end of each agricultural year. 42 L. J. Ch. 334 followed. A division of profits cannot be considered a periodical payment. 47 L. J. Ch. 735. GOBIND RAO *v.* BHAGIRAT BAI. **14 C. P. L. R., 1901, P. 84.**

51. **S. 37.**—*Application of the principal of this section to suit by tenants in common for ejectment and partition making all the co-owners parties—Joinder of ancillary relief is no misjoinder.*—See misjoinder of parties. SRI RAJA SIMHADRI APPA RAO *v.* PRATTIPATI RAMAYYA. **29 M 29.**

52. **S. 39**—*Widow's right to maintenance and residence how for effect a purchaser.*—See Hindu Law—Widow. JAYANTI SUBBIAH *v.* MANGAMMA. **12 M. L. J. 270.**

53. **S. 39**—*Maintenance of Hindu widow—Sale of ancestral property—Fraudulent intention to defeat her right of maintenance—Purchaser with notice of her right.*—See Hindu Law Maintenance. DIGAMBARI DEBI *v.* DHAN KUMARI BEBI. **10 C. W. N. 1074 =4 C. L. J. 476.**

54. **S. 39, 100.**—*Maintenance—Charge—Decree on compromise creating a charge*—Bona fide *transferees for value without notice.*

B instituted a suit to recover certain property from M, who was entitled to maintenance. The suit resulted in a decree incorporating a compromise. M. sued B and certain transferees for value without notice to recover arrears of maintenance by the sale of certain property charged by the above decree with the payment of the maintenance.

Held, (*a*) that S. 39 of the Transfer of Property Act had no application; (*b*) that, it being clear upon the construction of the decree that it was the intention of the parties to create a charge on the property for the payment of maintenance within the meaning of S. 100 of the Transfer of Property Act, the charge could be enforced against *bona fide* transferees for value without notice. MAINA

Sup: Govt. acts (IV of 1882) (*Contd.*)

v. BACHCHI. **3 A. L. J. 551=A. W. N., 1906, P. 165=28 A. 655.**

55. **S. 40.**—*Trust Act (II of 1882), S. 91—Mortgagee with knowledge of facts which might have revealed the existence of an equitable right bound by such right.*

Where a mortgagee, at the time of his mortgage, is aware of circumstances which ought to have put him on enquiry, and such enquiry if made would have revealed the existence of an agreement by the mortgagor to mortgage the property to a third party, the mortgagee's right will, on the principles embodied in S. 40 of the Transfer of Property Act and S. 91 of the Trusts Act, be postponed to the rights of such third party. KAMESWARAMMA *v.* SITARAMANUJA CHARLU. **29 M. 177.**

56. **S. 40.**—*Lambardar suing co-sharer for recovery of sum due on account of land-revenue—Vendor undertaking to pay land-revenue—*

A, a shareholder in the village, sold six plots of land included in his share to the respondent. The sale-deed recited that four plots of land sold were *bila lagani*. It also contained the terms:—"If in the present Settlement any revenue be assessed upon and become payable in respect of these fields and *baghs* the purchaser shall have no concern with it, I will pay myself, the purchaser and his heirs will hold the land free of revenue. At the recent revision of the Settlement the six plots held by the respondent were formed into a sub *patti* and assessed at Rs. 6. The appellant Lambardar brought a suit against the respondent for recovery of Rs. 7-8-7 due on account of land-revenue and rates payable by the respondent through the appellant, also for *lambardari* dues and village expenses. The appellant alleged that the respondent was a co-sharer in the village and was, as such bound to pay the revenue assessed together with rates, etc. The respondent contended that he was an under-proprietor and not the proprietor of the land and therefore not a co-sharer of the appellant and secondly that the appellant was bound by the agreement made between the respondent and the vendor.

Held, that the vendor parted with all his rights in respect of the four fields and two *baghs* and the respodent became full proprietor thereof and that the existence of an agreement by the vendor that he would pay any revenue that might be assessed on the land could not affect the completeness of the transfer of proprietary right,

Held, *also*, that the vendor's covenant was distinctly affirmative not restrictive and therefore would not be binding upon the appellant and that the vendor's agreement to pay the revenue was not annexed to the land transferred to the respondent and was not binding upon him and that section 40 of the Transfer of Property Act

Sup: Govt. acts (IV of 1882) *(Contd.)*

did not apply.—RAMADHIN DIKSHIT *v.* SHEORATAN SINGH, **6 O. C., 184.**

57. S. 41.—*Transfer by ostensible owners—Inquiry by transferee as to title of transferors—What amounts to reasonable care.*

A Government official owning zamindari property in the district in which he was employed, caused that property to be recorded in the revenue papers in the names of his young sons. The sons sold portions of the property and mortgaged others. The vendee and mortgagee satisfied himself that the property had been recorded for some years in the names of the sons, but there stopped, and made no further inquiries as to whether the property really belonged to the sons, who were the ostensible owners, or not.

Held, that the transferor, though acting in good faith had not taken reasonable care to ascertain that the transferor had power to make the transfer.—PARTAB CHAND *v.* SAIYIDA BIBI, **A. W. N. 1901. P. 137=23. A. 442.**

58. S. 41.—*Owner a minor.*

Where the real owner is a minor incapable of giving his consent to a transfer of his property by his guardian S. 41 does not apply. The lender can obtain a charge over the minor's property if the transfer was for minor's necessity. DALIBAI *v.* GOPIBAI. **4 B. L. R., 105=26 B. 433**

59. S. 41.—*Mortgage by ostensible owner.*

Where a person in possession of certain property as recorded owner and holding title deeds to it, mortgaged the same to a third party.

Held, that there was nothing to suggest a want of good faith in the mortgagees in dealing with the mortgagor in respect of such property and that it could not be contended that the mortgagees did not take reasonable care to ascertain that the mortgagor was only a *benamidar* and not the real owner. S. 41 of the Transfer of Property Act governed such a case. (11 B. L. R., 52), followed. KHAWAJA MUHAMMAD KHAN *v.* MUHAMMAD IBRAHIM. **A. W. N., 1904, P. 99; I. L. R., 26 A. 490.**

60. S. 41.—*Sale—Power of vendor—Reasonable care—Constructive notice.*

A purchaser from the ostensible owner cannot resist the real owner's claim unless he can show that he took reasonable care to ascertain that the transferring ostensible owner had power to make the fransfer and acted in good faith. What is reasonable care depends on the circumstances of each case. Mere reliance upon the entry of the vendor's name in Revenue Registers is not under all circumstances sufficient to constitute reasonable care in ascertaining whether the vendor has power to make the sale. Where therefore the vendor informed the vendee that he derived his title under a registered deed; it was for the vendee to ask the vendor for production of the original deed and if not produced to ask for explanation of its non-production and in any case he ought to see a registration copy of it:

Held the purchaser must be held to have had constructive notice of the contents of the deed, owing to his negligence in not doing what any prudent man would have done. 23. C. 790, 23. A. 442 P. J. L. B. 512, 11. Beng. L. R. 53, 14. A. 362 *referred to.* YEW SIT HOCK *v.* MAUNG DAWOOD. **1. L. B. R. 1900-02 P. 196.**

61. S. 41.—*Consent, it must be intelligent—Evidence Act (I of 1872), Section 115—Estoppel—Admission on point of law.*

The consent referred to in section 41 of the Act must be an intelligent consent and not one brought about by misapprehension on the part of the person making it as to his legal rights.

An admission on a point of law is not an admission of a thing within the meaning of section 115 of the Evidence Act. DUNGARIA *v.* NAND LAL. **3 A. L. J., 534=A. W. N. 1906. P. 182.**

62. S. 41.—*Ostensible owner—Benamidar—Purchase from the benamidar—Purchase for value without notice, limits of the doctrine of:—*

No purchaser can protect himself against the claim of a real owner merely by saying that he had no notice of the real owner's title. A purchaser is not justified in shutting his eyes and buying recklessly from a vendor without any enquiry and resisting the real owner on the ground that the real owner did not come forward. He must make some reasonable inquiry into title before he can take advantage of the doctrine of purchaser for value without notice which could protect him against an undiscoverable and hidden equitable interest. When he has taken reasonable care to ascertain his vendor's title then, no doubt, if there is an equitable interest of which he could by such reasonable care discover no trace, the doctrine of purchaser for value without notice may stand to him in good-stead. Reasonable care is to be expected from every one who claims to have purchased free from a really existing right, equitable or legal, and when the purchaser has failed to exercise it, he cannot claim that the real owner should be called on to prove his good faith and innocence instead—LUMGABAI *v.* BHAVANI. **9 B L. R. 388.**

63. S. 41.—*Transfer by ostensible owner—Owners of property transferred, minors—Guardian incapable of consenting to apparent ownership of transferor:*

Held that the guardian of a minor owner of immovable property is incapable of consenting, even though such consent be express, to a third person holding himself out as owner of the minor's property, so as to enable a transferee from such person to claim the benefit of S. 41 of the Transfer of Property Act, 1882.—DAMBAR SINGH *v.* JAWILRI KUNWAR.—**1907 A. W. N. 72=4 A. L. J. 181=29 A. 292.**

Sup: Govt acts (IV of 1882) (*Contd.*)

64. s. 41.—Pre-emption suit—Decree for foreclosure on a mortgage by ostensible owner—Effect on pre-emptors right—See *Pre-emption*—SITARAM *v.* SHEO PRASAD.—**11. O. C. 26.**

S. 41.—*See S. 6, 5, 41, 58—U. B. R. 1906. P. 1 (sub mortgage) No 32 supra.*

65. s. 42.—*Mortgage by ostensible owner —Transfer by* benamidar, *when not voidable —Notice of* benami, *purchase.*—

A sued B & C for declaration that three mortgage-deeds executed by B in favour of C and the decree obtained on them were null and void as against A and for an injunction to restrain C from selling the property in execution of the decree. A alleged that the property in suit was purchased by several sale deeds *benami* in the name of B and that A was unaware of the mortgages until a proclamation for the sale of the property was issued.

It was contended that all the sale-deeds were executed in the name of B for her maintenance and that A was the real owner of the property. B admitted all the facts alleged in the plaint but pleaded nevertheless that the suit should be dismissed. C pleaded, that B was the real purchaser of the property and that even if the purchases of the property were *ism farzi* in the name of B the mortgage-money was advanced by C in good faith, believing her to be the absolute owner of the property. The sale-deeds were all in the name of B and the mutation of names was effected in her favour in the register of proprietors and she had previously mortgaged the property and taken possession of it and retained it after her husband's death.

Held, that under all the circumstances of the case there was no constructive or other notice which put C to further inquiry.

Held, also, that even if B was merely *benami* owner of the property in suit, the mortgages and the decree obtained on them by C were not voidable as she was, with the consent of persons, interested the ostensible owner when the mortgages were effected. JAGANNATH BAKHSH *v.* THAKURAIN DHIRAJ KUAR. **4 O. S. 192=8 B. R., 104.**

66 s. 43—*Contract by guardian as such to sell a minor's property—The guardian subsequently entitled as an heir.*

A guardian as such contracted to sell the immoveable property of his word, but subsequently became entitled to it as the word's heir on the latter's death.

Held that S. 43 of this Act did not apply to the case because there was no erroneous representation nor did S. 18 Specific Relief Act apply to the case. *See Specific Relief Act S. 18.* RASHMONI DASSI *v.* SOORJA KANTA ROY. **2 C. L. J. 6=9 C.W. N. 1019=32. C. 832.**

67 s. 43—*Contribution against an auction purchaser of a part of the mortgaged property purchased by mortgagee of the whole mortgaged property in satisfaction of his decree. C. P. C, S. 244.*

A purched in execution of a simple money decree a part of the mortgaged property. Subsequently the mortgagee obtained a decree on his mortgage impleading A and purched from his mortgagors the whole of the mortgaged property and entered satisfaction of his decree. A had not joined in the sale deed. In a suit by the mortgagee for possession of the part purchased by A on A's failure to redeem it:—

Held that S. 244 C. P. C. did not bar the suit (2) That the mortgagee was entitled under S. 43 T. P. A. to contribution of decree debt from A to the extent of the share purchased by A. (3) That to the suit the mortgagors were necessary parties.—SETH SHAHPURJI *v.* ABDUL RAHMAN. **1 A. L. J. 564.**

68 S. 43—*Hindu Law—Interest of a Hindu reversioner. Transfer of—Mortgage—Proof—Attestation—Indian Evidence Act (I of 1872), section 68.*

The interest of a Hindu reversioner expectant upon the death of a Hindu female cannot be validly mortgaged by the reversioner. *2 C. W. N., 729; S. C., L. R., XXV I. A., 183, followed; I. L. R., XXV C. 778, dissented from.*

Quare—Whether the mortgagee of the reversionary rights can after the death of the widow claim benefit of the mortgage when the mortgagor reversioner becomes full owner. NAND KISHORE LAL *v.* RANEE RAM TEWARY. **6 W. N., C., 395=29 C. 355.**

69 s. 43.—*And C. P. C. (1882) S 305—Sale of mortgaged property by one of several judgment debtors—Right of purchaser—Lien.*

There is nothing in Section 305 of the Civil Procedure Code form which it can be inferred that the Court in authorising the sale could empower the judgment-debtor to transfer any higher interest than he had and bind the interests of others in the property.

When in execution of a mortgage decree order for sale of the mortgaged property is passed against the judgment-debtors and the mortgaged property is sold by one of them under Section 305 of the Civil Procedure Code the vendee is entitled to a lien on the shares in the mortgaged property owned by the judgement-debtors who did not join in the sale to the extent of the liability of such judgement-debtors to pay the decretal amount. DANAPPA. *v.* YAMNAPPA, **4. B. L. R. 61=26. B. 379.**

70. S. 43. *—Mortgage—Purchase of mortgaged property by mortgagor—Rights of subsequent mortgagees from the mortgagor.*

The doctrine that a person paying off a mortgage or puchasing the mortgage property in execution of a decree on the mortgage can set up such mortgage as a shield against puisne incumbrancers will not, on the principle embodied in section 43 of the

Sup: Govt. acts (IV of 1882) *(Contd.)*

Transfer of Property Act, apply when the person so paying or purchasing is the mortgagor himself. The effect of the payment or purchase in such cases, so far as the mortgagor and those claiming under him are concerned will be simply to extinguish the mortgage, and the rights of subsequent incumbrancers will be determined as if such prior mortgage never existed. MANJAPPA ROI *v.* KRISHNAYYA. **29 M. 113.**

71. S 43 —*Estoppel – Representation—Transferor—Subsequent acquisition of rights.*

S. 43 of the Transfer of Property Act enacts that, as between the transferor, and the transferee, the transferor cannot plead subsequent title to the land transferred, if he had induced the transferee to pay money for the transfer. The principle is an extension of the rule of estoppel.

Where a person who had merely a *ghatwali* interest in certain land mortgaged it on the representation that it was his *jaigir*, and he subsequently got a *mokarari* title to it:

Held, that on a decree for sale upon the mortgage, the *mokarari* interest of the mortgagor passed to the mortgagee. MOKHODA DEBI *v.* UMESH CHUNDRA BANERJEE. **7 C. L. J. 381.**

72. S. 43 —*Mortgage—Decree for sale—Portion of property comprised in a mortgage acquired by mortgagor subsequently to decree.*

The mortgagor having an interest in only a fractional share of a house mortgaged the whole house. The mortgagee sued, and obtained a decree for the sale of the whole house. After that decree was passed and partially executed, the mortgagor in virtue of a partition acquired the remaining interest in the house.

Held, that section 43 of the Transfer of Property Act applied and that the decree-holder was competent to continue execution of his decree against the mortgagor's after acquired interest. 18 M. 492 followed. DURGA DAS *v.* MUHAMMAD ISMAIL. **A. W. N., (1908). 155**

73 S. 43.—*Sale of reversionary interest if subject to right of pre-emption*—See pre-emption. BHERON BAKSH *v.* BALDEO SINGH. **7 O. C. 98.**

74. s. 4?, *85, 86, 92.*

Joint property mortgaged which subsequently became mortgagor's seperate property—sub mortgagee having an interest in mortgaged property—mortgagee's right to redeem sub mortgage.—*See mortgage suit for redemption.* LACHHMI NARAIN *v.* BABU SHEO DAYAL SINGH. **5. O. C. 335.**

75. s. 44. *Partition – Transferee of portion of estate Lessee of share of estate for term—Right to sue for partition.—*

The transferee from one or more co-sharers of a portion only of the co-tenancy cannot maintain a suit for partition of the portion transferred to him, whether for a term or in perpetuity (7. C 577 Referred) A lessee of a share in a whole village for a term of years can claim partition which is to last during the term of the lease

Sup: Govt. acts (IV of 1882) *(Contd.)*

(as he is not a transferee in a portion of village) 1. Ves and Beam 551, 16. Beav referred to. RAMASAMI CHETTY *v.* ALAGIRI SAMI CHETTY. **14 M. L. J. 14 =27. M. 361.**

76. s. 44. *Partition Right of lessee—Partition suit—Parties—Lessor is necessary party—Civil Procedure Code (Act XIV of 1882), Section 34—Non-joinder of necessary parties - Waiver of objection—Duty of Court.*

A suit for partition by a lessee of a share in a property is competent when it is necessary to give effect to the transfer. Under section 44 of the Transfer of Property Act a transferee may enforce a partition of the property of which he is the transferee, provided the partition is necessary to give effect to the transfer.

When no objection is taken in the original Court by a party to a suit as to non-joinder of parties. he shall be deemed to have waived it.

In a suit for partition by the lessee of a property the lessor is a necessary party, and if the plaintiff fails to implead him the Court should add him as a defendant. MOHAMMAD JAFFAR-KHAN *v.* MAZHURAL HASAN. **3 A. L. J., (474),=A. W. N. 1906. P. 199.**

77. s. 45, 67. Suit by mortgagee for his share of money advanced on a joint mortgage. Right to sell the whole mortgage property.—*See mortgage.* GOPAL LAL *v.* LACHMAN PERSHAD. **3 O. C. 8.**

78. s. 48. *Tender of mortgage debt, no place for payment being specified. Interest ceases only on proper tender.* See mortgage redemption. MAHADAJI *v.* PAIRIA. **2 N. L. R. 62.**

79. s. 51, 101 & 108. A tenant erecting buildings not for agricultural purposes can only demolish them and remove the material during the continuance of his lease. His right after the termination of the lease. Landlord's option. Compensation. *See Landlord and Tenant building by tenant.* ISMAI KANI ROWTHEN *v.* NAZARALI SAHIB. **14 M. L. J. 25=27 M 211.**

80. s. 51.—A vendee of a widow's life estate being compelled to give up land purchased by him is entitled to the value of improvements effected by him in good faith—*See Hindu Law Alienation.* NANJAMA *v.* NACHAR AMMAL. **17 M. L. J. 622.**

81. S. 51.—Bona fide—*Improvements by a stranger on another's property—Equitable right—Compensation for improvements.*

Under the English law, to raise an equity in favour of a stranger building on another's land, two things are required, first that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner, at the time of the expenditure, knowns that the land belongs to him,and not to the person expending the money in the belief that he is the owner. S. 51 T. P. A. requires merely that the transferee mentioned therein shall have made the improvements believing, in good

Sup: Govt. acts (IV of 1882) *(Contd.)*

faith, that he is absolutely entitled to the property and nothing more. Under the section the transferee, who, after having made the improvements on the property, is subsequently evicted therefrom by any person having a better title, has a right to require the person causing the eviction either to have the value of the improvement estimated and paid to him or to sell to him such person's interest in the property at the market-value thereof irrespective of the value of such improvements. MR. COLLIER *v.* MRS. L. BARON. **2 N. L. R. 34.**

82. S. 51.—*Good faith—Mistake of law—Mohammedan Law.*

A party acting under a mistake of law may, nevertheless, act in good faith within the meaning of S. 51, T. P. A. The principle of equity laid in S. 51 T. P. P. A., not being inconsistent with any rule of Mahomedan Law applies to purchasers from Mahomedans. DURGOZI ROW *v.* FAKEER SAHIB. **1 M. L. T. 433=17 M. L. J. 9 = 30 M. 197.**

83. S 51.—Improvements made by transferee of immoveable property—*See Lease.* RAJA RUDRA PRATAB SINGH *v.* DEBI PERSHAD. **8 O. C. 13.**

84. S. 51.—*Subsequent lessee in possession—First lessee's suit to eject him—Compensation for improvement.*

S. 51 does not entitle a lessee to claim compensation for improvements because he can never believe himself that he is absolutely entitled to the land.

Held, that, as it was not shown that the plaintiff knew that the defendants were spending money upon the improvement of the land and were doing so in the belief that they had a good title, while he stood by and allowed them to proceed with these expenditures, the plaintiff was entitled to get a decree for ejectment without indemnifying the defendants for their outlay. *Caw'or v. Lewis*, (1. V. & C. 427) and (L. R. 15 Ch. Div. 96) referred to.

Held, further that even assuming that mere quiescence of the plaintiff amounted to a representation, in the absence of a finding either that it was intended that the tenant defendants should believe or act upon it, or that in point of fact they did act upon it, the plaintiff was not estopped from asserting his possession against the defendants. NUNDO KUMAR NASKER *v.* BANOMALI GAYAN. **29 C. 871.**

85. S. 52.—*Lis pendens—Contentious suit—Suit for partition—Admission of share in plaint—Transfer after filing of plaint—Objection to share in written statement.*

A instituted a suit against *B* and other co-sharers, for partition, admitting that *B* had a share in the property. Afterwards *C* purchased the share, which B claimed to have held. Some of the defendants who were co-sharers of the property under partition, then put in written statements, in which they denied that *B* had any share. A preliminary decree was passed by the Court specifying the shares of the several proprietors and declaring that *B* had no share at all. *B* did not enter

Sup: Govt. acts (IV of 1882) *(Contd.)*

appearance in these proceedings. After the decree declaring the shares of the proprietors had been passed, C applied to be made a party to that suit, but her application was rejected. *B* appealed against the preliminary decree, but his appeal was dismissed. Upon a suit by C for possession of the share purchased by her from *B*, the defence mainly was that the suit was barred by reason of s. 52 of the Transfer of Property Act.

Held that the suit was not so barred. The suit did not become contentious, until the written statement was put in by the opposing defendants disputing any right, title or interest of *B* in the property under partition; as in the plaint in the partition suit, it was admitted that he had a share in the property under partition; and that, having regard to the fact that *C*, the transferee, was not allowed to become a party to that suit, she could not properly be regarded as prejudiced by the result. (27 C. 77) distinguished. KRISHNA KAMINI DEBI *v.* DINO MONY CHOWDHURANI. **31 C. 658.**

86 s. 52 *Lis Pendens—"Contentious suit" Mortgage—Surplus sale proceeds—*

Where suits were brought for the purpose of recovering moneys due upon mortgage bonds by sale of the immovable properties mortgaged therein, no question as to the right to those properties having been involved, and the defendants not appearing to contest the claim, *ex parte* decrees were passed against them:

Held that the suits were not "contentious" within the meaning of s. 52 of the Transfer of Property Act, and the doctrine of *Lis pendens* did not apply, and that a mortgagee whose mortgage deed was executed pending such suit would not be bound by the decree for sale and would therefore be entitled to redeem the prior mortgage even though summons in the suit had been served on the mortgagors at the date of the mortgage. 15, C. 647, 27. C. 77, 31 C 658 *referred to.* OPENDRA CHANDRA SINGH *v.* MOHRILAL. **31 C. 745 at 752** *(Note) As to when a suit becomes contentious see the final Privy Council decision 29. A. 339.*

87 s. 52 *Contentious suit.*

A suit does not become contentious within the meaning of Section 52 of the Transfer of Property Act, 1882, only when all the defendants have been served with summonses. It may become so, though one of the defendants has not been served with summons. 21 *All.*, 408 *referred to.*

A suit cannot be regarded as contentious as against some of the defendans and not contentious as against the others. CHATURBHUJ *v.* LACHMAN SINGH. **A. W. N. 1905 P. 250=28. A. 196.**

88 s. 52—*Lis pendens.*

A purchaser at a sale in execution of his decree against the judgment-debtor is bound by the decision of the Appellate Court in favour of a mortgagee reversing the judgment of the Lower Court and

Sup: Govt. acts (IV of 1882) *(Contd)*

declaring the property liable to be sold to satisfy the mortgage d bt though the purchaser bought the property before the decision was passed by the Appellate Court and he was no party to the appeal as the purchase was made during the active prosecution of a contentious suit within the meaning of section 52, Transfer of Property Act. The doctrine of *lispendens* applies to execution sales (*15 C. 94 follows)* The English law of *lispendens* differs from Indian law DINANATH GHOSH *v.* SHAMA BIRI. **28 C, 23.**

89 s. 52 *Involuntary sales –*
Where a sale is involuntary for arrears of income tax or other revenue and is not free of all encumbrances the doctrine of *lispendens* applies thereto. This doctrine is not applicable to the vesting of an insolvent's property in an Official assignee or other Assignee "in invitum" 19. Beav. 551. 25. M. 209 followed. KADIR MOHIDEEN *v.* MUTHUKRISHNA AIYAR. **26. M. 230.**

90. S. 52.—*Two mortgages upon the same property—Decrees—Sales—Rights of Rival mortgagee-purchasers—Lispendens*
Per Brett and Mitra, J J. (Rampini, J. dissenting)—When a first mortgagee who has no notice of the second mortgage and a second mortgagee of the same property who has notice of the first mortgage obtain decrees upon their respective mortgages, each without impleading the other, if the second mortgagee purchases the property in execution of his own decree before a similar purchase by the first mortgagee, the first mortgagee-purchaser is entitled to call upon the second mortgagee to redeem him and upon his failure to do so, to get possession.
Per Rampini, J. Contra.—The remedy of the first mortgagee in such a case is to bring a fresh suit upon his mortgage making the second mortgagee a party, and if such suit is barred by limitation, he is without a remedy.
Quære.—Whether the doctrine of *lis pendens* would apply to the sale in execution of the second mortgage.
Per Brett J.—In a suit for sale on a mortgage the *Lis* continues till the sale and consequently a puisne mortgagee who purchases the property in execution of his decree in a suit in which the prior mortgagee was not impleaded before the sale by prior mortgaged though after his decree, is affected by the rule of *Lispendens.*
Per Mitra J.—The purchase by the puisne mortgage in a decree for sale on his own mortgage takes the property in the same condition as it stood at the date of the mortgage to him and his title relates back to the mortgage date and consequently, he is not affected by the rule— HAR PARSAD LAL *v.* DAL MARDAN SINGH **9. C. W. N. 728 at 735=32. C. 891.**

Sup: Govt. acts (IV of 1882) *(Contd.)*

See also *Lis-pendens* 6 B. L. R. 303= 28. B. 351.

91 s. 52—Lispendens—*Alienation after filing plaint but before service of summons—Contentious suit—Active prosecution of the suit*—
An alienation of property after the institution of the suit, but before the summons could be served upon the defendant, is affected by the rule of *lis-pendens.*
Per *Jenkins* C. J. S. 52 imposes two conditions; (*a*) the existence of a contentious suit, and (*b*) that the transfer should be during the active prosecution in a Court of the kind described in the section. The word "contentious," in S. 52 is used to introduce into the section a condition that the suit must be real and not collusive. It is impossible to think that it indicates a quality that cannot belong to a suit until service of summons, or that a suit in other respects contentious, is not so, because the plaintiff may have been unable to serve the summons on the defendant.
Semble. It is worthy of consideration whether the risk of the hardship to the purchaser could be diminished by requiring a *lis-pendens* to be registered before it can bind transferees.
Per *Beaman* J.—The word "contentious" in S. 52 qualifies the whole doctrine of *lis-pendens*, that is to say, that there can be no *lispendens* without a contentious suit. The expression "during the active prosecution" in the section, subject to that qualification defines the point of time at which the rule comes into operation. The former conditions the existence of *lis-pendens*; the latter fixes the commencement and continuance of its existence. From the moment a suit of any sort whatever, except only collusive suits, is filed, it is potentially contentious. And for the purpose of bringing the rule of *lis-pendens* into operation there must be an active prosecution of that suit. What is or what is not an active prosecution must be, from the very nature of the terms employed, always, in some degree, a question of fact.—KRISHNAPPA VENKAREDDI *v.* SHIVAPPA TIMAREDDI. **9 B. L. R. 530 =31 B. 393.**

92 s. 52—*Lis-pendens—Conveyance pending a suit—Effect of alienation.*—
The doctrine of *lis pendens* is not based on the equitable doctrine of notice; but on the ground that it is necessary to the administration of justice that the decision of the Court in a suit should be binding not only on the litigant parties but on those who derived title from them *pendente lite* whether with notice of the suit or not. The effect of the doctrine of *lispendens* is not to annul the conveyance made in contravention of it but only to render it subservient to the rights of the parties to the litigation. The doctrine is not applied so as to affect the title of the alienee of a defendant, by virtue of a claim not interfering with the title of the plaintiff in the pending

Sup: Govt acts (IV of 1882) (*Contd*)

litigation:—NATHAJI ANANDRAM *v.* NANA. **9 B. L. R. 1173.**

93. s. 52. *C. P. C., S. 410—Application to sue 'in forma' pauperis subsequently admitted—Contentions suit or proceeding:—*

Where after an application for leave to sue in *in forma pauperis* had been made but before it was granted, the defendant mortgaged part of the property in dispute and the plaintiff's suit was subsequently, after contest, decreed:

Held that S. 53, T. P. A,. applied and the mortgage could not be enforced against the plaintiff. 29 A. 349 ref. to. AMBIKA PARTAP SING *v.* DWARKA PARSHAD. **4. A. L. J. 795.**

94 s. 52. *Lis pendens.—Contentious suit—Service of summons if necessary—Right of redempt on extinguished on confirmation of sale.*

A suit, contentious in its origin and nature, is contentious within the meaning of S. 52 of the Transfer of Property Act, even if a summons is not served on the opposite party.

The true basis of the doctrine of *lis pendens* explained I. D. G. and J. 566 (185) relied on.

A sued B to enforce a mortgage, but before summons was served, B granted a second mortgage to C. Pending this suit, the second mortgagee sued on his mortgage without making A the first mortgagee a party, and had the property sold. The purchaser got ample opportunity to redeem the first mortgage, whilst the sale proceeding in execution of the decree obtained by the first mortgagee was still in progress but never offered to do so.

Held that the purchaser's right to redeem the property was extinguished when the sale in execution of the first mortgagee's decree was confirmed. FAIYAZ HUSAIN KHAN *v.* MUNSHI PRAG NARAIN. **11 C. W. N. 561 (P.C.)=4 A. L. J. 344=5 C. L. J. 563=17 M. L. J. 263=31 I. A. 102=9 B. L. R. 656=34. I. A. 102=29. A. 339.**

95. S. 52.—*Lis pendens applies to Involuntary sales:—*

The doctrine of *lis pendens* applies to transfers of immoveable property *in invitum* as well as to voluntary sales 21 W. R. 349; 15 C. 756; 15 C. 546 relied on.—RAJ KISHORE AWASTI *v.* JADU NATH BASAK. **11. C. W. N. 828.**

96. S. 52.—*The doctrine of* lis pendens *applies to cases in which decrees are passed on compromise—'Contentious suit or proceeding,' ing of—*

The doctrine of *lis pendens* as embodied in section 52 of the Transfer of Property Act applies to transfers effected during the pendency of a contentious suit or proceeding, even when such suit or proceeding is subsequently compromised and a decree passed in pursuance of such compromise, provided such compromise is not tainted by fraud or collusion.

The word 'contentious' is used in section 52 of the Transfer of Property Act in the sense in which it is used in Probate Practice and means the opposite of common form or voluntary business. *12 Mad., 439 overruled.* ANNAMALAI CHETTIAR *v.* MALAYANDI APPAYA NAIK. **16 M. L. J. 1906 P. 372 (F B)=1 M. L. T 145=29 M. 426.**

97. s. 52—*Lis pendens—Suit for maintenance by widow praying it to be charged on immovable property—Right to immoveable property in dispute in such suit.*

A suit in which a widow claims to get her maintenance made a charge on immovable property is one in which a right to such immovable property is directly and specifically in question within the terms of S. 52 of the Transfer of Property Act; and any transfer of the property during the pendency of the suit, not effected for the purpose of paying off any debt entitled to priority over the claim for maintenance will be affected by the *lis pendens* created by the suit. 4 C. 402 at p. 409, referred to and followed.—DOSE THIMMANNA BHUTTA *v.* KRISHNA TANTRI, **16. M. L. J. 413.=29. M. 508.**

98. s. 52—*Lis pendens—Contentious suit.*

Where there are several defendants to a suit, the suit does not become "contentious" within the meaning of S. 52 of the Transfer of Property Act, 1882, only when all the defendants are served with summonses in the suit, nor can a suit be contentious as regards some of the defendants and not contentious as regards others. 21 a. 408 discussed and doubted.—CHATARBHUJ *v.* LACHMAN SINGH, **28 A. 196.**

99. s 52.—*Lis pendens—Mortgage—Decree on mortgage against minor—Sale in execution—Reversal of decree in appeal—Attachment in execution of a money-decree—Title of the purchaser in execution of the decree on the mortgage*—Lis pendens—*Stay of execution.*

A certain house belonged to a joint family consisting of two brothers N and D and their cousin B. A mortgage of the house was said to have been effected by B during the minority of his two cousins. The mortgagee got a decree for the recovery of the mortgage-debt from the mortgaged property. An appeal was presented on behalf of the minors on the ground that they were not bound by the decree and pending the appeal, the mortgaged property was sold in execution of the decree and purchased by the defendant's father. Then the appeal came on and the decree was varied as to the minors by dismissing the suit against them and their property. Subsequently the plaintiff obtained a money-decree against N and attached in execution thereof what he claimed to be his judgment-debtor's ⅓th share in the house. The attachment was, however, raised at the instance of the defendants who relied on their father's court-purchase and contended that the judgment-debter N had no claim to the house. The plaintiff, thereupon, brought the

present suit for a declaration affirming his right to attach.

Held, confirming the decree which dismissed the suit, that the title of the defendants' father as purchaser at the Court-sale must prevail. Though the decree on the mortgage was varied in appeal by dismissing the suit as against the minors and their property, still as the defendants' father purchased in execution of the decree pending the appeal, his title could not be impugned in the absence of fraud, collusion or any other disqualifying circumstances. *Zain-ul-Abdin Khan* v. *Mohammed Asghar Ali Khan* (I. L. R. 10. All.. 166) *referred to.* The doctrine of *lis pendens* does not defeat a purchaser under a decree or order for sale when the *lis pendens* is the very suit in which that decree or order is passed. The doctrine rests on the principle that law does not allow litigant parties to give to others pending the litigation rights over the property in dispute so as to prejudice the opposite party. Where an appeal is presented from a decree directing the sale of property in dispute in a suit, then the only course is to take such steps as will secure that, by stay or otherwise, no detriment shall be suffered by the appellant in case the appeal succeeds.—SHIVLAL BHAGVAN *v.* SHAMBHUPRASAD, **7. B. L. R. 586=29. B. 435.**

100 s. 52 *Agricultural lease.*

A lease for agricultural purposes is within the purview of S. 52 T. P. A. and it is incombent upon any person taking such a lease pendente lite to show that the rights of the owner of the land leased are not thereby affected. 12 R. R. 73, 6. L. J. Ch. 67, 18. A. 123, 22. A. 349, 1. C. W. N. 62 *referred to.* NARAIN PATEL *v.* ABDUL MAJID KHAN. **15 C. P. L. R. 1902 P. 6.**

101 s. 52—*Contentious suit—Appeal struck off at appellant's request—Decision on merits—* Lispendens—*Alienation.*

A made a gift of his village to his wife, B. He was, at that time, indebted to D & E on a bond. After his death D and E sued A's widows B and C and their sons on the bond, and obtained a decree.

B paid them two-thirds of the decretal money, and C mortgaged one-third of the village as security for payment of the remaining one-third. D and E sued C and B on the mortgage-deed executed by C for sale of the mortgaged share. During the pendency of this suit, the Subordinate Judge issued an injunction to C restraining her from alienating the property and to the plaintiff restraining him from taking the same in transfer. Notwithstanding these injunctions C sold the one-third share to the plaintiff by a deed, dated the 31st May, 1895. Subsequently, on the 15th October, 1895, the Subordinate Judge gave D and E a decree against B and C for the sale of the property. C appealed against this decree to the District Judge but subsequently presented an application in which

she stated that she did not wish to prosecute the appeal and asked that the appeal might be struck off. The District Judge made an order striking off the appeal. D and E having, subsequently, sought to bring the one-third share to sale in execution of their decree, dated the 15th October, 1895, the plaintiff objected to the sale and his objection having been disallowed, he brought a suit against D and E and B and C in which he sought a declaration that the share was not liable to sale in execution of the decree.

Held, that an alienee during the pendency of the suit was not bound by any and every order which the Court might make, that he was only bound by the order which judicially decided the suit on the merits and that he was not bound by an order which the Court made at the request of the parties.

Held, that the transfer to the plaintiff was not a transfer during the pendency of a contentious suit within the meaning of section 52 of the Transfer of Property Act.—MUNNA LAL *v.* RAJA MOHAMMAD SIDDIQ KHAN. **6 O. C. 294.**

102 s. 52—Lispendens—*Compromise-Decree—S. 375 C. P. C.*

C sued A and B for recovery of his mortgage-money by sale of mortgaged property, and he obtained an order under S. 492 C P C prohibiting the defendants from making any further transfers of the property. On the 11th December, 1896, summonses were served on the defendants. On different dates in February, 1897, A and B made four separate transfers of portions of the mortgaged property to four different persons. On the 2nd March, 1897, A and B sold the 8 annas share to the plaintiff by a registered deed, the consideration being the money due on the footing of the mortgage and an additional amount for revenue, costs, simple loan and cash. On the 11th March, 1897 the parties stated before the Court that the matter had been settled out of Court and the plaintiff prayed that the suit should be dismissed and the suit was dismissed. On the 25th March, 1897, the plaintiff filed four suits against the four transferees for recovery of possession of the property transferred. The Court of first instance dismissed his claim but the Court of first appeal, holding that the transfers were void being *pendente lite*, decreed the plaintiff's claim.

Held, that the prohibition to transfer as contained in the doctrine of *lis pendens* was a limited and restricted prohibition.

Held, also, that under section 375 of the Court of Civil Procedure, the Court passing the decree in the suit of the 9th December, 1896, could only pass a decree on the compromise so far as it related to the suit and could not, in its decree, include the additional consideration money, that the doctrine of *lispendens* was applicable to the suit but only to the extent of those rights of the plaintiff which he obtained

Sup: Govt. acts (IV of 1882) (*Contd.*)

under his decree of the 11th March, 1897, that it did not totally invalidate the transfer but operated merely to prevent a transfer which would affect the rights of the plaintiff under the decree finally passed in the case. The defendant could retain the property purchased by him on paying the mortgage-money due to the plaintiff. RAM RATAN *v.* GOKAL SAH. **2 O. C. 330.**

103 s. 52—Lispendens—*Purchaser at auction-sale in execution of decree.*

A obtained a decree against B and, pending an appeal by B his property was attached and sold in execution of the decree and was purchased by C. In appeal, the decree obtained by A was set aside and her suit dismissed. B made an application for restitution of the property purchased by C.

Held, that the doctrine of *lispendens* is inapplicable to a purchaser at auction-sale in execution of a decree. MISRI LAL *v.* CHUTKO. **3 O. C, 170.**

104 s. 52—Lispendens—*Transfer* pendente lite—*When suit becomes "contentious."*

A, the owner of a house, contracted to sell it to the plaintiff for Rs. 50 and received Rs. 7 earnest money. On the 10th of July, 1893, the plaintiff brought a suit for specific performance. On the 11th of July, 1893, A executed a registered sale-deed of the same house in favour of B who, on the 13th of March 1894, executed a registered deed of sale in favour of C. On the 19th of June, 1894, the Court decreed the plaintiff's claim for specific performance. The plaintiff then sued the heirs of B and C for possession of the house.

Held, that there was no contentious suit or proceeding in existence until the summons in the suit brought by the plaintiff was served upon the defendant and that therefore the transfer of the house to B was not *pendente lite*. 15 C 647, followed. UMRAO KHANAM *v.* MUSTAKIM KHAN. **1 O. C., 280.**

105 s. 52, 53—*Lis Pendens—Purchase from heir during administration suit—Rival mortgagees—Priority of title—Purchaser from Receiver in administration suit—Purchaser at sales in execution of mortgage decree—Transfer to benamidar, pendente lite.*

When the estate of a deceased person is under administration by the Court or out of Court, a purchaser from a residuary legatee or heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of administration, the right of the residuary legatee or heir being only to share in the ultimate residue which may remain for final distribution after all the liabilities of the estate, including the expenses of administration, have been satisfied. As between the appellant and respondent, who were rival mortgagees of the property of a Mahomedan family, the Judicial Committee (reversing the decision of the High Court)

Sup: Govt. acts (IV of 1882) (*Contd.*)

upheld the title of the appellant, who represented a purchaser at sales by the Receiver of the High Court in a suit for administration of the estate of one of the mortgagors, as entitled to priority over that of the respondent who claimed through a purchaser in execution of the mortgage decree at sales which took place pending the administration suit, in one case after the order for sale by the Court and in another after the actual sale by the Receiver in that suit. The shares of all the heirs to the mortgagor's estate were, pending the suit for aministration, purchased at private sales by the appellant in the name of, and were transferred to, a *benamidar*, who was made a party defendant in the appellant's mortgage suit and a party plaintiff in the administration suit:

Held, that the appellant being, in execution of decree in the mortgage suit, alone represented in each side of the record could not rely on the sales effected in such circumstances in support of his title, or derive any advantage therefrom.

Held, also (without deciding whether such transfers could be avoided under s. 52 or 53 of the Transfer of Property Act in a properly constituted suit), that the appellant must be treated as the transferee for value of the entire equity of redemption, and that the respondent, therefore, had not made out any title to redeem the appellant's mortgage, notwithstanding the subsequent sales in his mortgage suit under which he claimed. CHATTERPUT SINGH *v.* MAHARAJ BAHADUR. **9 C. W. N. 225=2 A. L. J. 190=32 I. A. 1 =32 C. 198 (P. C.)**

106. s. 52, 86 & 87. Lispendens—*Suit for foreclosure—Suit not terminated until decree absolute.*

A suit for foreclosure of a mortgage is not terminated until the passing of the decree absolute (under s. 87). A purchase, therefore, of the mortgaged property made after the passing of the decree *nisi* (under s. 86) but before such decree is made absolute, is subject to the doctrine of *lis pendens* 2 *Dr. and War.*, 356, 23 *All.*, 331, 22 *Bom.* 939 *followed.* 1 *De G. and* J., 566 *referred to.* PARSOTAM NARAIN *v.* CHHEDA LAL. **A. W. N. 1906 P. 233=3 A. L. J. 675=29 A. 76.**

107. s. 53. *Transfer with intent to defeat or delay creditors—Sale of property to wife in lieu of dower.*

Held, that a sale of property by a Muhammadan in favour of his wife in lieu of dower is not illegal and voidable, although it has the effect of saving the property from being attached by the creditors of the husband. 8 *All.*, 178, *referred to.* KHADIJA BIBI *v.* SHAH MUHAMMAD ZAHIR ALAM. **W. N. A. 1901, P. 64.**

108 s. 53. *Transfer with intent to defeat or delay creditor—Sale of property to wife in lieu of dower.*

Sup: Govt. acts (IV of 1882) (*Contd.*)

Held, that a sale of property by a Muhammadan in favour of his wife in lieu of dower is not illegal and voidable although it has the effect of saving the property from being attached by the creditors of the husband. 2 *Bom., L. R.*, 986, *referred to.* UMRAO SINGH *v.* KANIZ FATIMA. **W. N. A. 1901, P. 67.**

109. S. 53.—*Fraudulent conveyance—Transfer to one creditor—Good faith.*

One B died in June, 1896, indebted to several creditors. Immediately after his death, his sons mortgaged his property to M, one of his creditors. On the 11th August, 1897, another creditor, J obtained letters of administration to the estate of the deceased, and, as such administrator, sold the property to the son of the mortgagee, the latter having died. Subsequently the plaintiffs obtained a money decree against the estate and sued to establish their right to attach the property alleging that the sale was void under S. 53 of the transfer of Property Act. The lower Appellate Court *held* that the purchase was for value and that there was no evidence of fraud, and it dismissed the suit. On second appeal.

Held (affirming the decree) that the sale was valid. The fact that it was a sale of the whole of the property of the deceased to one of his creditors made no difference. The only question was whether the transaction was in good faith. The test of good faith in such cases is whether the transfer is a mere cloak for retaining a benefit to the grantor. On the findings of the lower Court, it appeared that in this case it was intended that the grantee should have the property and keep it.—NATHA *v.* MAGANCHAND, **5. B. L. R. 179=27. B. 322.**

110. S. 53.—*Fraudulent Conveyance—Suit by one creditor to set aside deed—Creditor not a judgment creditor—Statute 13 Eliz., c. 5.*

Under S. 53 of the Transfer of Property Act, a creditor may sue to set aside a deed executed by his debtor by which he (the creditor) is defrauded, defeated or delayed, although he has not obtained a decree for the debt in respect of which he is a creditor. But such a creditor can only sue on behalf of himself and all other creditors.—ISHVAR TIMAPPA HEGDE *v.* DEVAR VENKAPPA SHANBOG, **5. B. L. R. 19.=27. B. 146.**

111. S. 53.—*Fraudulent transfer—Burden of proof.*

The second paragraph of section 53 of the transfer of Property Act does not amount to more than a rule of evidence. As such it is applicable to the conditions stated in the second paragraph but cannot be treated as modifying the substantive law, as declared in the first and third paragraphs of the same section.

Where certain conditions specified in the second paragraph exist the Court may presume the intent to defraud, defeat or delay; cases of transfers are not excluded where the intention to defeat or delay exist, though so far as consideration is concerned, there may be nothing to say against them.

The true meaning of the proviso to section 53 is that there must be both good faith and consideration to support a transfer by taking it out of the preceding paragraphs of the section.

It is immaterial whether there was consideration or not, or whether it was adequate or not when the transaction was entered into by the parties with intent to defeat or delay the creditors.

But though good faith and consideration are two distinct conditions of a good transfer, under the proviso to that section in considering the question of good faith, it is necessary to determine whether there was good consideration for the transfer. RANCHHOD DAS *v.* CHUNI LAL. **5 B. L. R. 213.**

112. S. 53.—*Fraudulent transfer to defeat or delay creditors—Creditors.*

Section 53 of the Transfer of Property Act lays down three propositions. The first is, that if the intent to defraud, defeat or delay is established, then the assignment is voidable at the option of the creditors. The second is, that if the transfer is made gratuitously or for a grossly inadequate consideration then the Court may presume that the intention of the parties was to defraud the creditors. The third proposition is, that where the good faith of the transferor is established and where he is shown to have paid consideration, when the section has no application.

Decrees obtained by creditors against the transferor, unless shown to be collusive, are very good evidence to establish the fact of their being creditors of the transferor. HOOSEINBHAI AHMEDBHAI *v.* HAJI ESMAIL HAJI ESSAC. **5. B. L. R. 255.**

113. S. 53.—*Fraudulent transfer.*

A sale deed was executed on the day the order for attachment of the property sold was made and registered, after notice had been given at the Registrar's office both to the transferor and the transferee that the order for attachment had been made, but before the attachment had been actually effected. The attachment of which notice was given was an attachment before judgment, and the suit in which it was granted was instituted on the same day as that on which that attachment was ordered and on which the sale deed was executed.

In a suit for cancellation of the sale-deed as fraudulent, *held*, that the *onus* of proving that the sale was without consideration was on the plaintiff.

Held, also, that a transaction entered into for good consideration is not voidable merely on the ground that it would, or even that it must, have the effect of defeating a particular creditor, notwithstanding that

Sup: Govt. acts (IV of 1332) (*Contd.*)

the transferee might know that it would have that effect, the obvious and known effect of the advantage to be gained and even the intention to profit by it are insufficient to prove an intention to defraud. An intention to gain an advantage for one's self may incidently involve loss to another. But it is not identical with an intention to cause such loss.

The suit was dismissed, as it was not proved that the sale was effected gratuitously or for a grossly inadequate consideration.

From the mere intent to defeat an anticipated execution it does not necessarily follow that there was an intent to defeat or delay the creditors though such intent would probably be inferred if it were also found that there was an inadequacy of consideration sufficient to bring the case under clause 2 of Section 53 of Transfer of Property Act. Clause 3 only comes into operation when the facts are sufficient to justify the application of clause 1 or 2.—BHAGWANT *v.* KEDARI. **3. B. L. R. 986 =25 B. 202.**

114. S. 53.—*Good faith—Test of.*

Under section 53 of the Transfer of Property Act the test of *good faith* is whether it was a genuine or a colourable transaction. If a conveyance is made *bona fide* and with a full intention that the property should be parted with, it will not be fraudulent if made with intent to defeat the execution. Such a motive does not defeat the assignment. MAHAMMADUNISSA BEGUM *v.* T. C. BACHLOR. **7. B. L. R. 477=29. B. 428.**

115. S.53.—*Fraudulent transfers—Evidence Act (I of 1872), Section 3—May presume, Shall presume. Meaning of—Discretion of Court—Statute 27 Eliz. C. 4, 13 Eliz. C. 5.*

There is no valid ground "to think that the words 'may be presumed to have been made with such intent as aforesaid' in section 53 of the Transfer of Property Act should be construed in accordance with the cases decided under Statute 27 Eliz, C. 4": since to read the *may presume* of the section as the equivalent of *shall presume* would be to wrest the words from their natural meaning, and to disregard the well recognized distinction between the two phrases.

The presumption of the section applies equally to cases that previously fell under Statute 13 Eliz. C. 5. The words of the section vest the Court with a discretion in the matter, and do not impose on it the obligation to presume an intent to defraud. BAI COOVERBAI *v.* MAHOMED ABDULLA. **7 B. 7 R. 267.**

116. S. 53.—*Statute 13 Eliz. C. 5—Bona fide Deed in favour of creditors.*

A deed is void against creditors when the debtor in a state of insolvency or when the effect of the deed is to leave the debtor without the means of paying his present debts. A good consideration does not suffice to validate the deed, if the transaction be not also *bona fide*. The question is one of fact and each case must depend upon its own circumstances. Both under the English law 13 Eliz. C. 5 and under section 53 of the Transfer of Property Act, good faith and consideration are equally essential for the validity of the transfer. There is nothing in 13 Eliz. C. 5 or in s. 53, Transfer of Property Act, to prevent a creditor being preferred, provided nothing more is done by the transaction either with reference to the transferor or the transferee so as to injuriously affect the creditors of the former. Where a deed is voidable by reason of its being in effect intended to defraud the creditors of the executant the deed cannot be valid even to the extent to which the consideration for the deed went in discharge of the executant's creditors. The proper course for the transferee is to protect himself by discharging the claims of all the creditors at whose instance the deed is voidable. CHIDAMBARAM CHETTI *v.* SAMI AIYAR. **16 M. L. J. 427=1 M. L. T. 351=30 M. 6.**

117. S. 53—*Fraudulent conveyance—Part of the consideration paid.*

Ordinarily a transaction may be described as colourable when it is not what it purports to be; but when a substantial part of the consideration has been paid, the transaction cannot be described as colourable. YEDU VEDU *v.* KESARRAI JOHARMAL **8 B. L. R. 110.**

118. S. 53.—*Assignment creating trust for creditors—Act of Bankruptcy—Composition deed signed only by some of the creditors.*

If a person assigned *part* only of his property in trust for creditors, then if the transaction was *fair* and *bona fide*, and in the ordinary course of business, or upon the pressure of the creditors, it was not open to objection: but if the settlor contemplated bankruptcy or even thought it probable, though not inevitable, and wished to give an undue preference to certain creditors over others, it was fraudulent and constituted an act of bankruptcy.

A composition-deed may be signed by some only of the creditors. The creditors who have not signed can take benefit under the deed, but they cannot impugn it except on the ground that it represents a sham or fictitious transaction. As to its registration *See Registration Act S. 17 (c)*—MALUKCHAND AMARCHAND *v.* MANILAL NANSHA. **6 B. L. R. 293=28 B. 364.**—

119 S. 53—*Creditor—Transfer during the pendense of a suit—Decree—Lien.*

A suit may be brought under S. 53 T. P. A. by a creditor who has not yet obtained a decree 27 B. 116 15. B. 1. referred to. 4 B. 70, and L. R. 3 I. A. 241 P. C. distinguished. DEWAN JOGESHWAR PRASAD SINGH *v.* KUNJI RAM BRAHMAN. **16 C. P. L. R., 1903. P. 161.**

120 S. 53—*Voluntary transfer as against creditors—Fraud.*

Sup: Govt. acts (IV of 1882) *(Contd.)*

Held, that though the Transfer of Property Act 1882 is not in force in the Punjab, the principles it embodies are founded on equity and justice and are of universal application throughout India.

In accordance with the provisions of section 53 of the Act, the Court held that a mortgage deed of all the property, moveable and immoveable, fraudulently executed by the debtor to the prejudice of one of the creditors though for valid consideration, was void. 10 C. 616, 26 L. J. Ch. 179, 22. L. J. Ch. 1066, 21 Beav. 511, 7 Q. B. 892, 30 L. J. X. 355, L. R. 20. Ch. D. 389, 21. B. 666, 13 B. 434, 22. B. 255, 22. C. 185, 27. C. 825, 23. M. 184, 21. P. R. 75, 22. W. R. 473, 113, P. R. 80, 68. P. R. 95 referred to. LAKHMI NARAIN *v.* TARA SINGH AND CHARNDAS. **P. L. R. 1900 P. 513=P. R. 6 of 1901.**

121 S. 53—*Conveyance to defraud creditors—Essentials—Preference of one creditor—Good faith—Suit—Parties.*

A suit to set aside a conveyance alleged to be fraudulent within the meaning of S. 53 must be brought by or on behalf of all the creditors. 16 B. 1, 27 B. 146, 9 C. W. N. 225, 32 I. A., ref. to. Where a debtor purported to convey his properties for adeq ateconsideration for the purpose of paying off some only of his creditors, and it was proved that the debts were genuine debts and were all discharged out of the consideration for the conveyance;—

Held—That the transfer was not voidable under S. 53. It is not enough in order to support a conveyance or transfer as against creditors that it be made for a valuable consideration. It must also be *bona fide*, and mere fraudulent intent on the part of the grantor alone will not invalidate the transfer, if it is for valuable consideration and there is no want of good faith on the part of the grantee. A creditor, to whom such a transfer is made, occupies a more favoured position than a person who purchases for present consideration. For in the absence of a law of bankruptcy, a preferential transfer of property to one creditor cannot be declared fraudulent as to other creditors, although the debtor in making it intended to defeat their claims and the creditor had knowledge of such intention. If the only purpose of the creditor is to secure his debt, and the property is not worth materially more than the amount of the debt the transaction is not fraudulent. If, however, the transfer is not in reality a preference of an actual debt, but is a mere colourable device to place the debtor's property beyond the reach of his creditors or if the transaction extends beyond the necessary purpose of a mere preference so as to secure to the debtor some benefit or advantage or to unnecessarily hinder and delay other creditors the transfer is fraudulent. 13 Ch. Eliz 5, S. 6 and the third paragraph of S. 53 of the Transfer of Property Act compared.

Sup: Govt. acts (IV of 1882) *(Contd.)*

Held also, that reference to English authorities bearing on the enterpretation of the expression *bona fide* in the former enactment for the purpose of interproting the expression "good faith," in the latter is not only legitimate but essential. The English and Indian authorities reviewed.—LALA HAKIM LAL *v.* MOOSHABAR SAHOO.—**6 C. L. J. 410=11 C. W. N. 889=34 C. 999.**

122. S. 53.—*Fraudulent transfers—Barred debt consideration for transfer—Onus of proof of fraud.*

The mere fact that preference was given to one creditor to another does not, in itself, render the transaction voidable under the section. The Courts can say on the evidence taken as a whole, whether it is sufficient to infer that the transfer was made, with the intent to defeat or delay creditors: and such an intent must be established affirmatively, by the person alleging that it was so made.

The fact that a barred or irrecoverable debt is set up as part of the consideration for the transfer is, no doubt, an element in the case, which must be taken into consideration. It is *some* evidence of fraud, but a finding of that sort is not so strongly suggestive of a fraudulent intent, as a finding that the debts, set up as part of the consideration, have never existed and was fictitious.

The difference between the amount of the debt found due and the value of the property at the date of the sale, must not only be substantial, but it must be so gross as necessarily to indicate that the transferror, when the executed the sale-deed, did so, with the knowledge that the value of the property was greatly in excess of the amount of the debt. (23 M. 183 Distinguished). HANIFA BIBI SAHEBA *v.* PUNNAMMA, **17 M. L. J. 11.**

123. S. 53.—*Defeat or delay creditors—Consideration separable*—Onus *of proof*—Prima facie *case*—

A transfer of property, for distinct considerations partly for valuable consideration and partly for the intention to defeat or delay other creditors, is valid and enforceable with regard to the part which is for valuable consideration.

A mortgage was executed for a total sum of Rs. 8,500. It was found that Rs. 4,853 was actually advanced by the mortgagees, the evidence as to the balance, Rs. 3,647 was extremely suspicious and seemed to be for the purpose of delaying another creditor who had obtained a decree on a *hachitta.*

Held, there ought to be a mortgage decree on the footing of Rs. 4,853, being the principal money secured (24 C. 825 and 23 M 184 Followed.)

The party, on whom the *onus* of proof lies, must, in order to succeed, establish, at least, a *prima facie* case. He cannot, on failure to do so, take advantage of the weak-

Sup: Govt. acts (IV of 1882) *(Contd.)*

ness of his adversary's case. RAJ'NI KUMAR DAS *v.* GOUR KISHORE SAHA. **7 C. L. J. 586.**

124. S. 53 —*Assignment of invalid mortgage—Assignee's rights against mortgagor and puisne mortgagee for consideration*—See Mortgage—BASTI BEGUM *v.* BANARSI PRASAD. **A. W. N., 1908, P. 116.**

125. S. 53.—*Sale of property to defeat creditors.*

The intent which gives a creditor the right to have a transfer by his debtor of immoveable property avoided must be an intent to defeat or delay his creditors generally. If there has been a good consideration, and the transaction is not a mere sham, a transfer by a debtor, even if made with intent to defeat and delay one particular creditor, is not impugnable by that creditor. 25 B. 202 followed. SANDUN *v.* MEIN GALE. **3 L B R. 1906, P. 188.**

126. S. 53 —See S. 52, 53—32 C. 198 (P. C.) No. 105 *supra.*

127. S. 54 —*Transfer of possession by benamidar to the real owner.*

A plaintiff alleged that he was in proprietory possession of the property in dispute which had been sold in execution of a decree against him and purchased by the defendants benami for him.

Held, that ownership could not be transferred by a benamidar to the real owner by giving him possession, but must have been transferred according to this Act. BISHAN DIAL *v.* GHAZIUDDIN. **A. W. N., 1901, P. 44 = 23 A. 75.**

128. S. 54. —*Assignments of arrears of profits by Lamberdar*—See Registration Act S. 17 No. 12. DAMODERDAS *v.* GIRDHARIDAS. **2 A. L. J. 692 = A. W. N., 1905, P. 100 = 27 A. 564.**

129. s. 54.—*Transfer how to be effected—Pleadings—Family arrangement—Implement of contract to transfer—Costs.*

The zamindari in dispute was transferred in 1872 to Ovala by his father who declared himself unable to manage the affairs. In the year 1879 Ovala executed an usufructuary mortgage to one Ramanathan Chettier in consideration of advances of money and of a sum of Rs. 3,000 per annum to be paid by the mortgagee for the maintenance of the family. On the 4th November 1882 a new arrangement by way of mortgage was made with Lakhshamanan Chettier, who was the heir of Ramanathan. The deed was a deed pole executed by (1) Ovala, the zamindar; (2) his brother Karutha, (3) the defendant, Thirugnana son of Karutha and (4) another son of Karutha and addressed by them to the mortgagee Lakhshamanan. The deed commenced by stating the zamindari was mortgaged for Rs. 2,47,000. It gave an account of the debts affecting the estate, of which much the largest was the debt already due to Lakhshamanan. Other subsequent items amounting to Rs. 65,000 were declared by the four mortgagors as due by them. Among them was specified "Rs. 10,000 borrowed from you on this date in order that, after a settlement of the differences existing between the members of our family, the same might be paid as a recompense to the said I Ovala for his transferring;" even now the right to the property in dispute to Thirugnana and his addressing an *arzi* to the Collector of Madura District stating the said fact. The mortgagors stipulated that the mortgagee should pay the *peshcush* and road cess to Government and also an allowance 'for our maintenance at the rate of Rs. 270 per mensem.' The *arzis* contemplated in the deed were presented by Ovala on the 7th November to the Deputy Collector and the Collector of Madura. The *arzis* stated that Ovala had transferred the zamindari to Thirugnana after entering into an arrangement with him that he should pay Rs. 250 per mensem for the maintenance of the family and it was prayed that the name of Therugnana may be entered in the register and orders may in future be issued through him. Ovala made a statement on the 17th November confiring what he had stated in his petitions. There was no registered deed of transfer and possession remained all along with the mortgagee.

Held, that the mortgage-deed, the petitions and the statement of Ovala were not sufficient in law to transfer the right to the zamindari to Thirugnana. On appeal Thirugnana was not allowed to raise a fresh plea that there was a valid contract to transfer which should be implemented by the other party.

Held, also that though there may have been an intention to transfer the property it never was effected in the mode required by law, and that the intended transferree cannot now call for implement of the intention because he fails to show any contract founded on valuable consideration.

The mortgagee was added as a respondent, the appellant asked to be relieved from praying his costs on the ground that his interests were not attacked.

Held, that the respondent's costs must be taken as costs of the appeal. IMMADIPATTAM THIRUGNANA *v.* PERIYA DORASAMI **28 I. A. 46 = 5 W. N. C., P. 217 P. C. = 24 M. 377, P. C.**

130. S. 54. *Transfer of property by mere registration—Girl to be given in marriage—Consideration of transfer—Marriage not taking place. Effect of*—

Mere registration of an instrument without reference to other circumstances does not operate to transfer the property comprised in the registered deed.

A document purported to be a sale-deed for money was executed and registered by one *S.* It was found that *S.* intended to marry the defendant's daughter and the transfer was in consideration of such marriage. The defendant having refused to give his daughter in marriage, the transfer was never completed.

It was contended on behalf of the defendant that mere promise to give and not the

actual gift of the girl formed the consideration for the execution of the deed.

Held, that the transfer was intended to be effected only in the event of the marriage taking place, and as it did not take place, effect was not given to the intention to transfer and no property passed to the defendant. 18 M. 61, 27 C. 7, referred to. 27 M. 146 distinguished. RAMALINGA MUDALI *v.* AYYADORAI NAINAR. **M. L. J., 1904 P. 493 = 28 M. 124.**

131 S. 54 *Agreement to sell immoveable property effect of. See Specific Relief Act 1 of 1877. S 22* PIR MOHAMMED *v.* MOHAMMED ABRAHIM—6. B. L. R. **1013 = 29. B 234.**

132. S. 54 *Transfer of immoveable property worthless than Rs. 100—Delivery of possession—Transferee in possession before sale.*

Where immoveable property valued at less than Rs. 100 is sold, such sale must be either by a registered instrument or by delivery of possession of property. Where there is no delivery, as the vendee has been in possession of the property from before the date of sale, and there is no registered instrument, the sale is invalid. 22 C, 179 dissented SIBENDRA PADA BANERJI *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL, **5 C. L. J. 390 = 34 C. 207.**

133 S. 54. *Section 54 does not apply to Berar—sale of equity of redemption—Necessity for registration.* See Sale. JAIRAM *v.* BALKRISHNADAS. **3 N. L. R 72.**

134 S. 54 *Mahomedan Law—Decree for dower, oral transfer of property in satisfaction of.*

In part-satisfaction of a decree for dower, the judgment-debtor orally agreed to transfer certain immoveable properties to the decree holder, who was put in possession of the said properties. Subsequently the same properties were attached by another decree-holder in execution of a decree against the same judgment-debtor.

Held that the property was not liable to be attached by the second decree-holder as after the transfer, the judgment-debtor had no insterest on the property. Properly speaking, it was a *sale* of the property and not merely a *contract* for sale and the last clause of S. 54 of the Transfer of Property Act had no application. *Karalia Nanubhai v. Mansukhram Vakatchand* (I. L. R. 24 B. 400), followed. *Hormasjee Manekji v. Keshar Purshottam* (I. L R., 18 B. 13.) distinguished.—RAM BAKSH *v.* MUGHLANI KHANAM. **A. W. N. 1904 p. 8 = 26. A. 266.**

135 S 54 *Registered sale-deed—Consideration not passed—Subsequent sale of the same property.*

Where property was sold by a registered document, but the price agreed upon was not paid:

Held that the non-payment of the price did not make the sale invalid. The only course open to the vendor would be to sue the vendee for the purchase money. When the same property was again sold by the same vendor to a third party, the latter could not sue to set aside the first sale, —GOVINDAMAL *v.* GOPALACHARIAR, **16 M. L. J. 524.**

136. S. 54.—*Sale—Non-payment of consideration—Sale complete.*

In a sale of immoveable property, non-payment of the purchase-money does not prevent the passing of the ownership of the purchased property from the vendor to the purchaser and the purchaser can, notwithstanding such non-payment, maintain a suit for possession of the property. (11 A 244, 2 B. 517 and 23 B 525 followed) BAIJ NATH SINGH *v.* PALTU. **A. W. N. 1908, 38.**

137. S. 54.—The provisions of this Act do not apply to a tenancy created before this Act came into force. A non-permanent tenure created before this Act was passed is not transferable. 2 C. W. 122 and 32 C. 1023 referred to. See also S. 11 B. T. A. VIII of 1885. HIRA MOTI DASSYA *v.* ANNODA PROSAD GHOSH. **7 C. L. J. 553.**

138. S. 54.—Deed assigning arrears of profits due by a Lamberdar to a co-sharer does not transfer immoveable property and does not require registration.—*See Registration Act S. 17* DAMODER DAS *v.* GIRDHARI DAS. **2 A. L. J. 692 = A. W. N. 1905, P. 100 = 27 A. 564.**

139. S. 54 & 55.—*Document. Construction of—Auction sale. Conditions of—Payment of purchase-money—Right to rent of property sold.*

One of the conditions of a sale at an auction provided that "upon payment of the purchase-money in manner aforesaid the purchaser shall be entitled to the rents and profits......from the day of such payment."

Held, on a construction of the above clause, that the words "the day of such payment" meant the day of actual payment and not the stipulated day of payment.

Held, further that there was no suggestion of wilful delay, want of good faith, nor negligence or other misconduct disentitling the vendor to the interest clearly payable to him under the conditions, and that at the same time there was nothing in the conditions that deprived him of the rents and profits to which under the Transfer of Property Act, he was entitled until the transfer of ownership.

Semble.—It would be well that conditions of sale should be so framed so as to avoid the inequitable consequence of a vendor being entitled both to the rents of the property and interest on the unpaid purchase-money. EMPRESS SPINNING AND WEAVING CO., LTD. *v.* C. D. ATHAIDES. **7 B. L. R. 845.**

140. S. 54, 55 (6) (b).—*Enforceable contract of sale followed by delivery of possession. to defendant, but not followed by registered sale-*

Sup: Govt. acts (IV of 1882) (*Contd.*)

deed—No defence to suit for possession—Construction of statute.

The provisions of S. 54 of the Transfer of Property Act are imperative, and Courts will not be justified in disregarding them on equitable grounds. Where the words of a statute are clear and unambiguous, effect must be given to them, although hardship may result in individual cases. A contract of sale followed by delivery of possession does not, when there is no registered sale, create any interest in the property agreed to be sold and cannot, even if enforceable at date of suit or decree be pleaded in defence to an action for ejectment by one having a legal title to recover. (24 M. 449), approved. (24 M. 377), considered. KURRI VEERAREDDI *v.* KURRI BAPIREDDI **16 M. L. J. 395; F. B.=1 M. L. T. 753=29 M. 336.**

141. S. 54, 56 (6) (b).—*Contract of sale—Deed of sale not registered—Rights and remedies of the contracting parties.*

The plaintiff executed a conveyance of immoveable property of the value of upwards of Rs. 100 which was not registered according to law, received the purchase-money and delivered possession of the property to the vendee (defendant I). For a specific performance of this contract, the defendant 1 brought a suit which was dismissed. The plaintiff then sued to recover the possession of the property as its owner.

Held, that the suit should be decreed in plaintiff's favour and that all that the defendant 1 was entitled to was the benefit which he could claim under S. 56 (6) (*b*) of the Transfer of Property Act (IV of 1882). 21 B. 400, explained. LALCHAND *v.* LAKSHMAN. **6 B. L. R. 510=28 B 466.**

142 s. 54, 60—*Assignment of equity of redemption.*

Per Bhashyam Ayyangar, J. The equity of redemption in an usufructuary mortgage is an "intangible thing," within the meaning of s. 54 of the Transfer of Property Act, and its transfer by sale can be made only by registered instrument, even though its value may be less than Rs. 100. The equity of redemption in a simple mortgage may be tangible immoveable property and its sale can be effected, if its value be less than Rs. 100, without a registered instrument, by mere delivery of the property. The right of a simple mortgagee in the property mortgaged is an intangible thing, within the meaning of S. 54 of the Transfer of Property Act, and a transfer by sale of a hypothecation executed to secure a debt under Rs. 100, can be made only by a registered instrument. *Subramaniam* v. *Perumal Reddi.* **(I. L. R., 18 M., 454).** *Referred to.*

Per Shepherd J. Under S. 54 defendant had no interest in the property. RAMA SAMI PATTAR *v.* CHINNAN ASARI. **11. M. L. J. 132=24 M. 449.**

143 s. 54, 59, 99, 100—*Registration, Act (III of 1877), Section 17 (h)—Mortgage—Charge—Title deeds. Deposit of.*

Sup: Govt. acts (IV of 1882) (*Contd.*)

A mere agreement in writing by an obligor to execute a mortgage of immoveable property to the obligee does not create an interest in the immoveable property and cannot be treated as a charge.

The third paragraph of section 59 of the Transfer of Property Act necessarily implies that a deposit of title deeds of immoveble property not evidenced by a writing duly attested and registered is valid only if made in the towns specified in the paragraph. Therefore, a grant of security by a mere deposit of title deeds unaccompanied by writing duly attested and registered evidencing it is invalid if it takes place in the mufassil. KONCHADI SHANBHOGUE *v.* SHIVA RAO. **28 M. 54.**

144 s. 55 (2)—*Limitation Act (XV of 1877), Article 116—Sale—Covenant for title—Implied contract—Suit for refund of purchase money by one of several vendees—Parties.*

When a sale of immoveabl property is made in favor of several persons as tenants in common by a single conveyance and it is found that the vendor had no title, the vendees are entitled to sue the vendor severally for return of their shares of the purchase money, at any time within six years of the date of sale, notwithstanding that the sale deed does not contain any covenant for title because such a covenant is implied under S. 55 (2) of the act.—CHIDAMBARAM PILLAI *v.* SIVATHASAMY THEVER. **15 M. L. J. 396.**

145 s. 55—To enforce a charge on immoveable property under S. 55 of this Act by a vendor for unpaid purched money a suit must be brought within 12 years.—*See Limitation Act 132.* RAMA KRISHNA AYYAR *v.* SUBRAHMANIA AYYAR **29 M. 305.**

146 s. 55—A Landlord can not enhance the rent of his tenant during the term of his lease whether it be in perpetuity or for a definite term—*See Compensation.* SATISCHANDER CHATTOPADHYA *v.* RAI JATINDRA NATH CHOWDURY. **7 C. L. J. 284.**

147. S. 55.—*Covenant as to title—Warranty—Fraud—Misrepresentation—Caveat emptor.*

A who had only a limited title in a *ganj* sold it to B who soldit to C and who in his turn sold it to D. The sale-deed executed by C provided that if the property sold, in whole or in part, passed out of the purchaser's possession owing to the claim of any person whatsoever, he would be entitled to recover from C or his heirs, the value of the portion so lost. The purchasers from the remainder men sued D who was thereby evicted. D, accordingly, under the terms of his sale-deed, sued to recover his purchase-money from C. The Lower Court dismissed the suit holding the principle of *caveat emptor* did apply to the case and C only purported to convey to the plaintiff such right as he had

Sup: Govt. acts (IV of 1882) *(Contd.)*

himself acquired and that if A had only a limited title the defendant and the plaintiff had no more and there was no fraud or misrepresentation on the part of the defendant.

Held, that the doctrine of *caveat emptor* did not apply to sales of land in India and that the defendant was bound by the terms of his covenant which protected the plaintiff against any latent defect in title, to make good the purchase-money to the plaintiff.—MEHDI HUSAIN *v.* ASHIQ JAFAR KHAN, **8 O. C., 345.**

148. S. 55.—The suit of vendor to recover the unpaid balance of the price of immoveable property by its sale is governed by Art. 132 Limitation Act. SYED TALIB HUSSEN *v.* RAM CHARAN—**9. O. C. 284.**

149. s. 55.—*Limitation Act (XV of 1877), Sch. II., arts. 132, 111—Art. 132 applies to suits to enforce the charge created by S. 55 of the Transfer of Property Act.*

The statutory charge which an unpaid vendor obtains under S. 55 of the Transfer of Property Act is different in its origin and nature from the vendor's lien given by English Courts of Equity to an unpaid vendor. *Webb* v. *Macpherson* (I. L. R., 31 Cal. 57), referred to and applied. The article of the Limitation Act applicable to a suit to enforce such charge is art. 132 of Sch. II. and not art. 111. *Natesan Chetti* v. *Soundararaja Ayyangar* (I. L. R. 21 Mad. 141); *Avuthala* v. *Dayumma*, (I. L. R., 24 Mad. 233); *Subrahmania Ayyar* v. *Poovan*, (I. L. R., 27 Mad. 28), overruled.—RAMAKRISHNA AYYAR *v.* SUBRAHMANIA AYYEN, **I. L. R., 29 M. 305.**

150. S. 55.—*See S. 54, 55—7. B. L. R. 845 No 139 supra.*

151. S. 55 1. b.—*Mortgage—Sale-deed—Covenant for title—Covenant for quiet enjoyment—Charge—Money paid in redeeming property.*

The plaintiff purchased from the defendant certain lands under a deed of sale which contained a covenant that "if to the property mentioned above any one offers obstruction of any sort or puts forth any claim thereto, we, our heirs, and our representatives agree to hold ourselves answerable in any way you require us to do.' The plaintiffs got possession of only some of the lands mentioned in the deed of sale and had to pay Rs. 176-10-0 to redeem some more lands purchased by him. He then filed the present suit to recover the above sum and damages for breach of the covenant.

Held, (1) that the convenant relied upon by the plaintiff was not a covenant for quiet possession and that there had been no breach of it. *25 Bom., 593, S. C. 3 Bom. L. R., 75, followed.*

(2) That the deed of sale incorporated the provisions of section 55 of the Transfer of Property Act and in view of the obligation cast upon the seller by sub-section (1) *(g)* of that section, the plaintiff was entitled to recover from the defendant the amount paid by him in discharge of the incumbrance not mentioned in the deed of sale. MANISHANKER *v.* RAMKRISHNA NATHUBHAI. **6. B. L. R. 832.**

152. s. 55 1. b. and 4. b.—*Unpaid purchase-money—Vendor's lien—Non-possessory—Vendor's possession when adverse—Onus—discharge:—*

A vendor's lien for unpaid purchase-money is non-possessory, both in England and in India. He is not entitled to retain possession of the lands sold, in virtue of his lien for unpaid purchase money; but is only entitled to retain the title deeds and to a charge for the unpaid purchase-money. Even assuming that the possession of the vendor is *prima facie* adverse to the vendee and the onus lies upon the vendee to prove the non-adverse character of the possession, by the vendor:—

Held that, in the circumstances of the case, it had been sufficiently discharged by the issue of the pattah at the instance of the vendor in the vendee's name subsequent to the sale.—VELAYUDHA CHETTY *v.* GOVINDASAWMI NAICKER, *11. C. 229 referred to.* **3. M. L. T. 10=17 M. L. J. 450 =30 M. 524.**

153. s. 55. 1. g. 55 5. b. and 57— *Contract of sale of incumbered Property—Undisclosed incumbrance—Conveyance—Specific performance—Specific Relief Act, 1877, S. 18 (c)—Transfer of Property Act, 1882, S. 55 (1) (g) 55 (5) (b), 57.*

A contracted to sell a piece of land to B, without disclosing the existence of a mortgage on it. A failed to furnish particulars sufficient to enable B. to prepare a conveyance. B therefore sued A to compel him to execute a conveyance or in the alternative for damages for breach of contract.

Held, that under section 18 (*c*) of the Specific Relief Act, B was entitled to a decree for specific performance of the contract of sale, and that if A did not pay off the mortgage before executing the conveyance, B was entitled, under section 55 (5) (*b*) of the Transfer of Property Act to retain out of the purchase money the amount payable to the mortgagee. *Ayeshar Bee* v. *V. Somasundram Iyer*, 11 Bur. L. R., 257; referred to. BA PE *v.* MA MA. **4. L. B. R. 1907. P. 83.**

154. S 55 (1) (g) & (5) (b).—

The principal of T. P. A., Ss. 55 (1) (*g*) and (5) *(b)* are applicable to such cases even in Lower Burma—*See contract sale of a house failure to clear and encumbrance—Retention of purchase-money.* H. McDONALD *v.* C. B. WILLS. **4 B L. R. 224**

155. S. 55 (g) (5) (b).—*Civil Procedure Code, S 111—Evidence Act (I of 1872), S. 9.—Amanat receipt—Mortgage-decree, purchase of—Set-off—Payment by purchaser to protect his*

Sup: Govt. acts (IV of 1882) (*Contd.*)

interest—Suit on amanati receipt—Oral evidence varying written document.

A sum of Rs. 20,225 10-10 was due to the defendant from the plaintiffs. To pay this off, the plaintiffs sold to the defendant a certain decree in their favour for Rs. 40,000, out of which *hundis* for Rs. 12,000 were given to the plaintiffs and a sum of Rs. 7,774-5-11 was deposited by the plaintiffs with the defendant; for this deposit of Rs. 7,774-5-11, the defendant granted to the plaintiffs an *amanati* receipt which ran thus: "That you keep in deposit with me Rs. 7,774-5-10 in order to pay off the debts due to your Calcutta creditors on account of your joint business as well as to meet the expenses of your joint law suit. I shall return the said deposit money to you when you both will come to me and jointly demand payment from me of the said money in deposit." The mortgage-decree sold to the defendant having been already attached by a creditor of the plaintiffs, the defendant paid Rs. 6,289-12-5 to have the same released from attachment. On a suit by the plaintiffs based on the *amanati* receipt claiming to recover with interest Rs. 7,774-5-10, the amount in deposit with defendant, the latter claimed to set-off Rs. 6,289-12-5 which he paid for releasing the decree from attachment on the ground that there was an oral agreement to the effect that if the plaintiffs failed to pay off the debt for which the decree was attached, the defendant should release it from attachment out of the amount in deposit.

Held, that the evidence of the separate oral agreement is not admissible in evidence inasmuch as the *amanati* receipt embodied the real contract but evidence may be admitted to show the real object of the deposit or to explain the meaning of the first sentence of the receipt (S. 92 of the Evidence Act).

Held, also that the defendant was entitled to set-off Rs. 6,289-12-5 because (1) he was compelled to make the payment to save his own interests in the property, having the right to compel the plaintiff to make the payment, (2) the payment was made on behalf of the plaintiffs, who were benefited by it and (3) the claim for the repayment of the deposit and the payment made by the defendant to release the decree were so connected together as to form part of the same transaction. KHETSIDAS AGARWALLA *v.* SHIB NARAYAN MURAD. **9 C W N 178**.

156. S. 55 (2).—This section under which the seller passes a covenant for title, ought to be followed as a matter of justice, equity and good conscience in Upper Burma, even though T. P. Act is not in force there. SADHU *v.* NGA SI GYE. **U B R., 1907, P. 1 (Evidence).** *See Col. 272.*

157. S 55 (2) & 108 (c).—*Limitation Act (IV of 1877), Sch. II, Arts. 62, 97, 116—Transfer of Property Act (IV of 1882), Ss. 55 (2), 108 (c): transaction to which S. 55 (2) or 108 (c) of the Transfer of Property Act apply and a covenant for title or quiet enjoyment can be implied.*

Sup: Govt. acts (IV of 1882) (*Contd.*)

The first defendant, in September 1897, granted, in consideration of an advance, a registered *karar* to P the predecessor in title of the present plaintiff, in the following terms: "deed of consent or permission granted to..............by..............in consideration of this amount, the trees standing.............. shall be cut down at your expense during a period of 6 years from this date, with the exception of teak and blackwood. For every cart-load of timber so removed.......... ...you are to pay a *kuttikanam* of Rs. 2-4-0 and on those timber, the seal of the *Etam* shall be impressed without delay..............During the period of 6 years, the *Etam* shall not grant any permission to others to cut trees........... ......You have the right to cut down trees and none whatever to the land." The first defendant and the other defendants formed a *Tarward*, and in a suit brought on behalf of of the *Tarward* against P and the first defendant, it was declared that the *karar* was not binding on the *Tarward* and P was restrained from cutting timber. The present suit was instituted by P to recover personally from the first defendant and from the *Tarward* properties the amount advanced with interest as damages.

Held, that the suit so far as the *Tarward* properties were concerned was *res judicata* by reason of the decision in the previous suit.

Held also, that the suit as against the first defendant was barred by limitation. The article applicable to the suit is either art. 62 or art. 97 of sch. II of the Limitation Act. The document is not a sale or lease of immoveable property within the definition of those terms in the Transfer of Property Act and a covenant for title or for quiet enjoyment cannot be implied under S. 55 (2) or S. 108 (c) of the Act. Art. 116 of Sch. II of the Limitation Act does not apply to the case. The document did not create a mortgage or charge on immoveable property. It is no more than an exclusive license to cut trees. A document may create an interest in land and bring it within the provisions of the Registration Act. The covenant for title will not necessarily be implied in such case unless it is one of the transactions in which the covenant can be implied under the Transfer of Property Act 29 M. 58, followed. MAMMIKUTTI *v.* PUZHAKKAL EDOM. **29 M. 353**.

158. S. 55 2.—*Limitation Act (XV of 1877), sch. II, art. 116—Vendor and purchaser—Implied contract.*

Immoveable properties were sold to two persons as tenants-in-common by a simple deed of sale. It was subsequently found that the vendor had no title to the property.

Held that any of the vendees is entitled to sue for the return of his share of the purchase money without making the other vendee a party although the sale deed did not contain any covenant for title. The period of limitation prescribed for such

Sup: Govt. acts (IV of 1882) *(Contd).*

suit is 6 years from the date of the sale, under sch. II, art. 116 of the Limitation Act. Covenants under S. 55 of the Transfer of Property Act run with the land.—CHIDABARAM PILLAI *v.* SIVATHASAMI THEVAR, **15 M. L. J. 396.**

159. S. 55 2.—*Sale of joint family property – Consequent partition – Share of lands sold falling to the lot of purchaser—Suit for damages*—See Vendor and purchaser. SHIVRAM *v.* BALDAJI. **4. B. L. R. 310 = 26 B. 519.**

160. S. 55 4. b.—*Vendor and Purchaser—Vendor's lien for unpaid purchase-money—Transfer of Property Act (IV of 1882), S. 55, sub-S 4 cl. (b)—"Contract to the contrary"—Sale in consideration of a particular covenant—Waiver—Charge on property sold, abandonment of—Appeal to Privy Council—Certificate of appeal, Form of—"Substantial question of law"—Civil Procedure Code (Act XIV of 1882), S. 596, 600.*

The charge which a vendor obtains under S. 55 of the Transfer of Property Act (IV of 1882) is different in its origin and nature from the vendor's lien given by the English Courts of equity to an unpaid vendor. The Indian Act gives a statutory charge upon the estate to an unpaid vendor, unless it be excluded by contract, and such a charge stands in quite a different position from a vendor's lien under the English law. Such a charge is not excluded by a mere personal contract to defer payment of a portion of the purchase-money, or to take the purchase-money by instalments, nor by any contract, covenant or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge. *Semble*; The English cases as to a vender's lien for unpaid purchase-money though useful for the purposo of illustration, are not authoritative in the interpretation of the law on the subject, as laid down in S. 55 of the Transfer of Property Act. A conveyance or sale in consideration of a covenant to pay a sum of money in the future, is different from a sale in consideration of money which the purchaser covenants to pay. In this case, the High Court had held on the authority of the English cases, that the purchase was one in consideration of a particular covenant, and that consequently no charge on the property arose; but

Held, by the Judicial Committee, that the conveyance was made in consideration of a sum of money, part of which was paid down, and the payment of the balance of which was deferred, and that there was therefore no contract excluding the operation of the charge.

Held, also, on the evidence that there had been no waiver or abandonment of the charge by vendor. The certificate of the High Court that "the case was a fit one for appeal to His Majesty in Council" was held to be correct in form, and not subject to the objection that it did not state that a substantial question of law was involved in the case. 25 A. 109: L. R. 30. I. A. 35) distinguished.—WEBB *v.* MACPHERSON, **5. B. L. R. 838 = 13. M. L. J. 389 = 30. I. A. 238 = 8. C. W. N. 41 = 31 C. 57. (P. C.)**

Sup: Govt. acts (IV of 1882) *(Contd.)*

161 S. 55 (4) (b) & 57 (a).

These Sections apply to the Punjab as they are equitable, though the whole Act does not. *See insolvency.* SARAN *v.* BASHESHAR NATH. **148 P. R. 1907.**

162 S. 55 (4) (b)—*Suit by vendor to enforce charge for unpaid balance of purchase money.*—See Limitation Acts Arts 111 aud 1 B 2 MUNIRUNNISA *v.* AKBARKHAN. **A. W. N. 1908 P. 71.**

162 (a) S. 55 (4) (b—*See S. 3, 35, &c.—10 B. L. R 403—No. 11 Supra.*

163 s. 55 (5) (d)—*Where no contract to the contrary, liability to pay public charges attaches to vendee on the passing of property—Condition precedent to liability—Limitation Act (XV of 1877), Section 19—Requisites of a valid acknowledgment.*

Under section 55 *(5)* (d) of the Transfer of Property Act, the liability of the vendee to pay the public charges on the property sold attaches, in the absence of a contract to the contrary, as an incident of the transfer and is complete when the property passes.

Where the adjustment of matters, which form part, but are the not the essence and substance of the contract, cannot be carried out in the mode contemplated, the Court will do whatever may be right and proper to effect such adjustment itself. L. R. 5 Ch., App. 519 referred to.

Where a deed of sale provides that the vendee shall pay "the amount due, as per sub-division of the *peshkush* due to Government" and the deed contains no other words to show that the sub-division was a prerequisite to the vendee's liability, the mere use of the words *as per sub-division* does not make it such, and where no sub-division is effected, and the vendor pays the whole *peshkush*, the Court will ascertain, as between the vendor and vendee, the proportion payable by the latter and direct payment thereof.

An acknowledgment of a conditional liability will not, under Section 19 of the Limitation Act, give a fresh start as long as the condition remains unfulfilled. There must be an unqualified admission or an admission qualified by a condition which is fulfilled. RAJAH KAVALI ARUNACHELLA ROW BAHADUR *v.* SRI RAJAH RANGIAH APPA ROW BAHADUR **16 M. L. J. 1906. p. 563 = I M. L. T. 318 = 28 M. 519.**

164 S. 55 (5) (d)—Its principles apply to Court sales subject to charge for maintenance MANGLA TH..MAL *v.* NARAYANA SAWMY AIYAR. **17 M. L. J. 250 = 30 M. 461.** *See Col. 347.*

165. s. 55 (6) (b). 82 & 95.—*Charge—Purchaser of a portion of mortgaged property paying money to pay off a prior mortgage who*

Sup: Govt. acts (IV of 1832) *(Contd.)*

actually supplies, pays the money—Contribution.

A mortgaged to B an entire village X and shares in 4 other villages. Some 15 years after this B obtained on this mortgage a decree for Rs. 59,480 by sale of the mortgaged property in March 1901. In September, 1901, the A entered into a contract with C for sale of the entire mortgaged property for Rs. 80,000. Before this contract was executed and formal deed of sale written out in favour of C, A, in October, 1901, entered into another contract to sell the same mortgaged property to B for Rs. 75,000. In November, 1901, the village X was sold by A to C for Rs. 37,237 of which Rs. 28,000 were retained by C to be paid to B. In December, 1901, C deposited the whole sum of Rs. 59,480 in Court for payment to B, which sum was withdrawn from Court by B in March, 1902, and in pursuance of the agreement to sell made with B in October, 1901, he brought a suit for specific performance of the contract of sale against A excluding from his claim the village X already purchased by C and obtained a decree in 1903 as to the *pattis* in the four villages on payment of Rs. 37,763. The money was paid by B into Court praying that it might be given to A on his executing the sale deed. Prior to the aforesaid payment C had informed B that he had paid Rs. 31,480 over and above the amount left with him by A for payment of the mortgage decree and either the said money should not be paid to A or a notice given to C of the deposit of the money in Court so that he might withdraw it therefrom himself. No notice of the deposit of the money was given to C and the whole of the money was paid to A on his executing the sale deed as to the *pattis* in favour of B. C then instituted this suit against B for recovery of Rs. 31,180 *plus* interest by way of damages by sale of the property sold to B on the ground that he had a charge to that extent on the said property. B pleaded that the money was not a charge on the property purchased by him on the ground that the money towards the mortgage decree was not paid by C himself but was paid by A and that it was not paid as mortgage money but as part of the purchase money.

Held, that C who had become the owner of a part of the mortgaged property and who paid off the mortgage debt in order to save the property from being sold in execution of the decree obtained on the basis of the mortgage, acquired a charge on the 4 *pattis* in respect of so much of the money as the *pattis* were rateably liable for.

Held, further that the money having been supplied by C for the payment of the mortgage decree the payment must be considered to have been made by C and it was quite immaterial that A and not C deposited the money.

Held, also, that even if the money paid by C were considered as purchase-money, he had a charge on the property sold to B to the extent of the money paid by him under S. 55 (6) (b) of the Transfer of Property Act (IV of 1882). (12 A. 110, 22 A. 284, 26 A. 407, 21 M. 96, 26 M. 686 and 26 B. 379 referred to). THE HON'BLE RAJA ALI MOHAMMAD KHAN *v.* THE DEPUTY COMMISSIONER OF BARA BANKI. **9 O. C. 259 (B).**

Sup: Govt. acts (IV of 1882) *(Contd.)*

166. S. 55 (6) (b).—*See S. 54, 55 (6) (b.) 29 M. 336 No. 140 supra.*

167. S. 55, 59.—*Assignment by mortgagee of his right pending his suit on mortgage—Mortgage deed insufficiently attested—Discovery of this defect after assignment—Suit by assignee for refund of purchase-money where special covenant protecting assignor from liability—Effect of.*

A mortgagee, after instituting a suit on the bond against the mortgagor assigned all his rights. At the time of assignment, both parties were ignorant of the fact that the bond was attested by only one witness, contrary to S. 59. The assignee specially covenanted that the assignor shall not be liable for any defect in the claim transferred and assigned or responsible for any sum of money that may not be recovered by the assignee. Subsequently, the above defect was discovered and the assignee brought a suit for declaration that the assignment was void and for a refund of the consideration paid by him to the assignor for the assignment.

Held, that the assignment was not void, and that the assignee was not entitled to the refund, in view of the special covenant referred to above. Assuming that the technical informality in the mortgage deed would constitute a breach of the covenant by the vendor under S. 55, the special covenant, upon which the vendor (mortgagee) relies, negatives the statutory covenant that the interest which the seller professed to transfer subsisted. Insufficient attestation does not render the personal covenant to pay the debt void. Likewise in cases of bonds for money also mortgaging immoveables their non registration has been held not to affect the validity of the contract to pay the debt, and there is no real difference between the two cases. Where in addition to the affirmation of a special quality there is a separate warranty also in the agreement, the existence of the separate warranty shows that the matter of the warranty is not a condition or essential part of the contract, but that the intention of the parties was to transfer the property in the subject of the sale at all events. In such cases, if the sale is made in good faith and there is a breach of the warranty, a purchaser is entitled only to compensation for the breach of the warranty, and the sale is not *even voidable.* The present is an *a fortiori* case, inasmuch as the vendee (assignee) has chosen to contract to take the claim with all its defects, and to hold the vendor not responsible for the consequences 23 C 78 approved 18 M 29 dissented from 12 B 70 distinguished. SADU KAVAUR *v.* TADEPALLY BASAVIAH. **1 M. L. T. 416 = 17 M. L. J. 167 = 30 M. 284.**

133. S. 55, 103. *Breach of statutory covenant for title and quiet enjoyment—Damages.*

Sup: Govt. acts (IV of 1882) *(Contd.)*

A sold certain property to B for consideration. 9 years afterwards C, a brother of A, who had absconded, appeared, sued B and dispossessed him to the extent of one-half *i. e.* C's share. B sued A alleging that he had concealed his brother's rights in the land and sought a decree for A's other lands in lieu of the lands taken away from him

Held, B was not entitled to other lands of A but in the absence of a contract express or implied to the contrary B was entitled to damaged for A's breach of the statutory covenant for title or the statutory covenant for quiet enjoyment. JALPA PANDE *v.* GUR PRASAD. **5. O. C. 78.**

169. S. 56, 67, 81 and 88—*Bona fide purchaser for value of part of the lands comprised in a prior mortgage—Right to insist on other lands being sold first—Marshalling.*

S. 56 & 81 T. P. A being read together it was held, that a purcharser of one of the lands comprised in a first mortgage has no right to insist that the other lands comprised in the mortgage should first be sold before selling the land that he purchased.

Under S. 83 of the Transfer of Property Act, the Court may order that a portion sufficient to discharge the plaintiff's debt be sold, and if the part not sold is sufficient, and if the plaintiff cannot possibly be prejudiced by such sale, it may be open to the Court to direct in the decree itself its sale before the other property.

Further, in execution of a decree for the sale of all the lands, the lands not sold may be sold first, and if the sale-proceeds are sufficient to discharge the plaintiff's debt, the sale of the other lands may be stopped. 5 M 357 11 C. 258, 17 A 435, 31 C 95 followed 29 M. 217, 7 A. 711, 22 B. 30 (F. B. R fd. to.) KOMMINENI APPAYYA *v.* MANGALA RANGAYYA, **3. M. L. T. 287 (F. B.)**

170. S. 56, 81, 82—*Marshalling—Inverse order—Contribution, right to, as between purchasers of mortgaged properties—*

When two properties X and Y are mortgaged to secure one debt, and subsequent to the mortgage, the property X is purchased by A and then the property Y by B, if the entire mortgage debt is satisfied by the sale to A of the property Y in execution of the mortgage decree, B. is entitled to contribution against A in proportion to the values of the properties X and Y; and the rule of inverse order does not apply to such a case. A claim for contribution is an equitable claim, and in determining the amount, the Court must take an equitable veiw of all the circumstances and must not give effect to what is only an apparent and not the real state of things.—MAGNIRAM *v.* MEHDI HOSSEIN KHAN, **8 C. W. N. 30.=31. C. 95.**

171. S. 56, (6).—*See S. 3, 35 and ca; 10 B. L. R. 403 No. 11 supra.*

Sup: Govt. acts (IV of 1882) *(Contd.)*

172. S. 56, (6) (b).—*See S. 54, 56, (6) (b)—28. B. 466 No. 141 supra.*

172 (a). S. 56.—*See S. 82, 56—2, A. L. J. 698 No. 350 infra.*

173. S. 57—This section does not apply when there is a question of adjustment of a decree out of Court.—*See C. P. C. S. 258.* MALLIKURJUNA SASTRI *v.* NARASIMBA RAO. **24 M. 412.**

174. S. 57.—*See S. 55 (1) (g) (5) (b) and 57—4 L. B. R., 1907, P. 86, No. 153 supra.*

175. S. 58 & 59.—Order of Court accepting security for costs of appeal under S. 545, C. P. C.—*See S. 17 Registration Act.* NAGRURU SAMBAYYA *v.* TANJATUR SUBBAYYA. **3 M. L. T. 317.**

176. S. 58.—*Mortgage by conditional sale—Whether sale or mortgage to be ascertained from whole instrument—Transfer of interest need not be in express terms—"Meddatu Krayam," meaning of—*

The question whether a document operates as a mortgage, or as a conditional sale, must be determined on a consideration of the whole document.

The mere description of the document as "Meddatu Krayam" is not conclusive.

The transfer of interest necessary to create a mortgage need not be in express terms. It is sufficient if the instrument taken as a whole opperates to create such a transfer. KOLA VENKATANARAYANA *v.* VUPPALA RATNAM. **29 M. 531.**

177. S. 58.—*Sale—Absolute sale or mortgage—Agreement to reconvey property on payment of purchase money and interest.*

The plaintiff in this suit sold a certain area of land to the defendant by a deed dated the 27th January 1886. On the same date the defendant executed an agreement promising to reconvey the land to the plaintiff, if the latter repaid the amount of the purchase money with 12 per cent interest within the period of three years. The plaintiff brought a suit on the 21st July 1897 and sought to have the land reconveyed to him though the period of three years had long been expired, on the ground that the deed of sale was not a deed of absolute sale but a deed of conditional-sale and mortgage.

Held, dismissing the plaintiff's suit that the deed of sale was a deed of absolute sale and not a mortgage. The transaction was not necessarily one of mortgage merely because interest was made payable on the repayment of the purchase money. *12 All., 387, 14 All., 195, 21 Bom., 709 referred to.* MODHU SUDAN DAS *v.* RHIDAY MONI BAISTABI. **6. C. W. N. 192.**

178. S. 58.—*Mortgage—Parties not knowing the existence of* sarbarakari *interest—Effect of mortgage on such interest—Death of appellant before delivery of judgment—Judgment* nunc pro tunc.

The mortgagor executed a mortgage of his entire interest in a *taluk*. In some villages of the *taluk* the mortgagor had a subordinate *sarbarakari* interest but at the

Sup: Govt acts (IV of 1882) *(Contd.)*

time the mortgage-deed was executed it was not known that any *sarbarakari* interest existed in these villages. The mortgagee sued the mortgagor and two *bona fide* puisne mortgagees for sale of the *sarbarakari* interest on the basis of the mortgage-deed.

Held, that the mortgagee was entitled to a decree against the entire interest of the mortgagor and the *sarbarakari* interest could not be excluded from the decree.

The appellant died before the judgment was delivered, but after the appeal had been heard. The judgment was entered *nunc pro tunc*. RAJA GOUR CHANDRA GAJAPATI NARAYAN DEB *v.* RAJA MAKUNDA DEB. **9 C. W. N. 710.**

179. S. 58.—*See S. 3, 58, 59—33 C. 410 No 12 supra.*

180. S. 58—*See S. 6, 5, 51, 58—U. B. R. 1906. P. 1 No. 32 supra.*

181. S. 58 to 104.—*Meaning of mortgaged property used in Ch. IV.* See Sub Mortgage-RAM SHANKERLAL *v.* GANESH PARSHAD **4 A. L. J. 273 = A. W. N. 1907 P. 97 = 2. M. L. T. 248 = 29. A. 385.**

182. s. 58, 59, 100.—*Mortgage—Attestation, absence of—Charge*

Where a transaction evidenced by a document was a mortgage as defined by s. 58 of the Transfer of Property Act, but the document was not attested by two witnesses as required by s. 59 of the Act.

Held, that it did not operate as a charge under s. 100 of the Act. *Rani Kumari Bibi* v. *Sri Nath Roy* (1 C. W. N. 81) and the observations of the Banerjee J. in *Tofaluddi Peada* v. *Mahar Shaha* (I. L. R 26 Cal. 78), approved. PRAN NATH SARKAR *v.* JADU NATH SAHA. **9 C. W. N. 697 = 32 C. 739**

183. S. 58, 59, 100 —*Construction of bond for repayment of debt—Simple mortgage—Attestation.*

The plaintiff brought a suit on a bond which stated "as collateral security for payment of the said money, I mortgage 23 bighas &c." but there was nothing in it to show that any interest was actually transferred.

Held, that the document should be treated as a simple mortgage within the meaning of s. 58 of the Transfer of Property Act and not as a charge under s. 100. Consequently not being attested by two witnesses, as required by s. 59, it could not have operation as a mortgage. NABIN CHAND NASKAR *v.* RAJ KUMAR SARKAR. **9 C. W. N. 1001.**

184. S. 58, 59, 100.—Difference between mortgage and charge. *See compromise decree.* GOBINDA CHANDRA PAUL. *v.* DWARKA NATH PAUL. **7 C. L. J. 492.**

185. s. 58, 67 & 68.—*Usufructuary mortgage—Temporary sale with possession as security for debt—Application of Transfer of Property Act.*

A borrowed a sum of money from B and as security therefor, temporarily sold certain land to her with a promise to re-take it on payment of the consideration money and put B in possession. Sometime after A entered on the land without B's consent and was in wrongful possession. B sued for a decree for ejectment and for possession or, in the alternative, for recovery of the amount lent, to be paid within a time to be fixed by the Court and that, in default, the land be sold and the proceeds applied towards satisfaction of the amount decreed.

Held, that the transactions amounted to a usufructuary mortgage within the definition contained in S. 58 (*d*) of the Transfer of Property Act. Though that Act was not in force, where the land was situated the principles of that Act were applicable. Applying the principles of S. 67 and 68 of that Act, there could be no decree for sale.

The decree for sale passed by the Lower Court was therefore set aside and a decree ejecting the defendant and putting the plaintiff back in possession was passed. (11 A. 367, 24 C. 677 and 12 M. 109 *referred to.*) SHWE LOK *v.* MA SEIK KAUNG. **4 L. B. R., 222.**

186 s. 58, 60, 86—*Contract Act (IX of 1872), s. 16—Sawaikhichadi—Interest on instalment in default—Mortgage enforceable in its entirety—Each case to be decided by its own circumstances.*

A mortgage deed, both the parties to which were money-lenders, purported to be a security for Rs. 5,000 as principal and Rs. 1,250, *sawai* repayable by 27 instalments. The *sawai*, which equalled one-fourth of Rs. 5,000, was to take the place of interest. The sum of Rs. 5,000 was made up as follows:—Rs. 4,812 8 were paid to the mortgagor in cash, Rs. 87-8 were retained by the mortgagee on account of the first instalment and Rs. 100 were retained on account of *khichadi* (bonus). The mortgagee having brought a suit to recover the mortgage-debt, namely, Rs. 7,995, and a question having arisen whether the mortgage was so unconscionable as to be unenforceable in its integrity;

Held that under the circumstances of the case, the mortgage was enforceable in its integrity. *Per Curiam*:—The principles of justice, equity and good conscience do not of necessity disentitle a mortgagee from insisting on his security for a greater sum than what has been actually advanced; in each case the question must be asked whether there has or has not been a hard and unfair bargain on the borrower, but when that is not established against the mortgagee then the right to redeem still remains, though it is redeeming not on payment of the sum advanced, but of the sum which the parties agreed it was worth the mortgagor's while to pay in order to get a smaller advance when he was in want of money. Each case must be determined according to its own circumstances.

Held, further, that there was nothing illegal in the provision for the payment of *sawai*. *Per Curiam*:—The Courts do not

Sup: Govt. acts (IV of 1832) (*Cont-d*)

lean towards compound interest, they do not award it in the absence of stipulation but where there is a clear agreement for its payment, it is, in the absence of dis entitling circumstances, allowed. HARI *v.* RAMJI. 6 B. L. R., 306=28. B. 371.

187 s. 58 (b), 67, 68, 93.—*Combination of simple and usufructuary mortgages—Personal covenant to pay—Right of mortgagee to decree for mortgage money and for sale.*

A mortgage deed, after acknowledging receipt of the consideration and mortgaging the land with possession (the usufruct, apparently, being taken in lieu of interest), contained the following proviso as to redemption; —"Thereafter, on [naming a date] on paying [the amount advanced] we shall redeem our land. If, on the date so fixed, the amount be not paid and the land recovered back, in whatever year we may pay [the amount advanced] on [naming the date] of any year, then you shall deliver back our lands to us":

Held, that this contained a promise by the mortgagor to pay on the date named, and that the mortgagee was entitled to a decree for the mortgage money, under cl. *(a)* of s. 68 of the Transfer of Property Act, and to a decree for sale under s. 67 the right to cause the mortgaged property to be sold in default of payment being implied within the meaning of s. 68 *(b)*. KANGAYA GURUKAL *v.* KALIMUTHU ANNAVI. 27 M. 526; F. B.

188. S. 58, 67, 99.—*Execution of decree—Security for costs—Sale of properties given as security—Mortgage—Interest on costs.*

As security for the costs of the respondents in appeal to the Privy Council the appellants executed a duly attested and registered bond whereby they "put certain immoveable properties in security" for such costs. The privy Council, in dismissing the appeal, awarded the respondents their costs, who thereupon in execution applied for the sale of the properties comprised in the bond:

Held that the effect of the bond was to create a mortgage; and that having regard to S. 99 of the Transfer of Property Act, the properties could not be sold without instituting a suit under S. 67 of the Act. 26 C. 246; 26 C. 190 and 29 C. 707 referred to 2 A 604 and 30 C 10 60 dist. TOKHAN SINGH *v.* GIRWAR SINGH 1. C. L. T. 118=9 C. W. N. 372=32 C. 494.

189. S 58 a. b—*Covenant to pay—Simple and usufructuary mortgage.* See Mortgage construction—KANGAYA GURUKAL *v.* KALIMUTHU (See supra No 187) ANNAVI. 14 M. L J 61=27. M. 526 (F. B).

189 (a). s 58 (b)—*Occupancy Raiyat creating usufructuary mortgage on his non-transferable holding* See Bengal Rent Act VII of 1869 S. 6. KRISHNCHANDRA DUTT *v.* MIRAN BAJANIA. 3. C. L. J. 222=10. C. W. N. 493.

Sup: Govt. acts (IV of 1832) (*Contd.*)

190. s. 58. c—A mortgage by conditional sale requires that a certain date for of payment must be given therein.—*See mortgage.* KNURAM MONDAL. 6. C. L. J. 203=11. C. W. N. 400.

191. s. 58 b, d, 98.—*Usufructuary mortgage—Simple mortgage—Anomalous mortgage—Suit by mortgagees for recovery of debt and in default of payment by mortgagors for foreclosure and possession.*

A mortgage-deed (1) put the mortgagees in possession of the mortgaged property and authorized them to retain possession until payment of the mortgage money, the mortgagors being given credit for all profits recovered from the mortgaged property over and above the Government assessment. (2) It also contained a personal covenant by the mortgagors to pay the mortgage money and an implied agreement that in the event of non-payment, the property should be sold (the debt to be recovered from the mortgaged land and from the persons and from other property of the mortgagors). Sometime after the date of the mortgage, the mortgagees let out the mortgaged property to the mortgagors for a certain term and before the expiration of the term, the mortgagees brought a suit for the recovery of the debt and in default of payment by the mortgagors for foreclosure and possession.

Held that owing to the proviso (1), the mortgage was usufructuary within the meaning of clause (*d*) of S. 58 of the Transfer of Property Act (IV of 1882), and owing to the proviso (2), it was a simple mortgage under cl. (*b*) of the section. The transaction was therefore an anomalous mortgage provided for by S. 98 of the act, being a combination of a simple mortgage and usufructuary mortgage. In such a case, the rights and liabilities of the parties must be determined by the contract as evidence in the mortgage-deed and so far as such contract does not extend, by local usage.

Held further that though the plaintiffs were not entitled to regain possession, they having let out the property to the mortgagors for a term, still that circumstance did not affect the distinct and independent right of the plaintiffs to sue for the mortgage-money and to obtain a decree for sale of the mortgaged property.—AMARCHAND *v.* KILA MORAR. 27. B. 600.

192. s 58 d—*Mortgage—Suit for redemption—Stipulation for interest until principal paid off—Mortgagee in possession and in receipt of rents and profits—Reduction of mortgagee's security by acts beyond mortgagor's control—Acquiescence of mortgagee.*

The plaintiff mortgaged to the defendant twelve villages, and stipulated in the mortgage deed that "until delivery of possession of the aforesaid villages I shall pay interest at the rate of 2 per cent on the mortgage money," and that "until I pay up the Rs 5,300 on account of principal with interest to the very last pie, the mort-

Sup: Govt. acts (IV of 1882) (*Contd.*)

gagee shall continue in possession and occupation of the villages." Possession of the villages was given to the mortgagee at the time of the execution of the mortgage; but a reduction in the number of villages in his possession was caused by a grant by the native Government in 1853, and settlements in 1858 and 1864 in favour of other persons. By a lease executed at the same time as the mortgage, some of the villages were leased to the plaintiff, who thus became the tenant of the mortgagee, and paid rent in lieu of interest.

Held, in a suit for redemption, that the interest referred to in the mortgage deed was only interest until possession was given of the mortgaged property: the mortgagee after possession took the rents and profits instead of interest, and the plaintiff was entitled to redemption on payment of the principal sum of Rs. 5,600 only.

Held also that no difference to this result was caused by the reduction in the number of villages held by the mortgagee, which did not constitute a failure on the part of the mortgagor to secure to the mortgagee possession of the mortgaged property such as entitled the mortgagee to claim interest in lieu of the rents and profits of those villages of which he was so dispossessed. The settlements were final as to the ownership of the mortgaged property, and the mortgagee having brought no suit, as he thought have when his security became diminished must be taken to have acquiesced more dispossession.—RAJA PARTAB BAHADUR GUJADHAR BAKHSH, 7 C. W. N. 97=521: P. C.

193. S. 58 (d) & 67 (a).—*Usufructuary mortgage—Converted from simple mortgage by mortgagee's taking possession—Interest* See mortgage. KALLU *v.* DAYARAM. **5 O. C. 286.**

194. S. 58 (d).—*Occupancy tenant—Heritable and non-transferable lease—Sub-lease.* See Lease. KANHYA BAKSH *v.* RAJA MEHDI ALI KHAN. **2 O. C. 12.**

195. S. 58 (e).—*Condition to reconvey not limited to time for repayment of mortgage debt—Essentials of English mortgage.*

The three essentials of an English mortgage, as defined in s. 58 (e) of the Transfer of Property Act, are (1) that the mortgagor should bind himself to repay mortgage-money on a certain day, (2) that the property mortgaged should be transferred absolutely to the mortgagee, (3) that such absolute transfer should be made subject to a proviso that the mortgagee will reconvey the property to the mortgagor, upon payment by him of the mortgage-money on the day on which the mortgagor bound himself to repay the same. A deed of mortgage recited that the mortgagors "hereby mortgage and assign to the mortgagee" the mortgaged property.

Semble, that (though it was doubtful if such an assignment was really an absolute one) the assignment was sufficient to fulfil the second requisite of an "English mortgage." The proviso for reconveyance in the deed was as follows:—"Upon repayment to the mortgagee of all sums due to him by the mortgagers the mortgagee shall reconvey the said property to the mortgagors," etc.

Held, (by the same Division bench), that the transaction could not be regarded as an English mortgage, there being no words importing that the covenant to reconvey was dependent upon the repayment of the mortgage-money being made at the stipulated time and that it should not be enforced in default of repayment at that time.

As to acknowledgement by managing member and limitation for a suit for foreclosure or sale, *see Limitation Act XV of 1877, Art. 147 and S. 19.* NARAYANA AYYAR *v.* VENKATA RAMANA AYYAR. **25 M. 220.**

196 s. 59—*Attesting witnesses—Remand.*

J executed a mortgage deed by putting her finger mark to it and P, who was present, at her request, wrote her name on it and also his own name, preceded by the words "by the pen of."

Held that P was an attesting witness and could not be regarded as having executed the document on behalf of J. In this case, it was further contended that the deed was not attested by two witnesses, and the case was remanded to the lower court for further evidence to prove that at least two of the signatories to the document were attesting witnesses. DINAMOYEE DEBI *v.* BON BEHARY KAPUR. **7 C. W. N. 160.**

197 s. 59—*Evidence Act, ss. 70. 144—Mortgage bond—Attesting witnesses—Presumption.*

Two names appeared on a mortgage bond as attesting witnesses. One of them, the writer of the bond, denied the execution of the bond, but it was proved that such denial was false. The other man admitted the execution of the bond in his presence but could not remember if the executant signed it in the presence of the writer. On the face of the bond, the signature of the writer appeared above that of the other man.

Held that under such circumstances, the presumption arose that both of them signed the bond as attesting witnesses after its execution. JOGENDRA NATH *v.* NITAI CHURN. **7 C. W. N. 384.**

198 s. 59—*Attestation of mortgage.*

Held that the attestation of a mortgage deed spoken of in s. 59 of the Transfer of Property Act, 1882, does not mean only attestation of the execution of the deed in the presence of the witnesses thereto, but includes also attestation after execution of the deed of the acknowledgement by the executant of the signature on the deed. *Grindra Nath Mukerjee v. Bejoy Gopal Mukerjee.* (I. L. R., 26 Cal. 246), and *Abdul Karim* v. *Salimun.* (I. L. R., 27 Cal., 190) dissented from. *Ramji* v. *Parvati*, (4 B. L. R. 869) and the *obitor dictum* in *Seikh Ghazi* v. *Bhawani prasad.* (A. W. N. 1896, p. 89) followed. GANGA DEI *v.*

Sup: Govt acts (IV of 1882) *(Contd.)*

SHIAM SUNDER. **A. W. N. 1903. P. 201 = 26 A. 69.**

199. S. 59—*Attestation of mortgage-bond—Meaning of the word "attested"—Attestation in the presence of the mortgagor after having received from him a personal acknowledgement of the signature.*

A mortgage-bond was signed by the mortgagor, was attested by three witnesses and was duly registered. In a suit for the mortgage-debt, it appeared from the evidence that none of the attesting witnesses had actually seen the execution of the deed by the mortgagor, but must have attested merely on the mortgagor's admission of his signature. The lower Courts held that this was not sufficient under S. 59 of Transfer of Property Act, and that the mortgage was, therefore, invalid. On appeal to the High Court, *Held* that the attestation was sufficient. A mortgage-deed is attested within the meaning of S. 59 where the witnesses have signed it in the presence of the mortgagor after having received from him a personal acknowledgement of his signature. ABDUL KARIM *v* SALIMUN. *(I. L. R., 27 Cal. 190) dissented from.*—RAMJI *v.* BAI PARVATI. **4 B. L. R. 869 = 27. B. 91.**

200. S. 69.—*Attesting witness—Writer—* See Evidence Act S. 68, Col. 189. **5. C. W. N. 454.**

201. S. 59.—*Attestation by a mark—Sufficient.*

An attestation by a mark is a sufficient attestation within the meaning of S. 59 of the Act. 2 C. W. N. 603, 11 L. J. Ex. 193; 8 Ves. 185; 8 Ves. 504; 61 R. R. 183; 3 B. 382; 11 C. 429; 15 M. 261, 31 R. R. 755; 32 R. R. 328 and 4 L. J. M. C. 25, Refd. to.—SHRIKISHEN MAYACHAND *v.* SONBA BHOER **1. N. L. R. 14.**

202. S. 59.—*Attestation of mortgage-deed—Evidence—Onus—*'Omnie rite esse acta.'—*Foreclosure suit—*

Some of the mortgagors admitted, while others denied, execution of the mortgaged-deed sued on. The first Court put the burden of proving the mortgage to be valid on the plaintiff. The attesting witnesses deposed that they saw the executants sign and that they attested the document. The Court disbelieved them and held the deed to be operative merely as a simple money-bond. On plaintiff's appeal the Divisional Judge held that, as the execution of the deed had been proved and the attestation was one *prima facie* duly made, it should be presumed valid unless there was definite evidence showing the contrary; and, that, as the burden of proof lay on the defendants and they had not satisfactorily discharged it, plaintiffs were entitled to obtain the foreclosure decree prayed for. On second appeal, it was further contended in support of the mortgagees that, S. 70 of the Indian Evidence Act is inconsistent with their being required to do more than prove execution by the mortgagor of a deed, which purports, on its face, to have been attested but that contention was overruled on the ground that there was no such inconsistency since the execution of a deed, to whose validity attestation is essential, designates the whole operation, including both the signature of the party and the attestation of the subscribing witnesses; and S. 70 of the Indian Evidence Act lays down no rule as to the burden of proof, but, in a particular class of cases, makes proof of partial execution adequate as proof of complete execution.

Held, also, that where there is evidence on both sides as to the *factum* of attestation, the maxim "*omnia rite esse acta*" can only be resorted to, if at all, when the evidence on both sides is evenly balanced. The maxim operates when there is no evidence on either side, and possibly it may be used to eke out unconvincing testimony on one side only. In the present case, therefore, the decree of the lower appellate Court was reversed, since it had erroneously proceeded as if the maxim compelled the mortgagors to show that the attesting witnesses could not have seen the mortgagors sign the mortgage-deed. JHAMA *v.* DEOBUX. **2 N. L. R. 10.**

203. S. 59.—*Attestation, when valid—Indian Succession Act, S. 50.*

There is no attestation unless the act of signing by the person who executes the document is done in the presence of the attesting witnesses. The thing must be done in the presence of the man who in future will be able to testify that it was done.

The provisions of S. 50, cl. (3) of the Succession Act cannot be made applicable to other Acts as though they appeared in an Interpretation Act. Those provisions have a special history and follow the provisions of the Wills Act, 1 Vic. C. 36; and it would not be justifyable to apply them to other Acts. 26 C. 246. 27 C. 190, 33 C. 864, 7 C. W. N. 160, *followed.* 27 B. 91, 26 A. 69, *dissented.* SHAMU PATTAR *v.* ABDUL KADER RAVATHEN. **3 M. L. T. 300.**

204. S. 59.—*Mortgage-deed, execution of—Attestation, required by law—"Attest"—"Attestation," meaning of—Signatures of witnesses affixed by other persons, with their consent—Marks, affixing of, absence of—Illiterate witnesses—Touching of pen, if sufficient.*

Per Rampini, J.—A deed required by law to be attested is properly executed when the signatures of the witnesses are affixed for them to the deed by another person, with their consent, they being illiterate and not able to write. It is not necessary that witnesses should put their marks at the deed themselves, any such mark on the deed not being implied in the word "attest."

"To attest" means only to witness the execution of a deed and there is nothing to preclude the signatures of the witnesses, as in this case, from coming under the heading of attestation.

Per Mookerjee, J.—"To attest" is to bear witness to a fact, and it is not necessary that the witness attesting a document should

Sup: Govt. acts (IV of 1882) (*Contd.*)
sign his name personally. *9 M. & W. 404; 9 Q. B. D., 139; 4 El. & B. 459, referred to.*

A signature, as contemplated by section 59 of the Transfer of Property Act (IV of 1882), need not be by the mortgagor personally but may be by some person acting on his behalf and under his authority. If the mortgagor is illiterate it is a good signature, if in the presence and at the request of the mortgagor some other person signs the mortgagor's name on his behalf as executant of the deed. There is no distinction in this respect between the signature of the mortgagor and the attestation by the witnesses. *24 All., 319, referred to and followed. 2 C. W. N., 603, referred to and explained. 7 C. W. N., 160; 29 Cal., 749, referred to.* SASI BHUSAN PAL *v.* CHANDRA PERHKAR **C. L. J., 41 = 33 C. 861.**

205. S. 59.—*Attestation of document—Admission of execution—Mortgage.*

The attestation required by section 59 T. P. A. is an attestation by witnesses of the execution of the document and not of the admission of execution. *27 C. 190, 26 C. 78, 26 C. 246, 3 M. I. A. 395 followed.* PANDURANG *v.* BALAJI.—**14. C. P. L. R. 1901—P. 42.**

206. S. 59.—*Signature with mortgagor's authority.*

Held, that S. 59 does not require personal signature of the mortgagor although if the mortgagor's signature is affixed for him by another man with his authority. MIRZA HAIDER ALI *v.* RAJA JANG BAHADUR. **6 O. C. 279.**

(In this case the mortgage deed was signed by another person for the mortgagor at latter's request).

207. s. 59. *Non-compliance, Personal covenant to pay:—*

Per *Subrahmanya Aiyar*, J:—It is settled law that non-registration of deeds purporting to mortgage immoveable property, and as such requiring to be registered, does not affect the validity of the *contract* to pay the debt. Non-compliance with the provisions of S. 59 of the Transfer of Property Act cannot have any further effect than to invalidate the instrument as a mortgage, *i. e*, as a transfer of an interest in immoveable property for the purpose of securing repayment of a loan, and if the instrument contains a personal covenant to pay, the same may be enforced, in spite of non-registration. SADU KAVAUR *v.* BASAVIAH. **17 M. L. J. 167 = 30 M. 284.**

208. s. 59, 100. *Invalid mortgage, creates a charge—Construction.*

A document, which fails to comply with the requirements of S. 59, and is, in consequence, not a valid mortgage, can, nevertheless, operate to create a charge, upon the property mentioned therein, under S. 100, on the principle that legal effect should, if possible, be given to a legal intention clearly expressed (24 M. 299 referred 26, C. 78 Dissented). NELLAKANTAM IYER *v.* MADASAMI TEVAN. **17 M. L. J. 39.**

209. s. 59, 100. *Mortgage deed—Attestation—Charge.*

Sup: Govt. acts (IV of 1882) (*Contd.*)

The failure to comply with the provision for attestation contained in section 59 of the Transfer of Property Act 1882, does not convert a mortgage transaction into a charge. NARAYAN BABAJI *v.* LAKSHMANDAS HARAKCHAND. **7 B. L. R. 934.**

210. s. 59, 98. *Kanom mortgage redemption and renewal of the mortgage.* See mortgage redemption. V. Y. L. GOPALAN NAIK *v.* P. KANHAN MENON. **15 M. L. T. 131 = 17 M. L. J. 189 = 30 M. 300.**

211. s. 59, 123. *Signature of Mortgagor—Mortgagor's name signed by the scribe of the document at the request and in the presence of an illiterate mortgagor—Signature held to be good—Maxim—Qui facit per alium facit per se—Construction of Statutes.*

It is not imperatively required by s. 59 of the Transfer of Property Act 1882, that a mortgage, where the principal money secured is Rs. 100 or upwards, shall be signed by the mortgagor, with his own hand, or by an agent specially appointed in that behalf. If the mortgagor is illiterate, it is a good signature if, in the presence and at the request of the mortgagor, some other person signs the mortgagor's name on his behalf as executant of the document. So held by Stanley, C. J., and Knox, Blair and Banerji, J. J. (Aikman, J., *dissentiente*) overruling the decision in *Moti Begam* v. *Zorawar Singh*, (All. W. Notes, 1899, p. 196).

Per Aikman, J.—Whether or not the autograph signature of the executant is required to any particular document is usually a question of construction to be decided separately in each case. In the case of a mortgage executed in accordance with the provisions of S. 59 of the Transfer of Property Act 1882, the law requires the personal signature of the mortgagor. In the course of the judgments the following authorities were referred to—(2 Beng. N. C., 776); (L. R., 22 Ch. D., 142); (L. R., 8 Q. B., 305), (L. R., 32 Ch. D., 337); (20 W. R. Cr. 375) : (8 W. R, I), (14 Q. B. D., 22), (L. R, 1819, A C., 531); and (6 Moo. P. C., 1). DEO NARAIN RAI *v.* KUKUR BIND.—**A. W. N., 1902 P. 127 = 24 A. 319. (F. B.)**

212. s. 59—See S. 3, 58, 59—33 C. 410. No. 12 *supra.*

213. s. 59—See S. 54, 59, 99, 100—28. M. 54. No. 14 *supra.*

214. s. 59—See S. 55, 59—30 M. 284. No. 167 *supra.*

215. s. 59—See S. 58, 59—3 M. L. T. 317 No. 175 *supra.*

216. s. 59—See S. 58, 59, 100—32. C. 729 No. 182 *supra.* See also 9 C. W. N. 100

217. s. 59—See S. 58, 59, 100—9 C. W. N. 1001 No. 183 and 7 C. L. J. 492. No. 184 *supra.*

218 s. 60—*Mortgage—Right of a purchaser of a part of equity of redemption to redeem the whole—Mortgagee's option.*

Held that a purchaser of a portion of the equity of redemption was not entitled to redeem the whole against the will of mortgagee. He could redeem his portion only. 13 M. I. A 401 at P. 415 follow-

Sup: Govt. acts (IV of 1882) *(Contd.)*

ed. GRISHCHANDAR DEY *v.* JURA MONI DEY. **5 C. W. N., 83.**

219. S. 60—*Mortgage—Effect of mortgagee purchasing part of the mortgaged property—Redemption.*

Where a mortgagee acquires a part of the mortgaged property, and thus a fusion takes place of the rights of the mortgagee and the mortgagor in the same person, the indivisible character of the mortgage is broken up, and one of several mortgagors may in such a case redeem his own share only on payment of a proportionate part of the mortgage-money but he cannot compel the mortgagee to allow him to redeem the shares of other persons, in which he is not interested. 2 All. 565, followed. 17 All. 63, referred to. 15 Bom. 24, distinguished. KALLAN KHAN *v.* MARDAN KHAN.—**A. W. N. 1905. P. 225=28. A. 155.**

220. S. 60.—*Mortgage—Purchase of part of the mortgaged property—Mortgage foreclosed, purchaser not being made a party—Right of purchaser to redeem part of the mortgaged property.*

The plaintiffs' father purchased some *sir* land which, along with other property, was the subject of a mortgage by conditional sale. The mortgagees subsequently instituted a suit for foreclosure, in which they obtained a decree and an order absolute for foreclosure. But the mortgagees, although they had notice of his interest in the mortgaged property, did not join the purchaser as a party to their suit.

Held that there was no bar to the plaintiff's suing to redeem that portion of the mortgaged property in which their father had acquired an interest, and that they were not bound to redeem the whole mortgage. 2. A. L. J. 752 followed. BRIJ KISHORE *v.* MADHO, **3. A. L. J. 27.=A. W. N. 1905. P. 278=28. A. 279.**

221. S. 60.—*Clog on right of redemption.*

Where a bond contained a covenant to the effect that a usufructuary mortgage previously executed between the same parties, should not be redeemed until the money payable on the bond should have been paid up with interest:

Held, such covenant operated as a clog on the mortgagor's right of redemption and could not be enforced. 4 A 85 not followed.—SHEO SHANKER *v.* PARMA MAHTON, **A. W. N., 1904, p. 123=26 A. 559.**

222. S. 60.—*Partial redemption when allowed.*

Where a mortgagee purchased equity of redemption in a portion of the mortgaged property, a portion of the mortgage debt is proportionately extinguished and the mortgagor is entitled to redeem the remainder on payment of proportionate mortgage money. 22. A 284 referred to. SHIBLAL *v.* BHAWANI SHANKAR. **A. W. N. 1903. P. 190=26. A. 72.**

223. S. 60.—*Claim in the alternative—Effect on suit where there has been no previous tender or payment of mortgage amount.*

A mortgagor who institutes a suit for the redemption of his mortgaged property is entitled to put an alternative claim before the Court. He may aver that the mortgage money has been repaid, and in the alternative, in the event of the Court finding any sum to be still due under the mortgage, that he is prepared to pay such further sum. S. 60 of the Transfer of Property Act raises no bar to a suit for redemption where the mortgage money has not been paid or tendered. —BUTCHANNA *v.* VARAHALU, **24 M., 408.**

224. S. 60—*Foreclosure of a portion of the mortgaged property.*

Under S. 60 if the mortgagees have acquired in whole or part the share of a mortgagor, a person interested in a share only of the mortgaged property may redeem his own share; and in such a case, the mortgagee also is entitled to foreclose such a share. INU KHAN *v.* NAIMUDDIN SIRCAR, **3. C. L. J. 377.**

225. S. 60.—*Purchase by mortgagee of a portion of mortgaged property—Right of one mortgagor to redeem his share.*

When a mortgagee purchases the equity of redemption in a portion of the mortgaged property the integrity of the mortgage is broken up, and one of the several mortgagors can redeem only his share of the property. 13 M. I. A. 404, 2 A. 565, 5 C. W. N. 83 *referred to.* MUNSHI *v.* DAULAT. **4 A. L. J. 74=A. W. N., 1907, P. 49=29 A. 262.**

226. S. 60. *Construction of mortgage—Provision to make over land on failure to redeem at a certain time.*

Held, that in Upper Burma the Courts being bound not by the ancient law of India in relation to mortgages, but by equity, justice and good conscience, the equitable rule contained in section 60 of the Transfer of Property Act would apply in favour of redemption—But that if the case were one depending on the terms of the contract when the terms of the—deed were that the mortgagors would redeem at a certain time and if they failed to do so would make over the land outright to the mortgagees, and the mortgagors sued for redemption after the expiry of the stipulated time, the mortgagors' right to redeem was not forfeited by reason of their having failed to redeem at the stipulated time—that the contract was not intended to execute itself, and that a further transaction was necessary before the land could become the property of the mortgagees. 26 C. 1, U. B. R. 1897 to 1901, P. 502, U. B. R. 1897 to 1901, P. 509 *followed.* S. L. B. 549 and 645, 1 L. B. R. 192, 13 M. I. A. 560, 1 M. 1 *referred to.* NGA KYA *v.* NGA YU NUT. *U. B. R., 1907, P. 1 mortgage.*

227. S. 60.—*Mortgage-deed with forfeiture clause. T. P. Act not extended—Rule of English Equity Courts—Clogging rights of redemption.*

Where a mortgage of land by a registered deed stipulated that if the mortgagors did

Sup: Govt. acts (IV of 1882) *(Contd.)*

not redeem within two years the mortgagee would be entitled to outright ownership of the land, and such land was situate in a place to which the T. P. A. had not been extended.

Held, that the mortgagor must be held bound by the clause, and that consequently he had no right to redeem the land. 7 B. L. R. 136, 1. M. 1. *followed*. S. J. L. B. 549 and 645 *referred to*. MAUNG MAUNG *v*. MA BAK SON. **1 L. B. R 1900-02, P. 192.**

228. s. 60—*Creation of a term in mortgage—Redemption.*

Despite the creation of a term, a mortgagor may redeem at any time unless it appears from the nature of the mortgage or from other circumstances that the term was created in favour of the mortgage as well as of the mortgagor. S. 60, T. P. A., does not alter the Law as it previously existed. 1 C. P. L. R. 1 *dissented from*. 5 B. 22, 2 M. 314, 22 B. 677, 8 A. 95, 16 M. 486, 23 M. 33 *referred to* and *discussed*. JIVAN LAL *v*. DHUNDE. **16 C. P. L. R., 1903, P. 59.**

229. S. 60.—*Suit for redemption—Absence of tender of amount due.*

Held, that where there is a dispute as to the amount due and the mortgagor makes no tender or tenders what turns out to be an insufficient sum, his suit for redemption should not be dismissed on the ground that no tender was made. BURMA BAKSH *v*. SURAJ SINGH. **5 O. C. 127.**

230. S. 60.—*See S. 54, 60,—24 M. 449 No. 142 supra.*

231. s. 60.—*See S. 58, 60—28 B. 371 No. 186 supra.*

232. 60, 61.—*Suit for foreclosure—Further charge subsequent bond stipulating repayment at the time of redeeming previous mortgage—Clog on redemption.*—See mortgage. RADHA KRISHNA *v*. SHEO DIAL. **8 O. C. 132.**

233. S. 60, 62.—*Law of mortgage in Oudh —Previous to T. P. A.—Redemption—Suit*—See Mortgage—AHMAD BAKSH *v*. SETH RAGHUBARDIAL. **3 O. C. 371.**

234. S. 60, 74—*Portion of mortgaged property*—See Mortgage—BALDEO BAKHSH SINGH *v*. JAWAHER SINGH. **2 O C. 344.**

235. S. 60, 92, 93—*Mortgage—Redemption—Second suit for redemption—Civil Procedure Code, Section 13—Res-judicata.*

When the plaintiff obtained a decree for redemption directing that if payment was not made within the time fixed, 'the judgment should be deemed to be non-existent' and he failed to pay the decretal amount within the time allowed, *held*, that he was not precluded from bringing a fresh suit for redemption.—*19 All., 202, overruled, 6 Mad., 119; 7 Mad., 423; 8 Mad., 478; 15 Mad., 366; 17 Mad., 96; 19 Mad., 40; 21 Mad., 18; N. W. P. H. C. R., 1867, P. 256; N. W. P. H. C. R., 1868, p. 381; N. W. P. H. C. R. 1871, p. 62; 4 All., 481; 11 All., 386; 21 All., 251; 7 Bom. 467 10 Bom., 461; 13 Bom., 567; 22 W. R. (C. R.) 172; 13 M. I. A., 404, ref rred to.*—SITA RAM *v*. MADHO LAL.—**W. N. A., 1901, p. 191.**

236. S. 60, 83, 95—*Clog on redemption of*

Sup. Govt. acts (IV of 1882) *(Contd.)*

Mortgage—Purchaser of part of equity of redemption, right of, to redeem the whole mortgage —Right of purchaser of another part of the equity.

Held, that provisions in a bond executed after the execution of a usufructuary mortgage, to the effect that the mortgage would not be redeemed until the money payable on the bond was fully satisfied, were a clog and fetter on redemption placing in the way of the mortgagor a bar to the exercise of the right of redemption which the law gave him, and therefore provisions which could not be enforced. *Held* also that where the plaintiff was the purchaser of a part of the equity of redemption and paid into the Court the whole amount due on the mortgage for the purpose of redeeming the whole of the mortgage, the effect would be to satisfy and discharge the mortgage fully. The purchaser of another part of the equity of redemption could not in the same suit claim to have his proportionate share in the mortgage redeemed as there would be no longer any subsisting mortgage which could be enforced or redeemed. (A. W. N., 1904, p. 123) *followed.*—RUGAD SINGH *v*. SAT NARAIN SINGH.—**A. W. N., 1904, p. 208 = 27 A. 178.**

237. s. 61.—*Clog on equity of redemption*—See Mortgage—Redemption clog on. RAMA SWAMI PATTAR *v*. CHINNAN ASARI. **11 M. L. J. 132 = 24 M. 449.**

Also, Sheo Shanker *v*. Parman Mehton, A. W. N., 1904, P. 123 = 1 A. L. J. 282 = 26. 559; *also*, Durga Pershad *v*. Dukhi Roy, 9 C. W. N., 791; *also*, Kauleshar Singh *v*. Raghubir Singh, 1 A. L. J., 224; *also*, Rugad Singh *v*. Satnarain Singh, A. W. N., 1905, P. 203 = 1 A. L. J., 572 = 27 A. 178; *also*, Bhagwandas *v*. Shamdas, A. W. N., 1901, P. 121 = 23 A. 429; *also*, Hari *v*. Vishnu, 6 B. L. R., 313 = 28 B. 349 (F. B.); *also*, Kahayialal *v*. Narhar, 27 B. 297; *also*, Mahomed *v*. Ezekiel, 7 B. L. R., 782; *and also*, Rajamal *v*. Shivaji, 4 B. L. R, 966 = 27 B. 154.

238. s. 61.—*Clog on equity of redemption.* BHARTU *v*. DALIP. **3 A. L. J., 672 = A. W. N., 1906, P. 278.**

239. S. 61.—*Clog on equity of redemption.* See Mortgage Redemption, clog on. DURGA PERSHAD *v*. DUKHI ROY. **9 C. W. N., 789.**

240. s. 61.—*See S. 60, 61—8 O. C. 132 No. 232 supra.*

241. S. 62.—*See S. 60, 62—3. O. C. 371 No. 233 supra.*

242. s. 62.—*Discretion of Court in decreeing redemption in a suit for possession—Suit for possession to be treated as one for zar-i-peshgi lease*—See Mortgage Redemption RIASAT HUSAIN *v*. GAURI PERSHAD—**4. O. C. 257.**

243. S. 62 and 63.—*Redemption Limitation Act art. 134—Mortgage by mortgagee's donee purporting to be of a proprietary interest in the morgaged property—Foreclosure.*

A mortgagor ordinarily cannot, before the time limited for payment to the mort-

Sup: Govt. acts (IV of 1882) (*Contd.*)

gagee expires, take proceedings to redeem the mortgage (14 Sim 427, 5 B 22, 8 A. 95, L. R. 1900, 1 ch. 142 Refd).

A. the widow of a usufructuary mortgagee in possession made a gift of the mortgaged property to B. B. mortgaged part of the property, the subject of this gift, to C., purporting to mortgage the full proprietary interest in the property. C. took proceedings for foreclosure against B, as absolute owner and obtained foreclosure and possession of the property.

Held, on the finding that C acted *bona fide* and had no reason to suppose that B was not, as he represented himself to be, the full owner of the property mortgaged, that C. was entitled, as against the representative of the original mortgagor, to the protection afforded by article 134 of the second schedule to Act No. XV of 1877 25 M. 99, 23 B. 614, D; 9 A. 97, 14 M. I. A. 1, 15 B, 583, 20 A. 482, 22 B. 225, 24 M. 471, 27 B 373, Refd. HUSENI KHANNUM *v.* ALI HUSEN KHAN, **A. W. N. 1907 P. 133=4 A. L. J. 375=29 A. 471.**

244. s. 63 and 70—*Accession.*

The meaning of the term accession in S. 63. T. P. A. is explained. In this case B took an usufructuary mortgage of his lands from A for 16 years. During the currency of the mortgage B took a deed of conditional sale from C, an ordinary tenant, and obtained a conditional decree for foreclosure on the 28th November 1898; the term of B's mortgage expired, and A had a right to recover possession of his land on 10th April 1899. This right he (A) successfully enforced by a regular suit. On 3rd May 1900 B obtained an order absolute for foreclosure and on the 15th August he entered upon the possession of the holding. A sued to eject B from the said holding alleging that on expiry of the mortgage term, B's right terminated and that the mortgage of the holding could not enure for B's benefit.

Held that the conditional sale of the holding constituted an accession within the meaning of S. 63. T. P. A. and that the mortgagor is entitled to such accession on payment to the mortgagee of the expense of acquiring it 10. Bom 4 C. R. 369, 5. C. 198 followed. For instance the purchase by an usufructuary mortgagee of a rayoti holding would enure for the benefit of the mortgagor whereas the purchase of a *Malik Makbuza* plot might not so enure. In the one case he purchases as landlord and must make it good to the original land lord from whom he had derived his rights, and his case would fall under S. 90 of the Indian Trusts Act 1882. In the other case he may purchase it as a stranger for his own benefit. MOHANLAL *v.* CHAODHRI PULANDAR SINGH. **14 C. P. L. R., 1901 P. 169.**

245 s. 63—*See S. 62, 63—29 A. 471. No. 243 supra.*

246. s. 63, 83, 84, 91—*Proper time and place for deposit of mortgage money—Tenders in Court—Interest upon mortgage money—Subsequent to deposit in Court*—See Mortgage. KASAM SINGH *v.* MOHAMMAD SADDIK KHAN. **4. O. C. 387.**

247. s. 64.—*U. P. Rent Act S. 9—And U. P. Tenancy Act S. 20.*

S. 64 T. P. A. is in its operation subject to S. 9 Act XII of 1881 and S. 20 of Tenancy Act II of 1901 U. P. Acts. KEHAR *v.* HUSSAN ALI KHAN. **2 A. L. J. 583.**

248.—s. 64. *Mortgage—Lease. Renewal of—Effect on rights of mortgagor.*

If a trustee or mortgagee obtains a lease during the continuance of the trust or mortgage, the benefit of the lease taken by the mortgagee or trustee enures to the benefit of the *cestui que* trust or the mortgagor. The above rule is equally applicable in the case of the mortgagee of a *jote*, and even if mortgagee has reviewed it by threat of eviction. BAIJ NATH SINGH *v.* HARIKISHEN BHAGAT, **6. C. W. N. 372.**

249—s. 65. *Equity of redemption sold in portion of mortgaged property to discharge prior mortgage decree—Purchaser's right to recover his purchase money from* puisne *mortgagee in suit by the latter to enforce his mortgage —Re-purchase by purchaser of equity of redemption in portion of mortgaged property in a revenue sale—Rights of purchaser—Rights of* puisne *mortgagee in that portion.*

A portion of the mortgaged property was sold by the mortgagor to discharge a prior mortgage decree, *Held* a *puisne* mortgagee could enforce his mortgage against the portion sold, and the purchaser could not claim from the *puisne* mortgagee the purchase mony paid by him.

The mortgagor must be taken to covenant, under s. 65 T. P. A. in the absence of contract to the contrary, to pay all public charges in respect of the mortgaged property, when the mortgagee is not in possession. The mortgagee, and any one claiming through him, is entitled to the benefit of this covenant, but the purchaser of the equity of redemption from a mortgagor is not a party to such a covenant, and there is no obligation on him to pay the public charges accruing due in respect of what he has purchased, though it may be to his interest to do so and avert a revenue sale of the mortgaged property.

Where a person purchased the equity of redemption in a portion of the mortgaged property, but before the revenue pattah was issued in his name in respect of the portion sold, that portion was re-sold by the revenue authorities, owing to a default in the payment of revenue in respect of the remaining portion of the mortgaged property, and purchased again by the purchaser of the equity of redemption in the portion sold, the purchaser has absolute rights over the portion purchased and is entitled to hold it free of the mortgage, and the *puisne* mortgagee cannot proceed upon that portion. RENGA SRINIVASACHARI *v.* GNANAPRA-

Sup: Govt. acts (IVof 1882) (*Contd.*)

KASA MUDALIAR, **2 M. L. T. 36.=30. M. 67.**

250. S. 65, (5) cl. (b)—*Vendee of mortgage decree sold free from incombrance entitled to retain money to pay off claims against decree.*

Where a mortgage decree is sold free from incumbrances, the purchaser will be entitled, upon a principle anologous to that embodied in this section, to retain out of the purchase-money a sum sufficient to pay off any claim outstanding against the decree. KHETSIDAS AGARWALA *v.* SHIB NARAYAN MURDA **9 C. W. N. 178.**

251. S. 65. (c)—*Duty of mortgagor to pay public revenue on mortgaged land—Sale for arrears of revenue—Subsequent sale by purchaser at revenue sale to original mortgagor—Right of mortgagee under original mortgage.*

It is the duty of the mortgagor, under S. 65 (c) of the Transfer of Property Act, to pay the public revenue accruing due on the mortgaged property when it continues in his possession. If he fails to perform that duty and the land is sold for arrears of revenue and the purchaser at the revenue sale sells the land to the original mortgagor, the mortgage is not extinguished. A man cannot be allowed to take advantage of his own wrong, and notwithstanding that the land might have vested in the purchaser at the revenue sale free of the mortgage, the original mortgagor (or his son), on his purchase from the auction purchaser, cannot plead, for his own benefit, that by reason of such wrong there has been a statutory extinction of the original mortgage. (10 M. I. A., 540 at p. 557), *followed.*—SANAGAPALLY LAKSHMAYYA *v.* INTOORY BOLLA REDDY. **13 M. L. J. 129= 26 M. 385.**

252. S. 65 (e)—*See S. 90—A. W. N. 1903. P. 202=26 A. 93 No. 576 infra.*

253. S. 66. *Mortgage—Mortgagor's right to impose easement on mortgaged property—Easements Act (V of 1882), Section 10.*

Where the mortgagor of a house, with a well in its compound, made an express grant of the user of the well to the vendee of the adjoining house sold by him after the mortgage, and the mortgagee having purchased the mortgaged property in execution of his mortgage decree, objected to the use of the well by the occupants of the adjoining house.

Held, that to establish the validity of the grant it was for the mortgagor or his successor in interest to prove affirmatively that the imposition on the mortgaged property of the easement of taking water from the well did not, in point of fact, render the security insufficient, or, in other words, that even after the imposition of that easement the value of the mortgaged property, house and well, exceeded by one-half the amount due on the mortgage.

The principles of law, embodied in S. 66 of the Transfer of Property Act and S. 10 of the Easements Act, being in consonance with the principles of equity, good conscience and justice, should be adopted by Courts in the Punjab, when giving a decision on matters which are dealt with by these sections, though these Acts are not in force in the Punjab. *Mussammat* BHAGWAN DEVI *v.* (SECRETARY OF STATE *Through*) *Mussammat* BUNYALI KHANAM—**124 P. L. R. 1902=85. P. R. 1902.**

Sup: Govt. acts (IV of 1882) (*Contd.*)

254. S. 67—*Public Demands Recovery Act (VII of 1880 and I of 1895, B. C.)—Sale.*

Held, that a purchaser at a sale held under a certificate under the Public Demands Recovery Act (Bengal Council), Section 7, Sub-section (*1*) of property hypothecated under the Agriculturists Loans Act (XII of 1884) acquires only the judgment-debtor's right, title and interest in the property at the date of the service of the notice under Section 10 of the Public Demands Recovery Act. *I. L. R.*, 20 *Cal.*, 826; 23 *Cal.*, 775, *referred to.*

A mortgagee of the property is not debarred from obtaining a decree to enforce his mortgage executed by the judgment-debtor by reason of the purchase under a sale held in execution of the certificate. The Government likewise can institute a suit under S. 67 T. P. A. for sale of land for Takavi dues, without proceeding under Public Demands Recovery Act.

Under the Transfer of Property Act a mortgagee is debarred from selling the property mortgaged to him except by means of a suit under that Act, and the rule laid down in 63 *W. R.*, 187; *I. L. R.*, 4 *Bom.*, 57, is no longer law.—1 *All.*, 240, *referred to.* LUCHMI NARAIN SINGH *v.* RAGHUNANDAN SAHI. **6 C. W. N. 484=29 C. 537.**

255. S. 67.—*Security bond—Mortgage of property—Sale by decree holder.*—See C. P. C., S. 545. SIYAMSUNDERLAL *v.* BAJPAI JAI NARAIN. **7 C. W. N. 914=30 C. 1060.**

256. S. 67.—*Sale of mortgaged property—Suit by simple mortgage.*

A mortgage executed on the 26th of May 1885, hypothecated one-third share of a certain village as security for the payment of the loan with interest at 12 per cent. per annum. The mortgagor agreed to pay interest out of the profits of the mortgaged property every six months and the mortgage was for a term of 3 years. On default in payment the mortgagee was to obtain possession of the mortgaged property. The mortgagee sued for a decree for the sale of the property, on the 8th November, 1900, when a suit for possession under the terms of the mortgaged deed had become barred.

Held, that, as the mortgage was not a usufructuary one, the mortgagee had a right at any time after the 26th May, 1888, when the money became payable to him, to institute a suit for sale under S. 67, T. P. A. BINDA BAKHSH *v.* ABDUL SAMAD KHAN **6 O. C. 151.**

257. S. 67.—See S. 6, 67—30. M. 255 No. 33 *supra.*

258. S. 67.—See S. 45, 67—3. O. C. 8. No. 77 *supra.*

Sup: Govt. acts (IV of 1382) *(Contd.)*

259. S. 67.—See S. 56, 67, 81, 88—3. M. L. T. 287 (F. B) No 169 *supra.*

260. S. 67.—See S. 58, 67, 68—4. L. B. R. 222. No 185 *supra.*

261. S. 67.—See S. 58 (b), 67, 68—27. M. 526 No 187 *supra.*

262. S. 67.—See S. 58, 67, 99—32. C. 494 No 188 *supra.*

262. a.—See S. 99, 67—26. A. 223, 28, A. 58, 33. C. 283, 10. B. L. R. 274. Nos. 691 to 694 *infra.*

263. S 67 (a)—See 58 (d) and 67 (a)—5. O. C. 286 No 193 *supra.*

264. S. 67 (a) and 68 (b) (c)—*Usufructuary mortgage—Mortgagee's suit for money when maintaianble*—Zar-i-peshgi *lease.*

S. 67 cl: (a) should be read subject to S. 68 cl: (c) an usufructuary mortgagee can sue the mortgagor for his money when the mortgagor fails to give him possession or secure him quiet enjoyment of the mortgage property. ABDUL ISLAM *v.* MT. RAFIAT, **2 C. L. J. 403.**

265. S. 67, 68.—*Morgagee's rights—Failure of title as to a portion of mortgaged property.*—See Mortgage. Mortgagee's rights. VENKATRAO *v.* MAHABALESHWAR. **8 B.L.R. 876=26 B 241.**

266. S. 67, 68.—*Usufructuary and simple mortgage—Promise to pay—Suit for sale.* See Mortgage Construction. KANGAYA GURUKOL *v.* KALIMUTHU ANNAVI. **14 M. L. J. 61=27 M. 526 (F. B.).** *See No. 187 supra.*

267. s. 67, 85, 99 *Sale under a decree of redemption—Rights of purchaser, the decree having become final.*

On the 22nd of March 1881, one Nathu Ram mortgaged certain property with possession.

On the 9th of May 1881, the mortgagees leased the mortgaged property to Nathu Ram, who, as security for the rent due from him, further pledged his equity of redemption. The original mortgagees died. The rent due under the lease fell into arrear; and the sucessor in title of the mortgagees instituted a suit against the mortgagor to recover the amount due to him for arrears of rent by sale of the equity of redemption of the property. On the 27th of November 1889, a decree for sale was passed, and on the 31st of March 1890, an appeal against the decree for sale was rejected. The property was accordingly sold by virtue of the decree for sale, and was purchased by the successor in title of the mortgagees on the 20th of April 1891. The sons of Nathu Ram thereupon brought a suit, claiming proprietary possession of the property on the ground that the sale of the equity of redemption was illegal and void, and conveyed nothing to the purchaser. *Held*, that the sale having been the outcome of a suit under s. 67 of the Transfer of Property Act 1882, did not offend against s. 99 of the Act, and that although according to law as laid down by the High Court, the sale of an equity of redemption was not contemplated by the Transfer of Property Act, yet, inasmuch as the sale had taken place under a decree which had become final, it could not at that time be upset (13 All. 432) and (18 All. 325) *referred to.*—PARMANAND *v.* DAULAT RAM. **A. W. N. 1902, P. 162=24 A. 549.**

268. s. 67, 90—*Irregularities in execution sale, how waived—Estopet.*

A judgement debtor applied for postponement of sale and stated in the petition that if the sale was stayed as prayed, he would raise no objection on the ground of irregularities in publishing sale proclamation. The Court granted it and directed that the sale should take place on the adjourned date without fresh sale proclamation, and the judgement debtor accepted these terms.

Held that by the express terms of the petition, the judgement debtor waived all such irregularities and from the fact that he raised no objection to the order passed it must be inferred that he waived the issue of a fresh sale proclamation, and could not now impugn the validity of the sale for the proclamation being not served in proper time and manner according to Law 8. C. 51, 8. I. A. 123 followed 3. I. A. 230 =26. W. R. 44 (P C) and 25 W. R. 34 relied on 6. C. W. N. 42 and 17 M. 304 distinguished. 2. C. L. J. 589 referred to. RAJA THAKUR BARHAN *v.* ANANTA RAM MARWARI. **2 C. L. J. 584.**

268. (a) s. 67, 99.—*Mortgagee purchasing property in execution of money decree*—See Limitation Act 1877 Art 12.—DATTO *v.* GANESH. **5 B. L. R. 952.**

269. s. 67, 99.—*Mortgage—Execution of decree—Mortgagee obtaining money-decree against mortgagor—Sale of mortgaged property in execution of money-decree not allowed.*

Held, that a mortgagee cannot by obtaining a money-decree for the mortgage-debt relieve himself of his obligation as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken, and wtih the other safe-guards usual in a suit on the mortgage. He cannot in execution of simple money-decree obtained by him sell the mortgaged property. He must proceed under section 67 of the Transfer of Property Act. 2 All. L. J., 71 *referred to.*—MADHO PRASAD SINGH *v.* BAIJ NATH. **2 A L. R. 353=A. W. N. 1905. P. 152.**

270. s. 67, 93, and 99—*Assignee of decree—C. P. C., S 232, 233—Equities:*—

The assignee of a simple money-decree from the decree-holder who holds a mortgage from the judgment-debtor is precluded from selling the mortgaged property in execution of the money decree both by Ss. 232 and 233, C. P. C., and the fact that it is not open to the transferee to institute a suit under S. 67 does not relieve him from the condition imposed by S. 98 T. P. A. S. 99, T. P. A., does not prohibit the attachment of the mortgaged property. 27 A. 450 diss. from; 9 Bom. L. R. 728 app. 22 : C. 813 ref. to. JIVARAT MUDALIAR *v.* SRI-

Sup: Govt. acts (IV of 1882) *(Contd.)*

NIVASA MUDALIAR. **3. M. L. T. 107= 17 M. L. J. 503.**

271. S. 67 & 99.—*Assignee of decree for money bound by provisions of S. 99.*

The assignee of a money decree obtained by a mortgagee against his mortgagor, is bound by the restriction imposed upon the mortgagee by S. 99 T. P. A. He can, in execution of his decree, attach the property, but he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit under S. 67 of the Act. CHHGAN GUMAN *v.* LAKSHMAN DAGDU. **9 B. L. R., 728=31 B. 462.**

272. S. 67 & 99—*Sale in contravention of S. 99—Remedy—C. P. C., S. 244.*

A sale in contravention of S. 99 T. P. A. is not null but an irregular and voidable sale. Such a sale can be voided by an application under S. 244, C. P. C. before or after confirmation of sale on the ground that the provisions of S. 99, T. P. C., have been contravened; but if the application is made after confirmation the applicant has to prove further that owing to fraud or other reasons he was kept in ignorance of the sale proceedings and the proceedings preliminary to sale.

Per Mukerjee J:—The substance of S. 99 is that when the mortgagee has, in execution of a money-decree against the mortgagor, effected an attachment of the mortgaged property, he cannot proceed to sell it; he must bring a suit upon the mortgage against all the parties interested in the equity of redemption and the decree in such suit should be not for the sale of the equity of redemption but for the sale of the property free from the mortgage claim of the plaintiffs and the sale proceeds should be applied in the first instance, to the discharge of mortgages on the property, in the order of their priority, and the surplus, if any, towards the satisfaction of the plaintiff's claim under the attachment so far as may be necessary. ASHUTOSH SIKDAR *v.* BEHAR LAL KRISTNIA. **11 C. W. N. 1011=6 C. L. J. 320=35 C. 61 (F. B.)**

273. S. 67, 99.—*Holder of usufructuary mortgage attaching mortgaged property for a decree on an independent claim may sue under section 67 on the mortgage.*

Where a usufructuary mortgagee, who had no right to sue for his mortgage amount, obtained a decree against the mortgagor on a claim independent of the mortgage and in execution of such decree attached the interest of the mortgagor in the mortgaged property—

Held, that he was entitled under the provisions of section 99 of the Transfer of Property Act to bring a suit on his mortgage under section 67 of the Act.

The decree in such a suit should be one for the sale of the property free from the mortgage claim and for the application of the sale proceeds in satisfaction of the mortgages on the property, the balance, if any, to be applied towards the claim under attachment. GOVINDA BHATTA *v.* NARAIN BHATTA. **16 M. L. J. 1906, p. 285, =29. M. 424.**

Sup: Govt. acts (IV of 1882) *(Contd.)*

274—S. 67, 99 *Mortgagee's suit for sale of equity of redemption of mortgaged property for a simple money-decree.*

B. mortgaged certain immoveable property to A. Three years afterward B. executed a simple money bond for a certain amount in favour of A. A sued on the latter bond and obtained a money decree, in execution of which he attached the mortgaged property. On the strength of this attachment A brought the present suit in which he claimed a decree for recovery of the amount due under the decree by sale of the mortgaged property, *i. e.*, the remaining rights of B. *Held*, that the plaintiff's suit was not maintainable within the meaning of action 99 of the Transfer of Property Act. The result of S 99 is that a mortgagee who has accached the mortgaged property in execution of a decree for the satisfaction of a claim arising under the mortgage, *e. g.*, a claim for interest may, notwithstanding section 44 C. P. C. include that claim in any suit that he may be able to bring under section 67 of the Act and that a mortgagee who has attached the mortgaged property in execution of a decree for the satisfaction of a claim not arising under the mortgage must first sue on his mortgage under section 67, if his mortgage admits of such a suit, so that the mortgagor may exercise his right of redemption. If such a suit is brought and the mortgagor or any other person redeems the mortgage it ceases to stand in the way of the execution of the money-decree and the mortgagee may, if necessary, proceed to enforce his attachment by sale of the the property; if, on the other hand, the mortgage is not redeemed then the property is put up for sale and the creditor may, if necessary, enforce his claim under the attachment against the surplus proceeds, if any, or if only a portion of the mortgaged property has been sold against the other portion which remains unsold. —BABU LAL SAHU *v.* RAM PRASAD. **7 O. C., 314.**

275 S. 67, 99 *Sale of mortgaged property in execution of decree—Mortgages created before T. P. A.*—

Three separate and distinct shares in a village were mortgaged by A. to B. by 3 separate mortgage deeds, before the Transfer of Property Act was enforced. B obtained a money-decree on a claim not arising under any of the mortgages and attached the mortgaged property. The question arose whether he could bring such property to sale in execution of the money-decree. The Lower Appellate Court decided that section 99, Transfer of Property Act, disentitled B to bring the property to sale otherwise than by instituting a suit under section 67 of that Act. B. contended as follows:—

(1) That under section 2, clause (*c*) of the Act, section 99 was not applicable where the mortgage was made before the Act came into force;

Sup: Govt. acts (IV of 1882) (Contd.)

(2) That section 99 was not applicable because the relation of mortgagor and mortgagee had ceased to exist, as the mortgagee had sub-mortgaged the property and a decree for sale had been made against him on the sub-mortgage;

(3) That the mortgages were purely usufructuary mortgages, that the mortgagee had no right to sell under the Transfer of Property Act and that section 99 was only applicable where at the time of the attachment the mortgagee could at once institute a suit under section 67;

(4) That the last mortgage had been redeemed and S. 99 was not applicable thereto.

Held, that the decree having been passed subsequent to the Transfer of Property Act coming into force, section 2, clause (*e*), did not bar the application of the provisions of section 99 of the case.

Held, also, that the mortgage had not ceased to exist.

Held, also, that there was no evidence that the mortgages were purely usufructuary.

Held, further, that even if the suit required by S. 99 were one on the mortgages and even if such a suit did not lie under section 67, the mortgagee could not bring the property to sale except by proceeding in a certain way before he could sell the property, and that if he could not proceed in that way, he could not sell, as S. 99 did not make any exception.

Held, further, that there being no evidence that the last mortgage had been redeemed, the contention failed.—RAM PARSHAD *v.* RAM PARSHAD SINGH, **4 O. C. 231.**

276. s. 67, 99.—*Sale of mortgaged property—Money-decree—Purchase by the mortgagee, Effect of—Mortgagee, liabilities of—Account.*

A mortgagee, in execution of a decree obtained against the mortgagor on account of another debt, sold the mortgaged properties, purchased the equity of redemption himself and obtained possession through the Court. And in a subsequent suit upon the mortgage for sale of the mortgaged properties, the defence, *inter alia*, was that the proceedings were contrary to the provisions of s. 99 of the Transfer of Property Act, that the purchase by the plaintiff was null and void, and that the mortgagee was bound to account for the period he was in possession of the mortgaged property.

Held, that having regard to the provisions of s. 99 of the Transfer of Property Act, the purchase by the mortgagee was null and void, and possession obtained by him was not in accordance with law, and he was therefore liable to render account of moneys realized from the mortgaged properties during the term of his possession. 14 M. 74, *followed* and 19 M. 249; 28 I. A. 82 *referred to.* SHIB DASS DASS *v.* KALI KUMAR ROY. **7 C. W. N. 532=30 C. 463.**

277. s. 68.—*Usufructuary mortgage—Previous mortgage decree against the same property—Right of mortgagee to sue.*

Sup: Govt. acts (IV of 1882) (Contd.)

A property against which there was already outstanding a mortgage decree, was again usufructuarily mortgaged to a person from whom the existence of the decree was expressed. The decree was then executed and the property was sold.

Held, that under S. 68 (*c*) of the Transfer of Property Act, the mortgagee is entitled to sue the mortgagor for his mortgage money. AHMAD-UL-LAH KHAN *v.* SALAR BAKSH. **A. W. N., 1905, P. 61=2 A. L. J. 241=27 A 488.**

278. S. 68.—*Mortgagor executing another usufructuary mortgage—Right of prior usufructuary mortgagee to sue for recovery of mortgage money.*

One S. gave a usufructuary mortgage of certain *sir* lands to the plaintiff and put him into possession of the same. Subsequently he gave another mortgage of all his property to the defendants J and B. This mortgage was also usufructuary and in it the *sir* lands already mortgaged were included. J and B ejected the plaintiff and took possession of the *sir* lands.

Held, that the plaintiff's claim for repayment of the mortgage money under section 68, Transfer of Property Act was maintainable. 15 *Mad.*, 304 and 6 *All.*, 298, *distinguished.* SUKHDEO MISR *v.* SHEODIAL. **A. W. N., 1901, P. 52.**

278. s. 68.—*Mortgage—Suit for money paid upon an existing consideration which afterwards fails—Suit for compensation for the breach of an implied contract in writing registered.*—See Mortgage. SYED HADI *v.* NUR-UL HASAN. **8 O. C. 166.**

280 s. 68—*Suit by a mortgagee with possession dispossessed before expiry of term to recover—Mortgage money.*

A executed an instrument in favor of B whereby he purported to mortgage a one-third share of certain land with possession for eleven years, the mortgagee was to take the whole of the profits for that period in payment of principal and interest and in the month of *jeth* at the beginning of the twelfth year to restore possession to the mortgagor. B sued A for the recovery of his mortgage money alleging that before the expiry of the term he was dispossessed by A. A contended that the instrument was not a mortgage as defined by S. 58 T. P. A. and that a decree for the mortgage-money under section 68 of that Act could not be given.

Held, that section 68, T. P. A., was implicable to the suit and that B was entitled only to sue for possession of the property. FATEH KHAN *v.* RAMANAND. **6 O. C. 339.**

281. S. 68.—*Anomalous mortgage—Personal covenant to pay—Decree for sale.*

Held, that, where a mortgage of a usufructuary character contains a personal covenant to pay, the mortgagee is entitled to sue for sale of the property, on the basis of such a covenant (24 C. 677 and 12 A. 203, *referred* 27 M. 526 *followed.*) SARDAR SINGH *v.*

Sup: Govt. acts (IV of 1882) *(Contd.)*

THE COLLECTOR OF SHAHJAHANPUR. **10 O. C. 14.**

282 S. 68—*Deprivation of security—Suit for money—Limitation*—See Limitation. KRISHNAJI *v.* VASUDEV **3 B. L. R. 156.** (See also Usufructuary Mortgage —Prescription—Unregistered Mortgage—Possession of mortgagee for over 12 years—Validated title by adverse possession—See Mortgage Usufructuary Mortgage— BALAKRISHTNAMMA SUBUDHI *v.* VANAYAKA RAVA SINGHEE **12 M. L. J. 410=26 M. 72.**

283. S. 68 (a), (b) & (c) and 73—*Usufructuary mortgagee's suit—Property lost through mortgagee's default.*

Where property mortgaged is lost by the default of the mortgagee, the mortgagee cannot sue for the mortgage-money (Sp. Appeal No. 1792 of 1902 Referred to.)

Where in a usufructuary mortgage, the mortgagor binds himself to repay the money, but there are reciprocal promises, and the mortgagee, by his own default, precludes himself from fulfilling his part of the contract for restoration of the property on satisfaction of the debt, the mortgagee cannot compel the mortgagor, under S. 68, cl. (a) of the Transfer of Property Act to fulfil his promise of repayment.

Clauses *(b)* and *(c)* of S. 28 provide for relief, where the mortgagee is deprived of his security otherwise than by his own fault.—CHITKALI KOER *v.* MATHURA LAL. **8 C. L. J. 220.**

284.—S. 68 *(b)—Holder of unregistered mortgage deprived of his security by subsequent registered sale to third party can sue under s. 68 (b) of the Transfer of Property Act—The section applies even when there is a covenant to pay—Notice of prior unregistered mortgage, effect of.*

Where the owner of properties after having mortgaged them under an unregistered deed, sells them for valuable consideration by registered deed to one who has no notice of the mortgage is deprived of his security by the the wrongful act of his mortgagor and is entitled to sue the mortgagor for his money under s. 68 *(b)* of the Transfer of Property Act. Such right exists independently of, and is not taken away by, any covenant to repay contained in the mortgage deed. The purchaser under a registered sale-deed has no priority over a prior unregistered mortgage of which he has notice. *(16. M. 148 Refd to)* APPASAMI THEVAN *v.* VIRAPPA THEVAN. **29 M. 362.**

385 s. 68—*Mortgage—Dispossession of usufructuary mortgagee by third party—Relief—Pleadings—Res-judicata.*

Where a mortgagee entitled to possession under a usufructuary mortgage has been put in possession by the mortgagor, but is afterwards deprived of it by a third party claiming under a purchase from the mortgagor, the mortgagee's right is only to sue to recover possession of which he has been deprived. He cannot sue for the mortgage-money and bring the property mortgaged to sale unless the dispossession was owing to the wrongful act or defalt of the mortgagor or the mortgagee had failed fo secure the possession without disturbance by himself or some other person.

As a general rule the plaintiff is not entitled to relief not founded on the pleadings, but where on the pleadings, the issues and the evidence the relief is clear, the general rule does not apply.

Where a question is necessarily decided in effect, though not expressly, it is *res-judicata.* GOKUL DALSARAM *v.* SHRIMAL KASTUR CHAND. **6. B. L. R. 283.**

286—s. 68 *(c)—usufructuary mortgagee's right to recover mortgage money by sale of mortgaged property.*

An usufructuary mortgage deed provided for the recovery of the amount "from the mortgaged property," the Court granted a decree for sale of the property where the mortgagee, being dispossessed of the mortgaged property, sued for the recovery of the mortgage mony. *(21 A 4, A. W. N. 1905 P. 226 Refd. to).* NARPAT *v.* RAM SARAN DAS. **5. A. L. J. 130.**

287. S. 68. c.—*Mortgagee's suit for possession—Breach of contract to transfer immoveable property—Compensation—Specific Relief Act (I of 1877), S. 12.*

Certain property was mortgaged, and possession was to be delivered. Possession was not given but interest paid up which the mortgagee accepted. Now the mortgagee sued for possession.

Held, that the remedy provided by S. 68, cl. (c) T. P. A. is an alternative remedy. It does not debar a mortgagee from bringing a suit for possession. Under S. 12 of the Specific Relief Act, unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money.

Held, also, that no subsequent oral agreement in modification of the registered mortgage-deed could be pleaded or proved. —SANKATA *v.* JAGAT NARAIN, **2 O. C., 24.**

288. S. 68. c.—*One having no title to mortgaged property creating a mortgage is personally liable for mortgage debt*—See Mortgage Redemption—CHANDRIKA BAKSHSINGH *v.* BIRJ BIHARILAL, **4. O. C., 320.**

289. S. 68 c.—*Effect of mortgagee's dispossession by the mortgagor*—See Mortgage Usufructuary—PARGAN PANDEY *v.* MAHATAM MAHTO, **6. C. L. J. 145.**

290. S. 68—See S. 58, 67, 68—4. L. B. R. 222. No 185 *supra.*

291. S. 68—See S. 58 (b), 67, 68, 98—27. M. 526. No 187 *supra.*

292. s. 68.—See Ss. 68 *(b) (e)* – 2 C. L. J., 493, No. 264 *supra.*

293. s. 68.—See Ss. 67, 68—26 B. 241 No. 265 and 27 M. 526 (F. B.) No. 266 *supra.*

Sup: Govt. acts (IV of 1882) *(Contd.)*

294 S. 69 *Mortgage—Mortgaged property sold under power of sale—Break in sale—Fraud—Conditions. Depreciatory-Notice-Knowledge of agent—Waiver—Silence. Reasonable explanation of the service—*

The mortgaged property was sold by the mortgagee under a power of sale in the mortgage. The purchaser brought a suit for possession of the property. It was pleaded by the mortgagor that the sale was invalid, for the conditions in the notice of sale were unnecessarily stringent and depreciatory and not adapted to the state of the title to the property and the sale was effected in favor of the plaintiff, purchaser, collusively and fraudulently after the mortgagor and the intending bidders had left the place of auction. The notice of sale provided that "the purchaser shall accept such title as the vendors can give and shall not require the vendors to enter into any other covenant except a covenant that they have not incumbered and shall not raise any question or objection to the title and shall be held bound to accept such title as the vendors possess." The plaintiff urged that the sale was protected by the provisions of section 69 of the Transfer of Property Act and the mortgagor had waived his objections to the sale and acquiescence on his part precluded the mortgagor from insisting on his objections to the sale. It was found that there was a break in the auction sale which might have induced some people to leave, but it was brought about by the mortgagor and that there was no postponement of the sale. It was also found that the plaintiff had notice of the conditions in the notice of sale, that the mortgagor's title to the property went back to 1810 and that the mortgagor made a public protest at the time of auction against the stringency of the conditions.

Held, that though there was no postponement of the sale and collusion and fraud was not proved yet the conditions being unnecessarily stringent and the plaintiff having made the purchase with notice of conditions and protest on the part of the mortgagor the sale was invalid,

Held, also that waiver or acquiescence on the part of Mortgagor was not established.

The power to sell under special conditions though it may give in certain circumstances a mortgagee a wider discretion than he would otherwise possess, does not entitle him needlessly to use depreciatory conditions. Though a sale may not be impeachable on the mere ground that the power was improperly exercised this protection does not extend to a case where there is the additional ground, that the purchaser had notice of the proper exercise prior to the sale of the property.

Where a man employs another to act as his agent the knowledge of his agent derived in the transaction must be imputed to him though as it were his own knowledge.

In resting on silence of a person as to a particular matter as a legitimate ground of inference, regard must be had to the circumstances; it must be considered whether there was any occasion for words, and any reasonable explanation of the silence. CHABILDAS LALLOOBHAI *v.* DAYAL MOWJI. **6 B. L. R., 557.**

295. s. 69.—See S. 3, 69—31 B. 566 (P. C.) No. 13 *supra*.

296. s. 70, 8.—*Mortgagor building a new house on the mortgaged land—Mortgagee entitled to include the new house in his security—Accretion to mortgaged property.*

The Transfer of Property Act makes no distinction between free-hold and lease-hold property for the purposes of the rule of law embodied in the sections 8 and 70 of the Act. In this respect the Act reproduces the English law, which is, that all things which are annexed to the property mortgaged are part of the mortgaged security and therefore the deed need contain no mention of structures or fixtures, unless a contrary intention can be collected from the deed.

Hence where a mortgagor after the execution of the mortgage-deed constructed a new building instead of the mortgaged, the new building would be included in the mortgage unless there was a covenant to the contrary.

The word "appurtenances" has the meaning of "usually occupied" and would include a structure erected on a land for the purpose of its enjoyment.

Where in a lease for a term of years there is a covenant for the renewal of the lease for 10 years in favour of the lessee, his heirs, executors, administrators and assigns, such a covenant runs with the land. 12 *East*, 464; 4 *Bing. N. C.* 758 *followed.*

If a mortgagor left in possession grants a lease without the concurrence of the mortgagee, the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor, who granted it, the paramount title of the mortgagee may be asserted against both of them. N. C. MACLEOD *v.* KISSON VITHALSINGJEE. **6 B. L. R. 996.**

297. S. 70, 82.—*Mortgage—Accession to mortgaged property—Priorities—Contribution—Distribution of sale-proceeds.*

Where, after the execution of two simultaneous mortgages in respect of a house and certain lands appurtenant thereto, the mortgagor erected two other houses on the lands, and subsequently executed various mortgages in respect of the several houses, and the decree in the suit by the fourth mortgagee directed that the whole of the property should be sold free of incumbrances in separate lots, and the sale-proceeds to be distributed among the various mortgagees in accordance with their priorities and the property more or less pledged by each mortgage and the sale proceeds were insufficient to pay off the mortgagees. *Held* that for the purposes of the security of the two prior mortgagees, the two new houses were accessions to the mortgaged property and became incorporated with the original subject of the security, as though they had

Sup: Govt. acts (IV of 1882) *(Contd.)*

been in existence at the time when the original security was given.

Held also, that the sale-proceeds being insufficient to pay of the several mortgagees they were respectively entitled to only such surplusses after payment of the two prior mortgagees as might be attributable to the property subject to the respective mortgages. KRISHNA GOPAL SADHANI *v.* A. B. MILLER. **29 C. 803.**

298. S. 70—*Mortgage—Mortgage of mortgagee's rights—Acquisition of equity of redemption.*

J. S. mortgaged to the plaintiff property owned by him and also a property of which he was mortgagee. He subsequently purchased the equity of redemption of his mortgagor.

The plaintiff brought a suit to recover his money by 'sale of the mortgaged property.' It was contended for the defendant, that having regard to the rulings of *Matadin Kasodhan* v. *Kazim Husain, 13 All., 432, and Ganga Prasad* v. *Chunni Lal, 18 All.*, 113, the plaintiff was not entitled to sell the interest of his mortgagor in the property of which that mortgagor was only a mortgagee.

Held, that the purchase of equity of redemption by J. S. enured for the benefit of the plaintiff, *i. e.*, the plaintiff's mortgage became a charge upon the additional interest in the property which J. S. acquired by purchase and the suit was maintainable. The prayer in the plaint was allowed to be amended by omitting the word, 'mortgaged.'—AJUDHIA PRASAD *v.* MANSINGH. **A. W. N. 1902 P. 176=25 A. 46.**

299. S. 70.—*See S. 63, 70 14 C. P. L. R. 1901 P. 169 No. 244 supra.*

300. S. 72—*Mortgagee being a part proprietor—Cess—No lien—Personal decree—Cont act Act S. 70*—See Mortgage Lien—OPENDRA CHANDRA *v.* TARA PROSANNA MUKERJI.—**7. C. W. N. 609=30 C. 794.** *(See Contract Act. S. 70 No. 249 Col: 329.)*

301. S. 72—This section does not exhaust the cases of tacking. *See* ROKKOHARI CHOTTARAJI *v.* BIPRE DAS DEY. **31. C. 975.**

302. S. 72.—*Mortgagee in possession expending money to defend his title against mortgagor.*

A mortgagee in possession is, under s. 72 of the Transfer of Property Act (IV of 1882), entitled to add to his mortgage-debt, in the absence of a contract to the contrary, sums spent by him for making his own title thereto good against the mortgagor. The mere fact that in a redemption suit the mortgagee in possession did not give details of the sums either in the course of the trial or in his written statement is not sufficient to deprive him of his right, seeing that those details can be gone into after the redemption decree providing for an account has been passed. DATTARAM *v.* VINAYAK. **5. B. L. R., 916=23 B 181.**

303 S. 72—*Prior and subsequent incumbrances—Rights of usufructuary mortgagee who*

Sup: Govt. acts (IV of 1882) *(Contd)*

satisfies a decree on a prior mortgage of the property mortgaged to him.

This was a suit by a usufructuary mortgagee for sale of the mortgaged property, for the recovery of the amount paid by him to release the property from a prior mortgage, at the same time retaining his lien as usufructuary mortgagee. *Held* that he was not entitled to bring the suit unless he waived all his rights under the usufructuary mortgage. But he is entitled to retain possession until the mortgage-debt and the amount paid by him on the prior mortgage was satisfied. ABDUL QAYYUM *v.* SADR-UD-DIN AHMADA. **W. N. 1905, P. 11=2. A L. J. 23=27. A. 403.**

304 S.72—*Enhancement of revenue subsequent to mortgage—Payment of enhanced revenue by mortgagee—Liability of mortgagor to pay amount so paid by mortgagee—See Mortgage Redemption.* THE COLLECTOR OF ALIGARH *v.* BOHRA THAKUR DAS. **3. A. L. J. 435.**

305 S. 72 (a) and (b)—*Redemption—Improvements made by mortgagee—Planting of groves by tenants with mortgagee's permission—Claim against mortgagee for damages.*

By a deed of mortgage the mortgagee was put into possession of the mortgaged property and was entitled to appropriate the entire profits in lieu of interest. There was a covenant that the mortgagor should be entitled to redeem and regain possession of the mortgaged property at the end of five years or subsequently on payment of the whole principal sum together with the arrears of advances to tenants (*taqavi*), the coast of building new houses for tenants and other miscellaneous expenses such as advances of seed grain. A having purchased the property from the mortgagor brought a suit for redemption. The Subordinate Judge found that A was entitled to redemption on payment of the principal sum secured by the mortgage less certain sums on account of damages caused to the mortgaged property by the planting of groves by tenants and others in a number of plots of land with the mortgagee's permission, but allowed certain sums on account of cost of embankment, sinking wells, erecting houses for tenants reclaiming barren land and survey.

Held, that as the mortgage-deed contained a distinct contract regarding the sums payable to the mortgagee on redemption, he was not entitled to add to the principal money any other sums spent by him for the improvement of the property under S. 72, cls. (*a*) (*b*) T. P. A (26 C.) (P. C.) 21.Ch. D. (469 Refd. to) that his claim to costs incurred for building houses for tenants was rightly allowed; and that the plaintiff's claim to damages for the planting of groves could not be maintained. THAKUR JAWAHIR SINGH *v.* THAKUR SARDAR KUAR. **9 O. C. 18.**

306. S. 72—*Suit for redemption—Mortgagee paying a simple money decree to save mortgaged property from sale—Charge—*Malikana—*Condition for recovery by separate*

Sup: Govt. acts (IV of 1882) (*Contd.*)

suit—Set-off in redemption suit.

A mortgaged property was put up for sale in execution of a decree on a simple money bond of a prior date. The mortgagees paid up that decree, and prevented the sale.

Held, that the mortgagees had an interest in protecting the mortgaged property from sale and were entitled to recover the amount of the simple money decree paid to save the property from sale, when subsequently the mortgagors sought to redeem the property.

The mortgage deed provided that the mortgagees would pay Rs 1,000 as *malikana* to the mortgagors.

Held, that the mortgagors were entitled to the *malikana* allowance which should be credited to them in taking the accounts in redemption suits. The provision in the deed that the *malikana* could be recovered by a separate suit, would not prevent its being set off at the time of redemption.

In this case some of the mortgagors executed further mortgages in favour of the mortgagees covenanting to pay the mortgage debts with the money payable on the prior mortgage, *held* that this would not preclude the mortgagors as a body from exercising their right to redeem the earlier mortgage only. MUHAMMAD HUSAIN *v.* SHEODARSHAN DAS. **4 A. L. J. 176 = A. W. N. (1907), 71.**

307. S. 73.—*Mortgagee's claim to surplus of Revenue sale*—See Limitation Act 1877 Art 132—JOGOSHAR BHAGAT *v.* GHANSHIAMDAS. **5. C. W. N. 356.**

308. S. 73—*Sale of mortgaged property for rent or revenue—Effect of—Charge on sale proceeds.*

Under S. 73 of the Transfer of Property Act, when a mortgaged property is sold for arrears of rent or revenue, the effect is that the charge of the mortgagee upon the property is extinguished and transferred as it were to the surplus sale-proceeds.—HEM CHANDRA CHOWDHURY *v.* TAFAZZEL HOSSEIN KHAN, **8 C. W. N. 332.**

309. S. 73—*Tenure sold in execution of rent decree with power to avoid incumbrances—Bengal Tenancy Act (VIII of 1885), S. 167—Right of mortgagor to have his lien transferred to sale proceeds*

A tenure which was under orders to be sold in execution of a mortgage decree was sold in execution of a rent decree in favour of the landlord with power to the purchaser to avoid all incumbrances.

Held, that the mortgagee is entitled to abandon his lien upon the mortgaged properties and to recover his dues from the surplus sale proceeds. S 73 of the Transfer of Property Act would be no bar to a suit for the recovery of surplus sale proceeds—NIM CHAND BABU *v.* ASHUTOSH DUTT, **9 C. W. N. 117.**

310. S. 73—*Prior and subsequent mortgages—Suit by prior mortgagee—Lien of puisne mortgagee on surplus sale proceeds—Third mortgagee, withdrawal of surplus sale*

Sup: Govt. acts (IV of 1882) (*Contd.*)

proceeds by—Limitation Act (XV of 1877), sch. II, arts. 120, 132—Civil Procedure Code, S. 244, 295.

A property which was subject to several mortgages, was sold in execution of a decree obtained by the first mortgagee in a suit in which the *puisne* mortgagees were impleaded as parties.

Held that the purchaser got the property free from all incumbrances and the lien of the *puisne* mortgagees were transferred to the surplus sale proceeds. But a second mortgagee having taken no steps to satisfy his mortgage out of the surplus sale proceeds, a third mortgagee who was aware of the lien of the second mortgagee on the surplus sale proceeds, brought a suit on his mortgage and withdrew the surplus sale proceeds in satisfaction thereof. The second mortgagee who was not made a party to this suit, subsequently instituted a suit to enforce his lien on the sale proceeds and to recover the same from the third mortgagee.

Held that art. 132 (and not art. 120) of sch. II. of the Limitation Act applied to such a suit.—BERHAM DEO PERSHAD, *v.* TARA CHAND, **9 C. W. N. 989**

311. S. 73—*Mortgage between date of default and date of sale for arrears of revenue—Mortgage-lien extinguished—Charge on sale proceeds.*

Held, that if an estate is sold for arrears of revenue, the mortgage of a share of such estate between the date of default and the date of sale is invalid as against the purchaser and the mortgage-lien on the property is extinguished by the sale. (17 C. 148 *followed*). That lien, being extinguished, becomes a charge on the sale proceeds, (15 C. 546 *explained*) and, under S. 73 of the Act, the mortgagee becomes entitled to recover his mortgage-debt out of those sale-proceeds after payment of the arrear of revenue. The section must be taken to apply to any case where the effect of the sale is that the lien on the mortgaged property in favour of the mortgagee has been extinguished owing to a sale of that property through the failure of the mortgagor to pay an arrears of revenue or rent. UMATRA GUPTA *v* UMA CHARAN SEN. **3 C. L. J. 52.**

312. S. 73.—*Surplus sale-proceeds for arrears of revenue are subject to mortgagee's charge.*

Property mortgaged to the plaintiff was subsequently sold under a decree in a rent suit and a surplus was left of the sale proceeds, after paying off the arrears of rent and it was *held*, that, under S. 73 of the Act, plaintiff had the right to enforce his charge on the surplus proceeds and that Ss. 159 and 161 to 167 of Bengal Tenancy Act did not prejudice such right of the plaintiff as mortgagee. GOVIND SAHAI *v.* SIBDUT RAM, **33 C. 878.**

313 S. 73. - See Ss. 68 (*a*), (*b*), (*c*), 73—3 C. L. J., 220, No. 283 *supra.*

Sup: Govt acts (IV of 1882) *(Contd)*

314. s. 74.—Puisne *mortgagee being impleaded, affect on second mortgagee's rights—Prior mortgagee purchasing in execution sale.*—See Mortgage Suit. GOVERDHAN DAS *v.* VIRASAMI. **26. M. 537.**

315. s. 74.—*Subsequent mortgagee paying amount of decree whether his right enforceable in execution.*—See No. 321 *infra.* **27 A. 325 (P. C.).**

316—s. 74. *Mortgage—Prior and subsequent mortgages — Satisfaction by mortgagee of a decree for sale on a prior mortgage—Civil Procedure Code (Act XIV of 1882), s. 244.*

J, the mortgagee, obtained a decree for sale and an order absolute for sale of the mortgage property, against the mortgagor U. U then mortgaged 8 villages including those which were previously mortgaged to J. to one T. and with a portion of the sum secured thereby, he paid off the decree held by J. T. brought the present suit to recover the amount due on her mortgage by the sale of the villages which were covered by the former mortgage and decree. *Held* that s. 244 of the Civil Procedure Code did not govern the case and there was no reason why T should be driven to the cumbrous procedure of partially recovering his loan by executing the discharged decree formerly held by J, and as to the remainder of the loan, by instituting a separate suit on his own mortgage. T was entitled in this suit to recover that portion of the loan which U used to discharge J's decree. 24. 179 distinguished. TUFAIL FATMA *v.* BITOLA. **A. W. N., 1904, p. 384 = 2 A. L. J. 18 = 27. A. 400.**

317 s. 74. 85. *Mortgage - Conditional Sale —Civil Procedure Code (Act XIV of 1882), s 244 —Prior and puisne mortgagees—Payment by puisne mortgagee, defendant in prior mortgagee's suit for foreclosure, of amount due on the prior mortgage—Application by such puisne mortgagor for an order absolute for foreclosure—Application refused—Separate suit by puisne mortgagee for foreclosure—Transfer of Property Act (IV of 1882), s. 7.*

In July 1889, one Fateh Chand executed a mortgage by conditional sale of a certain village in favour of Bansidhar and Kunj Bihari Lal. In October 1889, Fateh Chand executed a second mortgage of the same village, also by way of conditional sale, in favour of Bansidhar and Anant Ram. In October 1891, Anant Ram transferred his interest in the second mortgage to Gaya Prasad. In September 1893, Bansidhar and Kunj Bihari instituted a suit for foreclosure of their mortgage. To that suit, Raj Kumar, the son of the original mortgagor, and Gaya Prasad were made defendants. On the same date, Gaya Prasad instituted a suit for foreclosure under the *puisne* mortgage of October 1889. On the 22nd December, foreclosure decrees were passed in both suits, and six months' time was allowed for redemption. The time allowed for redemption was extended from time to time, and ultimately, on the 3rd of January 1896, Gaya Prasad paid into Court the sum which was due to the mortgagees on the mortgage of July 1889, which sum was drawn out by the mortgagees. Subsequently to this payment into Court, Gaya Prasad applied to the Court in the suit on the prior mortgage, and prayed that the right of the defendant in that suit to redeem the mortgaged property, might be extinguished and an order absolute for foreclosure granted in the applicant's favour. This application was refused, on the ground that Gaya Prasad was only entitled to bring a suit for foreclosure and "had not acquired the status of a decree-holder," and that while he was a defendant, he could not execute the decree as a decree-holder and could not get a decree for absolute foreclosure. There was no appeal from this order, but Gaya Prasad submitted to it and brought a separate suit for foreclosure. *Held* that under the above circumstances no such separate suit for foreclosure would lie. 12 A. 61, 13 A. 278 and 21 C. 818 referred to. BANSIDHAR *v.* GAYA PRASAD, **A. W. N. 1902. P. 3 = 24. A. 179.**

318. S. 74.—*Mortgage—Rights of prior and* puisne *mortgagees.*

Where both the prior and the puisne mortgagees sued for recovery of their mortgage-debts by sale of the mortgaged property by separate suits without impleading each other as defendant in their respective suits and the mortgaged properties were purchased by them at sales held in execution of their decrees

Held, that the puisne mortgagee was entitled to possession on payment to the prior mortgagee of the mortgage-debt with interest, and costs to which the latter was entitled on the date when he purchased the mortgaged property, and not the amount for which the property was sold to the prior mortgagee (which sum in this case was less than the mortgage money.)

Held, also, that the puisne mortgagee's possession as to property not included in his mortgage was not proprietary but as a mortgagee only. DELHI AND LONDON BANK, LIMITED *v.* BHIKARI DAS. **A. W. N., 1902, P. 7 = 24 A. 185.**

319. S. 74.—*Sale—Price applied to payment of mortgage-debts—Payment not by purchaser, but by mortgagor.*

A mortgagor sold certain property, which was subject to two mortgages, and it was agreed that the consideration money should be paid by the purchaser to the mortgagees. The purchaser paid off the amount due on the first mortgage, but not that due to the second mortgagee.

Held, on second mortgagees suit for sale, that the purchaser was not entitled to set up the first mortgage as a shield inasmuch as it had not in reality been paid off by him but by the mortgagor, his vendor. (27 A. 400 *followed*). BAIJNATH *v.* MURLIDHAR. **A. W. N. (1907), 85 = 4 A. L. J., 349.**

Sup: Govt. acts (IV of 1882) (*Contd.*).

320 S. 74—See S. 60, 74, 2 O. C. 344 No, 234 *supra*.

321. S. 74, 83, 86—*Mortgage—Prior and puisne mortgagee—Civil Procedure Code (Act XVI of 1882), Section 244—Execution of decree—Fresh suit—Form of foreclosure decree.*

B. and K. were the first mortgagees, and B. and G. the second mortgagees of certain property. Two suits were brought in the same Court by both the prior and the *puisne* mortgagees for foreclosure of their respective mortgages and decree were made in both the suits. The decree in the suit brought by the prior mortgagees provided that if the mortgagor will not pay the decretal amount up to a certain time the mortgage will be treated as foreclosed and he will be debarred from redeeming the same in future. The time for redemption was from time to time enlarged, but the money was not paid by the mortgagor. When the enlarged time was about to expire, G., one of the *puisne* mortgagees who was impleaded as a defendant in the suit, paid the decretal amount into the Court and that sum was taken out by the prior mortgagees in discharge of their mortgage.

Held, that the *puisne* mortgagee having made the payment of decretal amount acquired under section 74 of the Transfer of Property Act all the rights and powers of the prior mortgagees as such and was competent to bring a suit to enforce rights acquired by him. That a separate suit was not barred by section 244 of the Civil Procedure Code for payment made by G. would not have the effect of reviving or giving vitality to the original decree which by the terms of it had become discharged, and rights and powers acquired by G. could not be worked out without additions to the decree which the Court in executing the decree had no power to make.

The form of order given in section 86 of the Transfer of Property Act contemplates a suit between one mortgagee and the mortgagor only, and should be treated as a common form not to be literally followed in every suit for foreclosure but to be adapted to the particular circumstances of each case.

The appropriate form of decree for the exercise by the *puisne* encumbrancers of the successive rights of redemption or for working out the rights of the parties in the event of any puisne incumbrancer in front of the mortgagor redeeming the mortgaged property so as to make a complete decree, is a form which is well known in the Chancery Division of the High Court in England; and it may be adopted in India. GOPI NARAIN KHANNA *v.* BANSIDHAR.—**7 B. L. R., 427 9 W. N., C. 577 = 32 I. A. 123 = M. L. J., 1905 p. 191 = 2 C. L. J. 173 = 27 A. 325 (P. C.)**

322. S. 75, 85, 86, 91. *Prior mortgagee—Subsequent mortgagee—Rights to redeem inter se—Foreclosure decree.*

In 1859, C and his brothers mortgaged certain lands with possession to H. Subsequently, on the 26th May 1897, C alone mortgaged the same lands to U. Shortly after this, C and his brothers brought a redemption suit against H and U was not made a party to it. In that suit, the usual redemption decree was passed; but as C and his brothers failed to redeem within the time allowed the order for foreclosure was made absolute in favour of H. U then brought a suit against C to recover his mortgage debt by sale of the mortgaged property; to this suit, H was joined as the person in possession. The lower Court allowed to redeem the property from H (defendant 2) on payment of the money due to him (defendant 2) under the foreclosure decree.

Held, reversing the decree, that H.. the prior mortgagee, had a right to redeem superior to that of U, the subsequent mortgagee. HASSANBHAI *v.* UMAJI. **5 B. L. R. 892 = 28 B. 153.**

323. S. 75. *Rights of a subsequent mortgagee when not made a party in this suit upon the prior mortgage.* See Mortgage Suits. KADER BUKSH *v.* JOWALA PRASAD. **1 A. L. J. 283.**

Ram Pershad *v.* Govindi, 1. A. L. J. 207; Baldeo Singh *v.* Jageram, 23 A. 1; Shivarama Chetty *v.* Kauppu Muthu, 13. M. L. J. 72 (F. B.); Harparshadlal *v.* Dalmardansingh, 32. C. 891; Goverdhandas *v.* Veerasami, 26. M. 537; Debendranarain Roy *v.* Ramratan Banerjee, 30. C. 599, 324; *See also*, Ramnarain *v.* Bandi Parshad, 31. C. 737; Rangasamy Naicken *v.* Jellibodi Naicken, 26. M. 484; Akatti Moidin Kutty *v.* Chrayel Ambu, 26. M. 486; Baijnath Singh *v.* Mahomed Ibrahim, 2. C. L. J. 574.

325. S. 76.—*Contract to the Contrary*—See Construction (of mortgage deed) M. TUPPAN NAMBADRI *v.* V. P. CHINNA PARI KUTTI, **18. M. L. J. 31.**

326. S. 76 c.—*Mortgagee's right to keep accounts*—See Mortgage Accounts—KIDARLAL *v.* BISHAN PERSHAD, **31. C. 332 (P. C).**

327. S. 76 Cl. c.—*Mortgagee's duty to pay Government revenue—Contract to the contrary—Construction:*—

By S. 76 (c) T. P. A. a mortgagee is bound to pay the revenue only in the absence of a contract to the contrary when the mortgagee is able to pay it out of the income of the property in his possession. A document provided that "the mortgagee was to appropriate for the interest on the mortgage amount the rent of * * * *idangazhies* of paddy and Rs. 20 less the amount of Government revenue which was to be paid to the mortgagor by the mortgagee pending the transfer of *patta* to the name of the mortgagee" and the *kist* was subsequently enhanced:—

Held, that there was a contract to the contrary within the meaning of S. 76, Cl. (c) T. P. A. and that the mortgagee was not bound to pay the enhanced *kist* under the contract and certainly so before the transfer of *patta* in his name—PANI-

Sup: Govt. acts (IV of 1882) (*Contd.*)

GATAN KANARAN *v.* RAMAN NAIR. **17 M. L. J. 517.**

328. S. 76, 84, 89 & 92.—*See Mortgage Redemption.* SATAYABADI BEHARA *v.* MT. HIRABATI. **5 C. L. J., 192 = 34 C. 223.**

329. s. 78.—*Priority—Failure of prior mortgagee to take possession of title deeds—Subsequent registration of prior mortgage.*

"Gross negligence" under S. 78, T. P. A., must be determined according to the circumstances of each case. Failure on the part of a prior mortgagee to get possession of the title deeds from the mortgagor is not, in the absence of reasonable explanation necessarily to be treated as gross negligence, especially in a country where a registration law prevails. A mortgage was executed to A by B. B, on 20th January, 1907, had previous to it on 21st December 1896, executed a mortgage to D who did not obtain possession of the title deeds. D's document was registered on 21st April 1897. It was found that thedelay in the registration of it was due to B.

Held, that gross negligence need not necessarily be imputed to D under the circumstances, and that the delay in having his document registered did not make his failure to obtain possession of the title deeds amount in law to gross negligence, as he could not have anticipated at the time of the execution of the deed that registration would be delayed in the manner it was. 2 C. W. N., 750, *followed*, L. R. 7 H. L. 135 L. R 26, Ch. D. 482, 9 Hare 449, 18 B. 444, *referred to.* 12 M. 429, 13 M. 383, 12 M. 424, 15 M. 268, 4 M. H. C. R , 369. *distinguished.* RANGASAUMY NAIKEN *v.* ANNA MALAI MUDALI **17 M. L. J., 499 = 3 M. L T., 87 = 31 M. 7.**

330. S. 78.—*Laches.*—See Laches. SETH NERBUDDA PRASAD *v.* RAJA SETH GOKULDAS. **1 N. L. R. 158**

331 s. 80—*Mortgage—Effect of payment of prior mortgage by a subsequent mortgagee as against intermediate charge.*

A subsequent mortgagee may redeem a prior mortgage and keep alive such prior mortgage for his benefit. An intermediate mortgagee or his successor in title cannot insist that his mortgage should be redeemed by the subsequent mortgagee before or at the time of the redemption of the previous mortgage. No equities arise in favour of the intermediate mortgagee. *10 Cal 1035 (P. C.)*; *P. R., 32 of 1903, s. a., 54 P. L. R., 1903, 77 P. R. 1899 and 38 P. R. 1894 referd.* RADHA RAM *v.* RALA RAM. **139. P. L. R. 1904 = 30 P. R., 1904.**

332 s. 80—*Intention to keep alive prior mortgage—Presumption—See Mortgage Subrogation.* GIRDHAR DAS *v.* RAMSUNTERSINGH. **8. C. W. N. 690.**

333. s. 81—*Decree for sale of the mortgaged property and recovery if necessary from the mortgagor—Construction.*

Where a decree upon a mortgage directed the sale of the mortgaged property, and if necessary from the defendant, *held* the words "if necessary" in the decree cannot be construed as given the decree-holder the right of abandoning his claim against the mortgaged property in order to create a necessity to proceed against other property. A necessity contemplated by the decree is a necessity of proceeding against other property, or the mortgagor personally, if the mortgaged property, proves insufficient to realise the amount due. (*29 A 369 Ref*) MANTI KAMOJI *v* CHODIMALLA RAMAMURTHY PANTULUGARU. **3. M L. T. 335.**

334 s. 81 See s. 3, 81—26, B. 538 No. 14 *supra.*

335 s. 81—See s. 56, 67, 81, 88—3. M L. T. 287 (F. B.) No. 169 *supra.*

336 s. 81—See, 56, 81, 82, 31. C. 95 No. 170 *supra.*

337. s. 82.—*Apportionment of mortgage debt—Mortgagee puchasing a portion of mortgaged property*—See Mortgage (contribution). SHIBLAL *v.* BHAWANI SHANKER. **A. W. N., 1903, P. 190 = 26 A. 72.**

338. S. 82.—*Liability of purchaser of some of the mortgaged properties—Arrangement making the properties purchased primarily liable for debt.*

The defendant No. 2 borrowed a certain sum of money, and mortgaged the properties Nos. 1 to 4 for the debt. The mortgagee sued on his mortgage, and obtained a decree, ordering that the properties Nos. 341—9 and 7 should be sold first, and that if any balance remained due after the sale of these properties, it should be realised by the sale of the remaining properties. The plaintiff purchased a share in estate Nos. 341—9, and when the property Nos. 341—9 was subsequently put up to auction in execution of the mortgage-decree, the plaintiff paid off the mortgage-decree, and sued the purchasers of the remaining properties for contribution.

Held, that the plaintiff was not entitled to contribution. Mortgaged properties are only liable to contribution in the absence of a contract to the contrary. In this case the liability was altered by the mortgage-decree by which the incidence of the debt was thrown primarily on properties Nos. 341—9 and 7, and the other properties were only liable, if the debt was not realized by their sale. As the plaintiff purchased the share of the property Nos. 341—9 subsequently to the decree, he bought it subject to the mortgage and to the arrangement made by the decree. Plaintiff was not entitled also on the ground that he himself stopped the sale paying off the mortgage-decree, and he could not make other properties liable when it was arranged between the parties to the morgage-suit and the mortgagee, that it was only in case there was any balance left due after the sale of Nos 341—9 and 7 that the remaining properties would be liable. SATYA KRIPAL BANDOPADHIA *v.* GOPI KISHORE MANDUL. **6 C. W. N. 583.**

339. S. 82—*Contribution to mortgage debt—Liability of several properties to rateable contribution "in the absence of a contract to the contrary."*

Sup: Govt. acts (IV of 1882) *(Contd.)*

The owner of certain lands mortgaged them, and subsequently effected a partition of the family property between himself and his three sons. By the terms of that partition the father and his sons each took a fourth share in the family property and each became liable for a fourth of the mortgage debt. One of the sons then sold the greater portion of his share in the mortgaged property to plaintiff, giving plaintiff a security bond for a sum of money and hypothecating other lands to indemnify plaintiff from any loss which might arise if the original mortgagee should bring the mortgaged lands to sale. The mortgagee obtained a decree on his mortgage in execution of which a portion of the mortgaged land was sold, including that which plaintiff had bought. The proceeds of sale of the said portion were sufficient to satisfy the mortgagee's decree. Plaintiff then sued on his security bond, and the land hypothecated to him was sold, plaintiff receiving the amount secured by the bond. He now sued under S. 82 of the Transfer of Property Act and claimed rateable contribution from the other portion of the mortgaged property has not been sold to satisfy the mortgagee's decree.

Held that he was entitled to recover, and that his right to rateale contribution was in no way affected by the indemnity bond or the payment made to him thereunder.

Held further, that the words "in the absence of a contract to the contrary," in s. 82 of the Transfer of Property Act apply to contracts between a mortgagor and mortgagee, and that an agreement which is binding only as between the mortgagors is not "a contract to the contrary," within the meaning of the section. RAMABHADRACHAR *v.* TRINIVASA AYYANGAR. **24 M., 85.**

340 s. 82—*Contribution to mortgage debt Liability of land in possession of third person C. P. C. S. 43—Maintenance of suit.*

Certain land was mortgaged to R. Subsequently a portion of the land comprised in R's mortgage was mortgaged to plaintiffs together with other land. R then obtained a decree on his mortgage, in pursuance whereof the said portion of R's security which was also mortgaged to plaintiffs was sold. R's decree was thus satisfied, without the necessity for the sale of the remaining land which comprised R's security. This remaining land was purchased by some of the defendants. Plaintiffs now sued on their mortgage, and claimed not only as against their mortgagors, and the property comprised in their security, but also, on the principle of contribution, sought to charge any balance which might still remain due as against the remaining land already referred to as having been purchased by some of the defendants.

Held, that plaintiffs were not entitled to enforce contribution against the defendants. *Semble*, that if the claim for contribution were maintainable it ought not to have been

Sup: Govt. acts (IV of 1882) *(Contd.)*

joined with the ordinary claim on a mortgage.—Plaintiffs had purchased a portion of the property comprised in their own mortgage when it was sold in execution of R's decree already referred to. By that purchase they had made a profit. It was contended that plaintiffs in their character of second mortgagees stood in a fiduciary position towards their mortgagors, and that they were not entitled to be treated as independent strangers buying at an auction sale. There was nothing to show that plaintiffs had taken any advantage of their position:

Held that plaintiffs took an absolute title such as strangers might have taken.

Held also, that their claim on their mortgage was not affected by their purchase of part of the property, since under the circumstances they must be taken to have paid the full value of the unencumbered property. The owners of certain property, wishing to raise a sum of Rs. 10,500 on mortgage, executed two mortgages in favour of the same mortgagees, over the same lands, on the same day;—one for Rs. 10,000 and another for Rs. 500. The latter instrument recited the bond for Rs. 10,000 as a prior mortgage. The mortgagees then sued on the mortgage for Rs. 500 and obtained a decree, under which portions of the security were sold, subject to liability under the mortgage for Rs. 10,000. The mortgagees now sued on the mortgage for Rs. 10,000, when it was objected that the suit was not maintainable by reason of S. 43 of the Code of Civil Procedure.

Held that this objection was not sustainable, and that, regarding the case as one of a mere personal claim on the instrument of mortgage, S. 43 did not apply.—SESHA AYYAR *v.* KRISHNA AYYANGAR. **24 M. 96.**

341. s. 82. *Mortgage—Suit upon—Parlies —Contribution against purchasers.*

In his suit by the mortgagee subsequent transferrees of a part of the property, defendants 1 to 3. were not made parties. The mortgager had sold a part of the mortgaged property to one R. K. with the consent of the mortgagee. In execution of his decree the mortgagee purchased the mortgaged property excepting the part sold to R. K. The mortgagee subsequently filed a suit against other transferrees defendants 1 to 3, to make the property purchased by them liable for the mortgage debt.

Held, that the mortgagor and R. K. were not necessary parties to this suit: (2) that the omission of the plaintiff to make the defendants 1 to 3 parties to the original mortgage suit would have been a fatal objection to that suit but it did not affect the present one; (3) that the plaintiff was entitled to a decree for an apportionment of the mortgage-debt on the property purchased by the defendants 1 to 3, account being taken in that appointment as well of the property purchased by R. K., as of the property purchased by the plaintiff himself. RAMMOY

Sup: Govt. acts (IV of 1882) (*Contd.*)

HAZRA *v.* PREM CHAND NASKAR. **5 W. N. C P. 423.**

342. S. 82. *Mortgage—Contribution—Valuation of properties for the purpose of ascertaining their liability to contribution.*

In a suit for contribution, the time at which the properties comprised in a mortgage are to be valued under s. 82 of Transfer of Property Act, is the date of the mortgage in respect of which the contribution is claimed. MARDAN SINGH *v.* SHANKUR SHEO DAYAL. **A. W. N. 1905, P. 95-2 A. L. J. 307 = 27 A. 549.**

343 S. 82—"*In the absence of a contract to the contrary.*" *Reference of—Mortgage—Discharge of part of mortgaged property—Subsequent mortgage—Second mortgagee not entitled to claim apportionment.*

After properties Nos. 1, 2, 3, were mortgaged it was agreed between the mortgagor and the mortgagee by a registered document that the property No. 1 was to be exonerated by means of credit being given to the mortgagor for a certain sum. After that the properties Nos. 2 and 3 were mortgaged to a second mortgagee.

Held, that the second mortgagee was not entitled to an apportionment according to the probable value of all three properties.

The words "In the absence of a contract to the contrary" in section 82 of the Transfer of Property Act do not refer merely to a contract to the contrary executed at the time of the mortgage. RAMA *v.* MANAK DULAB. **7. B. L. R, 191.**

344. S. 82.—*Civil Procedure Code (Act XIV of 1882), Section 305—Sale of mortgaged property by one of several judgment-debtors—Right of purchaser—Lien.*

There is nothing in section 305 of the Civil Procedure Code from which it can be inferred that the Court in authorising the sale could empower the judgment-debtor to transfer any higher interest than he had and bind the interests of others in the property.

When in execution of a mortgage-decree order for sale of the mortgaged property is passed against the judgment-debtors and the mortgaged property is sold by one of them under Section 305 of the Civil Procedure Code, the vendee is entitled to a lien on the shares in the mortgaged property owned by the judgment-debtors, who did not join in the sale to the extent of the liability of such judgment-debtors to pay the decretal amount. DANAPPA *v.* YAMNAPPA. **4 B. L. R., 61. = 26. B. 379.**

345. S. 82—*Marshalling—Contribution—Mortgagor and mortgagee.*

There is nothing in the provisions of the Transfer of Property Act to support the view that, as between a mortgagee and the holders of the equity of redemption, the mortgagee is bound to distribute his debt rateably upon the mortgaged properties. 29 M. 217, 18 C. 320 followed; 30 C. 755, C. L. T. 337, 3 C. L. T. 571 = 30 C. 613 distinguished. HARA KUMARI CHOWDHURANI *v.* EASTERN MORTGAGE AND AGENCY CO., LTD., **7 C. L. J. 274.**

Sup: Govt. acts (IV of 1882) (*Contd.*)

346. S. 82.—*Purchase of the mortgage-decree by the holder of the interest of one of the mortgagors, effect of—Reduction of the mortgage—Debt in proportion.*

Where the holder of the interest of one of the mortgagors in one of several mortgaged properties, subsequently purchases the whole mortgage-decree, the mortgage is satisfied to the extent of the proportion which the value of the mortgaged property purchased by him bears to the value of all the properties mortgaged.

Wherever there is a confidence of the estates of the mortgagor and the mortgagee in the same person, the mortgage-debt is extinguished in proportion to the extent of the mortgaged property acquired by the mortgagee, and the mortgagee or his assignee can only recover the balance of the mortgage-debt from the other properties mortgaged. HARENDRA KUMAR GUHA *v.* DINDAYAL SAHA, **4 C. L J. 195.**

347. S. 82—See S. 55 (b), 82. 92—9. O. C. 259 No 165 *supra.*

348. S. 82—See S. 56, 81, 82—31. C. 95 No 170 *supra.*

349. S. 82—See S. 70, 82, 97—29. C. 803 No 297 *supra.*

350 S. 83. 56—*Contribution—Purchaser of a portion of poroperty—Charge:—*

Held, that the purchaser of a mortgaged share, who satisfies the mortgage decree obtained against him and others is entitled to sue for contribution according to the proportionate value of the proportionate share of the mortgaged property and to hold it liable to satisfy the debt under S. 82, Transfer of Property Act. S. 56 applies to a case of a vendor purchaser and enables a purchaser of a portion of the property subject to a charge to have this charge satisfied out of the other portion of the property in the absence of a contract to the contrary. SIRAJ-UD-DIN AHMAD *v.* SIRAJ-UD-DIN. **2. A. L. J. 698.**

351. S. 82, 89—*Order absolute—Notice—Contribution—Purchase by mortgagee.*

No notice is necessary to be given to the mortgagor before an order absolute for sale is made under S. 89 of the Act.

Where certain properties, along with others, are subject to two mortgages in favour of the same person, and the mortgagee has purchased and obtained possession of such properties, in a sale in execution of his decree on the first mortgage, such properties are liable to contribute to the discharge of the second mortgage debt, and when a decree is obtained upon the second mortgage and sought to be executed, there must be a deduction, from the amount of the second decree, of the sum payable as such contribution (22 A 284, 13 M. I. A. 404 and 4 C. 475 followed.) MAHOMED TAKI REZA *v.* W. A. THOMAS. **4. C. L. J. 317.**

352. S. 82, 85, 91—*Purchase of part of mortgaged property by a third party—Suit by*

Sup: Govt. acts (IV of 1882) *(Contd.)*

mortgagees to recover from such purchaser a rateable portion of the mortgage bebt.

The plaintiffs, who were mortgagees of shares in four villages under a deed of simple mortgage, dated the 31st of March, 1883, brought a suit for sale of one-half of the mortgaged property, alleging as their reason for asking for sale of half the property only that the title of their mortgagors did not extend to more than half. In this suit, the mortgagees obtained a decree for sale of one-half of the mortgaged property on the 29th of June, 1893. In 1892, one M, in execution of a simple money decree against one of the mortgagors, attached the mortgaged shares in two of the villages, the subject of the mortgage and in 1894, caused half of those shares to be brought to sale and purchased them himself. The mortgagees, although they had not made M a party to their suit for sale, sought to execute the decree which they had obtained against the shares purchased by M. Ultimately M. obtained a decree, declaring that the property purchased by him was not liable in execution of the decree held by the mortgagees on their mortgage, but the mortgagees brought to sale the shares in the other two villages, one of which they purchased themselves, the other being sold to a stranger. The mortgagees then sued M's representatives (he having meanwhile died), and in this suit, having given credit for the sum realized by the sale of that part of the mortgaged property whih had been brought to sale in execution of their decree, they asked for the payment of the balance due to them, or rather of such portion thereof as was thought to be commensurate with the value of the shares purchased by M, and failing payment, for sale of those shares.

Held, that the suit was not objectionable in point of form. The plaintiffs (whatever might have been M's right, in a suit brought by him to redeem the whole property comprised in their mortgage, or if he had been impleaded in the mortgagee's original suit for sale) were not bound in this suit to give M, or his representatives, an opportunity to redeem the whole property. The plaintiffs, on the other hand, were not entitled, to the detriment of M, or his representatives, to set up the plea that their mortgage was only valid as to a moiety of the property included in it, and thus to saddle the shares purchased by M, with a double portion of the mortgage debt; but defendants were entitled to have an account taken of the respective values of the four parcels hypothecated under the bond of March, 1883, and could redeem their own two parcels upon paying that portion of the mortgag debt which might be found to be proportionate to the value of their parcels. (19 A. 527; and 24 A. 187), referred to. DINA NATH *v.* LACHMI NARAIN. **A. W. N. 1903 P. 150 = 25 A. 446.**

353. s. 82, 95, 100.—*Mortgage-decree—Execution of decree—Payment of decretal amount by one of the representatives of the mortgagor—Charge—Contribution—Limitation*

Sup. Govt. acts (IV of 1882) *(Contd.)*

Act (XV of 1877), Schedule II, Article 132.

The plaintiff and the defendants were co-sharers in a certain property. They were representatives of the original owner who had mortgaged it. The mortgagee sued on the mortgage and obtained a decree. The plaintiff paid the entire decretal amount and sued the defendants for contribution in proportion to their shares.

Held, that the plaintiff did not acquire a charge on the property, within the meaning of section 100 of the Transfer of property Act.

The provisions of 95 and 82 of the Transfer of Property Act are not applicable to such cases. 26 *All.*, 227, *dissented from.* 26 *Bom.*, 379, *distinguished.* 2 *Cal.*, 565, *referred to.* NAWAB JAHAN ARA BEGUM *v.* MIRZA SHAUJA-UD-DIN BUKHT BAHADUR. **9 C. W. N. 865.**

354. s. 82, 95.—*Contribution, priniple of—mortgage-debt paid by one of the co-mortgagors, to save property from sale—Purchasers of equity of redemption—Assignees of property from permanent lease-holder—Interest on the money paid to save property, if may be higher than that provided for in the mortgage-bond—Personal decree—Charge—Equitable lien.*

The principle of contribution requires that parties who are equally bound to pay a common debt and who are relieved of the burden of that debt by one of them, should reimburse him of all that he has paid in excess of his proper share of debt.

A *puisne* incumbrancer, who pays of a prior mortgage, is entitled to be placed in the position of a prior mortgagee, if his intention was not to extinguish the prior lien. 10 C. 1035 *referred to.*

The same principle applies in a case where one of the two co-mortgagors pays off the entire mortgage-debt and claims to be in the position of the mortgagee, for the purpose of obtaining contribution from his co-mortgagor. 4 A. 58, 26 B. 379, 26 A. 407 (416). R., 14 C. 809, *D.*, 9 C. W. N. 865, *Exp.* and *D.*

The same principle does not, however, apply to persons, who are not co-mortgagors, but are the assignees of a *mokarari* interest granted by the mortgagor himself, and they are not entitled to claim the same lien, as against the shares of the co-mortgagors, as the co-mortgagors. They are entitled only to a personal decree.

Co-mortgagors who have purchased the equity of redemption of the shares in the property of some of the mortgagors and have saved the property from sale, by paying the balance of the entire mortgage-debt, are not bound by the covenant as to the rate of interest as provided in the mortgage-bond. The liability of the defendants to pay the contribution-money to the plaintiffs, arises upon very different considerations from those which existed at the time of the execution of the mortgage-bond, and it is not right and proper to refuse to the plaintiffs the ordinary rate of interest at 12 per cent. per annum, which, in a case like this, the Court allows.

Sup: Govt. acts (IV of 1882) *(Contd.)*

RAUSHAN ALI KHAN CHOWDHURY *v.* KALI MOHAN MOITRA. **4 C. L. J. 79.**

355 s. 82, 100—*Mortgage—Co-mortgagors—Sale of property of one or more out of several co-mortgagors—Proceeds of such sale not sufficient to satisfy the decree—Contribution.*

Held, by Stanley, C. J., Burkitt, J. (Banerji, J., *dissentiente*) that one of two or more mortgagors (including the transferees of the equity of redemption from any of them) whose portion of the mortgaged property has been sold in execution of a decree for sale on the mortgage and has fetched at auction a larger sum than was rateably attributable to it, but has not discharged the whole of the mortgage debt, has no right against his co-mortgagors to compel them to contribute and indemnify him to the extent by which the proceeds of the sale of his protion of the mortgaged property was in excess of the amount rateably due from it. He therefore does not acquire a charge in respect of such excess against his co-mortgagor's protions of the mortgaged property. (12 A. 110); (26 M. 686); (21 C. 142) (24 M. 96); (20 M. 23); (14 A. 273); referred to. *Per* Banerji, J.—There is no distinction between a case where the payment in respect of which contribution is claimed is made to avert a legal process and a case in which payment has been enforced by sale of the property of the claimant for contribution. (13 A. 371): (19 A. 545); (24 M. 85); (26 M. 686) referred to. In order that the right of contribution may arise, it is not necessary that the whole of the debt in respect of the payment of which contribution is claimed, should have been satisfied. A right to contribution arises when the payment made by the claimant for contribution or the amount realized by the sale of his property exceeds the amount for which that property was rateably liable and the property of the person from whom contribution is sought has to that extent benefited by being relieved of liability. (2 A. 115); (12 A. 110); (19 A. 545); (26 M. 686); (19 A 332) referred to. A person who is entitled to contribution also acquires, in the case of a mortgage, a charge upon the property of the co-mortgagors. IBN HASAN *v.* BRIJBHUKAN SARAN. **A. W. N., 1904, p. 74 = 1. A. L. J. 147 = 26. A. 407.**

356. s. 83—*Right of depositor on deposit*—See Mortgage Extinguishment. RUGALSINGH *v.* SATNARAINSINGH.—**27 A. 178.**

357 s. 83—*Deposit of mortgage money into Court to credit of mortgagee and a third person.*

Payment of mortgage-debt under section 83 of the Transfer of Property Act must be a payment to the account of the mortgagee alone, so that the mortgagee may, on receipt of the notice of deposit, apply to the Court by petition and forthwith obtain payment, without the concurrence or sanction of any other person. When no such valid deposit is made, the mortgagee is entitled to the mortgage-debt and interest up to the date of the payment of the principal in accordance with the terms of the mortgage. DEBENDRA MOHAN RAI *v.* SONA KUNWAR. **A. W. N., 1904, p. 20 = 1. A. L. J. 5 = 26. A. 291.**

357 *(a)* **s 83**—*Deposit—Equties between prior and subsequent mortgagees—Estoppel:—*

Where money is deposited in Court under S. 83. T. P. A., by a subsequent mortgagee to redeem a prior mortgage and that money is withdrawn by the prior mortgagee without any objection, the withdrawal must be deemed to be an acknowledgment by the person to whose credit the money is deposited of an actually existing mortgage held by him which is capable of being redeemed, it being immaterial to consider whether the subsequent mortgagee could legally have taken a mortgage from a person who at its date had become an exproprietary tenant of the lands mortgaged. SUNCHRA *v.* SHADI RAM. **1. A. L. J. 590.**

358 s. 83—*Redemption of Mortgage—Deposit in Court by the mortgagor of the sum alleged by him to be due on the mortgage—Conditions of such deposit.*

A mortgagor paid into Court under the provisons of s. 83 of the Transfer of Property Act, the sum which in his estimation was sufficient to redeem his mortgage. The mortgagees refused to accept this sum in discharge of the mortgage, and the mortgagor filed a suit for redemption, without however, withdrawing from court the money which he had deposited. In this suit, the mortgagor obtained a decree for redemption on payment of the sum deposited, *plus* a small item for costs, and an appeal by the defendants from his decree was dismissed. The defendants then appealed to the High Court, but, pending their appeal, were allowed by the Court in which it was deposited to withdraw the money paid in by the plaintiff under s. 83.

Held that the defendants had after such withdrawal of the money deposited by the plaintiff no right to proceed with their appeal. The money deposited by the mortgagor plaintiff continued to be held by the Court on the terms upon which it was originally deposited, and the defendants were only entitled thereto upon fulfilling the conditions laid down in s. 83 of the Transfer of Property Act, that is to say, if they stated their willingness to accept the money deposited in full discharge of their mortgage and deposited the mortgage deed (if in their possession or power) in Court. DAL SINGH *v.* PITAM SINGH. **A. W. N 1903. P. 2 = 25 A. 179.**

359 s. 83— *Money deposited under, becomes property of mortgagee only when conditions stated in section complied with.*

Money deposited in Court by the mortgagor for payment to the mortgagee under section 83 of the Transfer of Property Act does not become the property of the latter until he has complied with the conditions prescribed by the section as conditions

Sup: Govt. acts (IV of 1882) (*Contd.*)

precedent to his drawing the mony out of Court. *25 All., 179, followed.* MOTHIAR MIRA TARAGAN *v* AHMATTI AHMED PILLAI. **29. M. 232.**

360 s. 83—See T. P. A. S. 86—27 A. 325 (P. C.) *supra.*

361 s. 83—See S. 60, 83, 95—27. A. 178 No 236 *supra.*

362 s. 83—See S. 63, 83, 86, 91—4. O. C. 337 No 246 *supra.*

363 s. 83—See s. 74, 83, 86—9. C. W. N. 577. No 321 and 27. A. 325 No 322 *supra.*

364 s. 83, 84—*Repayment of money lent—Lender not bound to accept payment in instalments unless he has so agreed.*

Where no stipulation of covenant has been made between the contracting parties as to the repayment of a sum borrowed, the lender is entitled to decline to receive payment of a sum due to him in instalments and he can claim that the whole sum due be paid at one and the same time. BEHARI LAL *v.* RAM GHULAM. **A. W. N. 1904 P. 135 = 24. A. 461.**

365. S. 83, 84.—*Redemption—Mortgage-debt tendered and deposited in Court— Possession of mortgaged property obtained by mortgagee —Mesne profits—Claim to mesne profits by mortgagor after tender of mortgage debt and deposit in Court.*

In 1890, the plaintiff mortgaged certain land to the first defendant without possession for Rs. 700. The mortgage deed provided that the plaintiff (mortgagor) should remain in possession and pay interest to the first defendant until the mortgage-debt was repaid. In 1895, the first defendant sued the plaintiff on the mortgage and a consent decree was passed, which directed that the defendant therein (the present plaintiff) should pay Rs. 300 on the 7th October 1897, and Rs. 400 on the 7th October 1898, and in case of default in either payment on the specific date, possession of the land should be given up to the plaintiff therein (the present defendant 1). Default was made in payment of the first instalment on the 7th October 1897, and the present first defendant thereupon applied for possession in execution of the said consent decree, which possession he did not obtain until the 3rd April 1898, and he then assigned it for value to the second defendant. In the meantime, however, (*viz.* on the 19th March 1898), the plaintiff (mortgagor), under s. 83 of the Transfer of Property Act (IV of 1882), tendered and deposited in Court the Rs. 700, and subsequently demanded possession of the land. The second defendant refused to give it up, and the plaintiff thereupon filed this suit for redemption. He also claimed the mesne profits of the land from the date at which he deposited the Rs. 700 in Court, *i.e.* the 19th March 1898. The Court of first instance held that the plaintiff was entitled to redeem on payment of the Rs. 700, but was not entitled to mesne profits. The lower Appellate Court held that under s. 84 of the Transfer of Property Act (IV of 1882) the plaintiff was entitled to mesne profits from the date on which the first defendant took possession of the land (3rd April 1898), and ordered redemption on payment by the plaintiff of the Rs. 700 less the amount of such mesne profits. On second appeal,

Held (reversing the decree of the lower Appellate Court and restoring the decree of the Court of first instance) that the plaintiff was not entitled to mesne profits, but was entitled to redeem on payment of the Rs. 700. By the consent decree, the first defendant became entitled to possession on the 7th October 1897, although he did not actually get possession until the 3rd April 1898. By that decree, the right to redeem accrued to the plaintiff only after the defendant had got possession. The plaintiff (mortgagor) could not defeat the right of possession which had accrued to the first defendant (mortgagee) by tendering and depositing the mortgage-debt in Court on the 19th March 1898. That tender was premature and the provisions of S. 83 and 84 of the Transfer of Property Act (IV of 1882) did not apply to the case. RAM SONJI *v.* KRISHNAJI. **3 B. L. R., 939 = 26 B. 312.**

366. S. 83, 84.—*Mortgage—Interest due after the date of tender.*

In order to get the benefit of s. 84 of the Transfer of Property Act, the mortgagor should deposit the money in Court under S. 83. RAMNATH TARK RATNA *v.* GOPAL CHANDRA SARKAR. **8 C. W. N. 153.**

367. s. 83, 84.—*Deposit of mortgage-debt in two instalments—Interest—Custom.*

There is nothing in Ss. 83, 84, of the Transfer of Property Act which expressly prohibits the deposit being made on two dates. In the absence of proof of custom, both the days, namely, the day on which money lent and the day on which money was paid cannot be included within the period for which interest is calculated. RAGHUB PRUSTI *v.* BHOBNI. **8 C. W. N. 216.**

368. s. 83, 84. *Mortgagor's suit for surplus collections made by mortgagee after satisfaction of his mortgage—Limitation Act Art. 105, 109 and 120.* See Mortgage Redemption. SALIGRAM *v.* ASHIK HUSAIN. **4 O. C. 355.**

369. s. 83, 84. *Redemption—Tender of mortgage money—Interest where exact amount not tendered.* See Mortgage Redemption. BALDEO PERSHAD *v.* INAYAT KHAN. **6 O. C. 135.**

370 s. 83, 84, 103. *Redemption—Interest on mortgage-debt—When interest ceases to run—Deposit by mortgagor—Duty of mortgagor making such deposit when mortgagee is a minor —Appointment of guardian* ad litem.

On the 25th October, 1893, the plaintiff passed a mortgage-deed to the defendant, which provided that in case of redemption, the mortgagor should pay interest for the whole year in which such redemption should take place. On the 12th October, 1899, the mortgagor with a view to redeem, deposited in Court, under s. 84 of the Transfer of Property Act (IV of 1882), the sum of Rs. 2,000,

Sup: Govt. acts (IV of 1882) (*Contd.*)

which was the whole amount due on the mortgage for the then current year ending 24th October, 1899. The mortgagee was then dead, and his son and heir was a minor, and it was therefore necessary that a guardian *ad litem* should be appointed to receive notice of the deposit as required by s. 82. Steps were accordingly taken to appoint the minor's mother and on the 18th November, 1899, she was duly appointed guardian *ad litem*. Notice was then served upon her calling on her to show cause why she should not receive the deposit. The notice was made returnable on the 9th December, 1899, on which day she refused to accept the deposit, on the ground that it did not include the interest which had accrued due for the year commencing 25th October, 1899. The deposit was consequently returned to the plaintiff, who then filed this suit for redemption. The Subordinate Judge passed a decree directing redemption on payment to the defendant of Rs. 2,000 and also interest for the year commencing 25th October, 1899. The District Judge varied this decree, refusing to give the additional interest, holding that "on making the deposit, the plaintiff (mortgagor) had done all that had to be done by him" to enable the defendant to take the deposit out of Court as provided by s. 84 of the Transfer of Property Act and that therefore interest had ceased to run. On appeal to the High Conrt.

Held (reversing the decree) that the defendant (mortgagee) was entitled to the additional interest. The defendant (mortgagee) was a minor. It was therefore requisite that a guardian *ad litem* should be appointed both to receive service of the notice of deposit under s. 83 and to take the deposit out of Court. It could not be said that the mortgagor (plaintiff) had completely performed his part until he had procured the appointment of a guardian *ad litem* for the above purpose. This was not done prior to the 25th October, 1899. Consequently the mortgagee was entitled under the mortgage to the interest for the year commencing on that day. PANDURANG *v.* MAHADAJI. **4 B. L. R. 714 = 27 B. 23.**

371 S. 84—*Requisites of tender seeking possession—Redemption.*

A mortgage deed, provided that—

"Notwithstanding any thing contained to the contrary, the mortgage debt, for the time being owing on the security of these presents, shall at once become payable, as if the due date, or extended date, if any, had elapsed, and, in such case, all such rights and remedies shall be available to the Banker, as will be available to her under the term of these presents, upon default being made in payment of the principal moneys, or interest, and all other moneys hereby secured, and the banker may, in such event in her discretion, without any further consent on the part of the Company, forthwith enter upon or take possession of the mortgaged premises, or

Sup: Govt. acts (IV of 1882) (*Contd.*)

any of them of which she is not already in possession."

Owing to the happening of some of the contingencies, the plaintiff claimed that the debt, owing on the security of the mortgage deed had become payable, and that she was entitled to enter upon and take possession of the premises mortgaged to her. She contended that the expression "as if the due date had elapsed" not only served to accelerate the due date, but also to fix the amount of the mortgage money at what it would have been, if, in fact, the due date had elapsed. The defendent alleged a tender of the mortgage money to plaintiff's attornies and refusal to accept the same, and claimed to redeem the property.

Held, (1) that the words 'as if due date had elapsed' were used merely to accelerate payment, and they could not be construed to cover the further amount that would have been due on the expiry of the due date of the mortgage.

(2) That the tender was not good, as the plaintiff's attorney disclaimed authority to receive it.

(3) That the defendant was entitled to redeem the property,

A tender must be made either to the principal whose business it is to consider it or to his authorised agent, and a tender made to a person who disclaims authority to receive it is made at the maker's risk (1 C. and K. 36) (1843), 1 N. and M. 398 (1833) referred. BAI RUTTONBAI *v.* THE FRASER ICE FACTORY. **10. B. L. R., 203.**

372 s. 84.—See S. 76, 84. 89, 92—34 C. 223 No. 328 *supra*.

373. S. 84—See S. 83, 84—24 A. 461 No. 364. 26 B. 312 No. 365, 8 C. W. N. 153 No. 366, 8 C W N. 216. No. 367, 4 O. C. 355 No. 368. 6 O. C. 135. No. 369, 27 B. 23 No. 370 *supra*.

374 S 85—Sale without impleading a son—*See Hindu Law Debt.* DEBI SINGH *v.* JAIRAM. **25 A. 214.** *(F.B.)*

375. S. 85—*Hindu Law—Father's debts —Suit against father—Son's liability.*

Under the provisions of Section 85 of the Transfer of Property Act a mortgage from a Hindu father, governed by *Mitacshara*, ought to implead in the suit on his mortgage against the father his sons as parties where he has notice of their interest.

Where the plaintiff prayed for a declaration that he was not bound by a certain mortgage executed by his father inasmuch as he was no party to the decree in the mortgage suit brought against his father, *held*, that he was not entitled to the declaration sought for by him, as upon the merits it was found that the mortgage debt was binding on him.

The plaintiff could only be given a decree redeem the mortgage. LALA SURAJ PRASAD *v.* GOLAB CHAND **5 W. N., C. 1901. p. 340. = 28. C. 517.**

376. S. 85.—*Joint Hindu family—Suit for sale on mortgage by father, son being no party—Subsequent suit by son for declaration*

Sup: Govt. acts (IV of 1882) *(Contd.)*

of non-liability of his share under the decree. See Hindu Law Joint Family. KANHYA LAL *v.* RAJ BAHADUR. **A. W. N. 1902. P. 24 = 24. A. 211.**

377. S. 85 —*Parties—Kanomdar necessary party*—See Malabar Law—VEDAPURATTI *v.* AVARA. **25. M. 568.**

378. S. 85.—*Suit by* puisne *mortgagee—Right of sale by* puisne *mortgagee—Decree on first mortgage to which* puisne *mortgagee was not a party—Civil Procedure Code (Act XIV of 1882), S. 287.*

A *puisne* mortgagee is entitled to a sale of the property secured by his mortgage subject to the right of the first mortgagee, even after the property has been sold in execution of a decree obtained by the first mortgagee in a suit to which the *puisne* mortgagee was not a party. (4 C. W. N. 541), overruled.—DEBENDRA NARAIN ROY *v.* RAMTARAN BANERJEE, **I. L. R., 30 C. 599; 7 C. W. N. 766; F. B.**

379. S. 85.—*Mortgage—Non-joinder—Apportionment of mortgage debt—Purchaser of mortgaged property—Release.*

When a purchaser from the mortgagor of one of the mortgaged properties (subsequently released by the mortgagee from his lien) is not made a party to a mortgage suit brought by the mortgagee, the proper course is not to dismiss the suit for non-joinder, but to apportion the mortgage debt between the property so purchased and released, and the other mortgaged property. In such a case, the mortgage should be treated as split up into two.—HARI KISSEN BHAGAT *v.* VELIAT HOSSEIN, **7 C. W. N. 723.—30. C. 755.**

380 S. 85—*Civil Procedure Code, s. 32—Failure of plaintiff to make prior mortgagees parties to a suit against* puisne *mortgagees.*

This was a suit to recover the amount due on a mortgage by the sale of the mortgaged property. There was a prior mortgage in respect of the same property but the prior mortgagees were not made a party to the suit. The Court acting under s. 32 of the Civil Procedure Code added the prior mortgagees as defendants to the suit. The District Judge held that the suit must fail as the plaintiffs did not in their plaint implead the prior mortgagees.

Held that the decision of the District Judge was wrong. The exercise by the lower Court of the power conferred by S. 32 satisfied obligation which lay upon the plaintiffs in respect of the prior mortgagees. 17 A. 48 refd. to. KUNDAN LAL *v.* FAKIR CHAND. **A. W. N., 1904, p. 166 - 1. A. L. J. 476 = 27. A. 75.**

381. S. 85—See Evidence Act (I of 1872) s. 8, 1812, 21, 66, 91, 157 & 167—No 7—Col. 149—U. B. R. 1907 P. 13.

382. S. 85—*Suit on mortgage in respect of a part only of the mortgaged property—Parties.*

In bringing a suit on a mortgage, the mortgagee is entitled to exclude from his suit any portion of the mortgaged property he likes and to proceed to sell or foreclose the mortgage as to the remainder. It is not obligatory on him to proceed against the whole property. The parties interested in the portion of the property excluded from the suit, are not necessary parties to the suit. 2. A. 906 *distd.* 25. A. 79. A. W. N. 1898 P. 12. *refererd to.* 2. A. L. J. 628 = A. W. N. 1905. P. 156 followed SHEO TAHAL OJHA *v.* SHEODAN RAI, **A. W. N. 1905. P. 244 = 2. A. L. J. 630 = 28. A. 174. (F. B.)**

383—*Meaning of property*—See Mortgage—Sub Mortgage. MISSILAL *v.* ABDUL AZIZ—**A. W. N. 1902. P. 216.**

384 *Minor—Hindu Law—Guardian—Mortgage by guardian of minor's property—Duty of mortgagee to inquire as to necessity for loan.*

Where the guardian of a minor Hindu purports to mortgage the minor's property on behalf of his ward, the lender is bound to ascertain whether the guardian is acting for the benefit of the minor. It is only, however, when there has been at the time of the loan due inquiry as to the necessity for it, that the lender can obtain a charge over the minor's property, DALIBAI *v.* GOPIBAI, **4. B. L. R. 1902. P. 105 = 26. B. 433.**

385 S. 85—*Mortgage suit—Appeal—Parties.*

To an appeal against a decree passed in a suit relating to a *puisne* mortgage the prior mortgagee is a necessary party. AMMAYI AMMAL *v.* RATHNA PATBAN. **14. M. L. J. 497.**

386. S. 85.—*Mortgage—Suit upon—Parties—Contribution against purchasers.*

In his suit by the mortgagee subsequent transferrees of a part of the property, defendants 1 to 3, were not made parties. The mortgagor had sold a part of the mortgaged property to one R. K. with the consent of the mortgagee. In execution of his decree the mortgagee purchased the mortgaged property excepting the part sold to R. K. The mortgagee subsequently filed a suit against other transferrees defendants 1 to 3, to make the property purchased by them liable for the mortgage-debt.

Held, that the mortgagor and R. K. were not necessary parties to this suit; (2) that the omission of the plaintiff to make the defendants 1 to 3 parties to the original mortgage suit would have been a fatal objection to that suit but it did not affect the present one, (3) that the plaintiff was entitled to a decree for an appointment of the mortgage debt on the property purchased by the defendants 1 to 3 account being taken in the apportionment as well of the property purchased by R. K., as of the property purchased by the plaintiff himself. RAMMOY HAZRA *v.* PREM CHAND NASKAR **5 C. W. N. C. P. 423.**

337. S. 85—*Mortg*[illegible]*the same property—D*[illegible]*rival mortgagee-purcha*[illegible]*—L*[illegible]*P*[illegible]*ns.*

Per Prett and [illegible] *JJ.* ([illegible], *J. disssenting*)—When a first mortgagee who has no notice of the second mortgage and a second mortgagee of the same property who has notice of the first mortgage obtain dec-

Sup: Govt. acts (IV of 1882) *(Contd.)*

rees upon their respective mortgages, each without impleading the other, if the second mortgagee purchases the property in execution of his own decree before a similar purchase by the first mortgagee, the first mortgagee-purchaser is entitled to call upon the second mortgagee to redeem him and upon his failure to do so, to get possession.

Per Rampini, J. (*Contra*).—The remedy of the first mortgagee in such a case is to bring a fresh suit upon his mortgage making the second mortgagee a party, and if such suit is barred by limitation, he is without a remedy.

Quære.—Whether the doctrine of *lis pendens* would apply to the sale in execution of the second mortgage. HAR PERSHAD LAL *v.* DALMARDAN SINGH. **9 W. N., C., 728 = 32 C. 891.**

390. S. 85.

On the 23rd January 1879 one U. S. mortgaged 10 *biswansis* of land to one K. S. and on the 5th June 1879 U. S. and his brother M. S. mortgaged the same land together with certain other property to one S. N. Both the mortgages were registered.

In 1885 K. S. sued upon his mortgage and obtained a decree under which the land mortgaged was no the 30th November 1886 sold to Kabra Begam for Rs. 425-2 of which Rs. 296-13-6 was due to and paid to the mortgagee. S. N. second mortgagee was not a party to these proceedings.

On the 13th November 1886, after the decree in the previous suit and before the sale under that decree S. N. instituted a suit on his mortgage without making K. S. the first mortgagee a party and he obtained a decree on the 26th March 1887, for sale of the mortgaged properties which were put up for sale and purchased by one Kudrat Ullah.

On the 15th December 1896 Kudrat Ullah deposited Rs. 299-13-6 the amount which had been due and paid upon the first mortgage to the first mortgagee, in Court, under section 83, Transfer of Property Act, to the credit of Kubra Begum. On her refusing to accept the sum Kudrat Ullah brought a suit to redeem the 10 *biswansis* purchased by Kubra Begum.

Held, that the suit was maintainable and the plaintiff was entitled to redeem the first mortgage on payment of Rs. 296-13-6.

13 *All.*, 432; 15 *All.*, 478; 22 *All.*, 212, *distinguished*, 18 *All.*, 469; *L. R.*, 13 *I. A.* 106; 26 *Cal*, 734, 10 *Bom.*, 224 and 20 *Bom*, 390; *referred to.* KUDRAT ULLAH *v.* KUBRA BEGUM. **23 A. 25.**

391. S. 85.—*Civil Procedure Code (Act XIV of 1882), Section 287—Registration Act (III of 1877), Section 17—Mortgage—Sale by first mortgagee without impleading second mortgagee—Right of second mortgagee.*

The first mortgagee, in execution of a decree under the Transfer of Property Act, sold the mortgaged property, and it was purchased by a third party. The present plaintiffs, who held a second mortgage were not made parties to that suit, and now claimed their right as second mortgagees to sell the property subject to the previous mortgage.

Held, that the claim was valid. 4 *W. N., Cal.*, 541, *overruled.* DEBENDRA NARAIN ROY *v.* RAMTARAN BANERJEE. **30 C. 599 (F. B.).**

392. S. 85.—*Mortgage—Redemption. Suit for—Parties. Non-joinder of.*

A mortgage affecting three villages was executed by the plaintiff to secure an advance made to him. Subsequent to the execution of the mortgage a proportionate part of the mortgage-debt was paid off by the mortgagor, and two villages were redeemed and discharged from the mortgage.

The mortgagee purchased a portion of the remaining third village, and so became entitled to the equity of redemption in that portion. The plaintiff then being desirous of redeeming the mortgage affecting the third village instituted a suit. The suit was dismissed on the ground that a party who had an interest in one of the two villages already redeemed, but had no interest whatever in the third village, ought to have been but was not made a party to the proceedings under the provisions of section 85 of the Transfer of Porperty Act.

Held, that the suit was wrongly dismissed. NAZIR HUSAIN *v.* NIHAL CHAND. **2. A. L. J. 628 = A. W. N. 1905 P. 156.**

393. S. 85. *Mortgage—Parties—Suit by sub-mortgagee for sale of mortgagee right—Original mortgagor not a necessary party—Decree for sale of mortgagee rights cannot be passed.*

The plaintiff, a sub mortgagee, brought a suit against the defendants, his mortgagors, to recover a debt secured by a mortgage of the defendants' rights as mortgagees. The lower Appellate Court dismissed the plaintiff's suit on the ground that the original mortgagors had not been impleaded as defendants in the suit.

Held, that the order of dismissal was wrong for they were not a necessary party to the suit.

Held, also, that the plaintiff could not get a decree for sale of the mortgagee rights of the defendants sub-mortgaged to him 18 *All.*, 113 *referred to.* RAM JATAN RAI *v.* RAMHIT SINGH. **2 A. L. J. 434 = A. W. N. 1905 P. 76 = 27 A. 511.**

394. S. 85. *Mortgage suit—Parties.*

Part-owners of a mortgaged property, who did not execute the indenture of mortgage and did not receive the money and were not interested in the equity of redemption are not necessary parties to a suit to enforce the mortgage, MON MOHINI GHOSE *v.* PARVATI NATH GHOSE. **32 C 746.**

395. S. 85. *Non-joinder of parties—Application for amending the plaint.* See C.

Sup: Govt. acts (IV of 1882) (*Contd.*)

P. C. S. 32. BHAGMANI KUNWAR *v* SUBH-NARAIN RAI. **A. W. N 1905 P. 35.**

396. s. 85. *Redemption suit against mortgagee.* See T. P. A. S. 99. No. 666 infra. A. W. N. 1905 P. 80=2 A. L. J. 210=27 A. 517.

397. s 85. *Mortgage suits—Parties—Notice, constructive—Registered mortgage—Frame of suit.*

Under section 85 of the Transfer of Property Act all persons having an interest in the property comprised in a mortgage, of which the plaintiff has notice, must be made parties to a suit relating to such mortgage. The notice may be actual or constructive.

Whether registration of a subsequent mortgage is itself notice depends upon the facts and circumstances of each case—upon the degree of care and caution which an ordinary prudent man would necessarily take for the protection of his own interest by search into the registers kept under the Registration Act.

Where a subsequent holder of a registered mortgage was not made party under section 85 of the Transfer of Property Act—

Held, that the decree passed in the suit was not bad as the mere fact of the registration of the subsequent mortgage was no notice of its existence to the plaintiff, who was not bound, before suing, to make a search in the Registrar's office to ascertain who should be made parties to the suit. 6 *Bom.* 168; 9 *Bom.* 427; 14 *Bom.*, 506; 17 *Bom.*, 741: 9 *All.*, 591, *disapproved*, 15 *Mad.*, 268; 12 *Mad.*, 429; 15 *Mad.*, 383; 23 *Cal.*, 790; 16 *All.*, 478; 27 *Cal.*, 358; 5 *C. W. N.*, Lxxxiii notes *approved.*

A purchaser under the prior mortgage may always shield his possession and protect his interest by setting up such prior mortgage, and it will not be proper to allow him to be dispossessed simply on the ground that a third party has the right to redeem. It will be for the *puisne* mortgagee or a purchaser under his decree, or an assignee of the equity of redemption to apply for redemption on the usual terms. The *puisne* mortgagee cannot ask a suit for confirmation of possession by the auction purchaser to be dismissed by reason merely of his not having been made a party in the suit on the prior mortgage. Decree for confirmation of possession should, however, be subject to the *puisne* mortgagee's right to redeem the prior mortgage.

Article 139 of the Limitation Act is not applicable to a suit for confirmation of possession brought by the purchaser under the prior mortgage. 23 *W. R.*, 338 *referred to.* BANWARI JHA *v.* RAMJI THAKUR. **7 C. W. N., 11.**

398. s. 85.—*Parties—Mortgage—Suit on mortgage bond—Person claiming under paramount title Misjoinder of parties—Multifariousness - Civil Procedure Code (Act XIV of 1882), Ss. 44, 45—Appellate Court—Other errors affecting merits of suit.*

To a suit to enforce a mortgage, persons claiming under a title adverse to that of both the mortgagor and the mortgagee are not proper parties. The term "property comprised in a mortgage" in s. 85 of the Transfer of Property Act means not the physical object but the interest therein which the mortgagor is competent to transfer by way of mortgage at the date of the transaction. The ordinary rule is that a plaintiff mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party, who is in no way connected with the mortgage and who has set up a title paramount to that of the mortgagor and mortgagee. Under Ss. 44, 45 of the Civil Procedure Code, causes of action of this description cannot be joined in a suit to enforce a mortgage. The rule is not one of convenience merely and the fact of the question of such title being determined by the Court of first instance in breach of the rule, does not preclude a Court of appeal from reversing the decree. The question, however, is not one of jurisdiction, and where in a mortgage suit, a question of paramount title raised by a defendant is tried without objection, neither party can ask for a reversal on the ground that the issue was not properly triable in the action. 1 C. L. J., 337, *followed.* 13 A. 432, *dissented.* JUGGESWAR DUTT *v.* BHUBAN MOHAN MITRA. **3 C. L. J. 205=33 C. 425.**

399. s. 85.—*Different suits on one mortgage only.*—See C. P. C. S. 43. KESHAVRAM DULVARAM *v.* RANCHHOD FAKIRA. **7 B. L. R., 811=30 B. 156.**

399 (a). S. 85.—*A mortgage decree could not bind persons of whose interest a mortgagee had notice and whom he omitted to implead in his suit as required by S 85, T. P. A.*—See Hindu Law, joint family. RAM AYTAR SINGH *v.* CHOWDHURI NARSINGH NARAIN SINGH. **3 C. L. J., 12.**

400. S. 85.—*Parties—Person not known to be interested—Representation of debtors' estate by adult heirs only—Suit to redeem brought after sale—Limitation Act, Art. 12 (a):—*

In a suit to enforce a mortgage the mortgagee made one only of two persons who represented the estate of the mortgagor a party defendant, not having notice of the existence of the other.

Held, that the latter was bound by the decree obtained by the mortgagee and his interest passed at the sale held in execution of the decree. 21 A. 194; 28 C. 517, and 6 B. 515 relied on. 4 C. 142; 7 A. 822 and 14 C. 464 referred to. That for the purpose of the suit the estate of the motgagor was sufficiently represented as the person who was sued was alone in possession of the mortgaged property and the other person, a minor, was not known to the mortgagee and his interest did not appear to have suffered by reason of his not being made a party. 9 C. W. N. 201; 32 C. 296; 32 I. A. 23 foll. *Sha fuddin* J.—A suit by the latter to redeem the mortgage after the property had been sold as above, could not succeed without the sale being set aside, and not having been instituted within one year of his attaining majority, was barred under Art. 12 *(a)* of Sch. II of the Limitation

Sup: Govt .acts (IV of 1882) (*Contd.*)

Act.—RAM TARAN GOSWAMI *v* RAMESWAR MAHA.—**11 C. W. N. 1078=6 C. L. J. 719.**

401. S. 85.—*Parties—Mortgage suit—Suit on second mortgage—First mortgagee not a necessary party.*

In a suit to enforce a second mortgage, the first mortgagee is not a necessary party. 1. C. L. J at 349 foll—GURDEO SINGH *v.* CHANDRIKAH SINGH. **5. C. L. J. 611.**

402. S. 85.—"*Property comprised in the mortgage*"—*Parties to mortgage suit by* puisne *or submortgagees.*

The words "property comprised in the mortgage" as used in S. 85 were probably intended to denote no more than the estate or interest which is the subject of any particular mortgage. It is the mortgagee's interest in the case of a sub-mortgage and the mortgagor's equity of redemption in the case of a *puisne* mortgage. A prior mortgagee is no necessary party to a suit on a *puisne* mortgage if the plaintiff seeks only to have the property sold subject to the prior mortgage; and the mortgagor is no necessary party in a suit by a sub-mortgagee of the mortgagee's rights. 13 A. 432 diss. from. 8 A. 105 app. RAM SHANKAR LAL *v.* GANESH PRASAD. **1907 A. W. N. 97=4 A. L. J. 273=29 A. 385.**

403. S. 85.—*Parties—Parties claiming adversely to mortgagor, if necessary parties—Contract Act, S. 23—Illegal contract.*

S. 85 of the Transfer of Property Act does not require persons who claim adversely to the mortgagor to be made parties. 32 C. 746 foll. A mortgage contract is not illegal within the meaning of S. 23 of the Contract Act, merely because the mortgagors were entitled only to a half share and not the whole of the property mortgaged.—JOGO MOHAN DAS LASKAR *v.* DANDOONG BURMAN. **12. C. W. N. 94.**

404. S. 85.—*Joinder of parties—Applicability to mortgage suits in mufussil in Lower Burma.* See mortgage (general). THA KAING *v.* MA HTAIK. **3 L. B. R., 1906, P. 241.**

405. S. 85.—*Mortgage—Suit for redemption—Buddhist Law—Joinder of parties—Transfer of Property Act, S. 85—Code of Civil Procedure, S. 437.*

Under Buddhist Law, a widow is entitled to an absolute disposing interest in her own share of the family property and to a life interest in the remainder. An only surviving daughter cannot, without joining the widow as a party, bring a suit on her own account for the redemption of property mortgaged by her deceased father.

The daughter is bound by an act of the widow extending the mortgage for a term of years.

Ma On v. *Ko Shwe O (1886)*, S. J. L. B., 378; *Ma Thin* v. *Ma Wa Yon (1094)*, 2 L. B. R., 255; *Ram Baksh Singh* v. *Mohun Ram Lall Doss (1874)*, 21 W. R., 428; *Prannath Roy Chowdry* v. *Rookea Begum (1859)*, 7 Moore's I. A., 323; *Hall* v. *Heward, (1886)*,

Sup: Govt. acts (IV of 1882) (*Contd.*)

32 Ch., D. 430; cited. MAUNG PE *v.* MA TAIK. **3. L. B. L. R. 1905 P. 15.**

406. S. 85.—*See C. P. C. S. 13*—NGA THET THA *v.* MI KYE GYI, **U. B. R. 1907. P. 5. (Civil Procedure).**

407. S. 85.—*Suit for sale on a mortgage—Parties.*

Whether or not S. 85 of the Transfer of Property Act, 1882, refers solely to persons interested in the equity of redemption, it is not essential to join as a party defendant, in a suit for sale on a mortgage, a person whose interest in the mortgaged property, if it exists, would be antagonistic to the claims of both mortgagor and mortgagee (33 C 425 ref.) KHAIRATI *v.* BANNI BEGAM, **A. W. N. (1908), 100.**

408. S. 85.—*Mortgage of joint family property executed by father alone—Decree for foreclosure—Sons not made parties—Right of sons to redeem*—See Hindu Law (Joint family) RAM PRASAD *v.* MAN MOHAN.—**A. W. N. 1908. P. 106.**

409. S. 85.—*Failure to implead* puisne *mortgagee—No knowledge of* puisne *mortgagee—Validity of decree.*

Where a *puisne* mortgage was not impleaded in a suit by a prior mortgagee the prior mortgagee having no knowledge of the *puisne* mortgage though registered, the decree for sale passed in such suit and the proceedings based thereunder are valid subject to the rights of the *puisne* mortgagee. RAM NARAIN SAHOO *v.* BANDI PERSHAD. **31 C. 737 at 742.**

410 S. 85—*Suit for possesssion by mortgagee—Mortgagor's sons not necessary parties.*

To a suit brought by a usufructuary mortgagee for possession of mortgaged property against the mortgagor and a purchaser of the mortgaged property the sons of the mortgagor are not necessary parties, even though they constitute a joint family with their father when the property was not the ancestral property of the family. *Semble*:—The fact that there is a prayer in the alternative for recovery of the mortgage money will not make any difference. RAM NARAIN RAM *v.* PALU PATAK. **1 A. J. L. 367.**

411. S. 85.—*Parties—Dismissal of suit—Review—Joinder.*

Where a suit on a mortgage was dismissed for non joinder of necessary parties under S. 85, T. P. A., but on an application for review the necessary parties were added and the suit was decided on the merits.

Held, on second appeal, that the review was not wrongly granted and that the case was rightly decided in the presence of all the necessary parties. GIRISH CHANDER DEY *v.* JURAMONI DEY. **5 C. W. N. 81.**

412. S. 85—*Mortgage of joint family property—Son's liability for decree against father—Decree for interest and costs.*—See Hindu Law. RAMADHIN *v.* SHAMESHAR DUTT. **4 O. C. 93.**

413. S. 85.—*Suit for possession, lis pendens—Purchaser in execution of decree on prior mortgage, the sale taking place after sale—Un-*

Sup: Govt. acts (IV of 1882) (*Contd.*)

subsequent mortgage—See Mortgage. FAIYAZ HUSAIN KHAN *v.* M. PRAG NARAIN. **7 O. C. 243.**

414. S. 85.—*Suit by second mortgagee—Sale of mortgaged property without redeeming prior mortgage—Rights of prior and subsequent mortgagees—"Property," meaning of—Equity of redemption.*

The plaintiff who was a second mortgagee sued the defendant for recovery of the principal and interest due to him by sale of the mortgaged property. In the plaint, he made no offer to redeem the prior mortgage.

Held, that the term "property" as used in Chapter IV of Act IV, 1882, means an actual physical object and includes an equity of redemption.

Held, therefore, that the plaintiff could bring the mortgaged property to sale without redeeming the first mortgage. MATADIN KASODHAN *v* KAZIM HUSAIN, 13 All. 432 *dissented from.* RAJA AZIM ALI KHAN *v.* MIR MOHAMMED HUSAIN. **1 O. C. 105.**

415. S. 85.—*Prior and subsequent mortgagee—Procedure.*

In a subsequent mortgagee's suit for foreclosure or sale a prior mortgagee must be made a defendant even though the plaintiff claims no relief against him. In such a case the plaintiff may claim to redeem the prior mortgage, if it is ripe for redemption; or otherwise, to obtain a declaration in respect of it, and failing a claim by the plaintiff the prior mortgagee, as defendant, may claim to have the priority and value of his incumbrance declared against the decree sought by the *puisne* mortgagee against the mortgagor.

Where any such claim as above is made by either party, the claimant must state the value thereof; and upon such valuation will depend, *prima facie*, the jurisdiction of the Court to deal with it.

Neither the plaintiff nor the prior mortgagee in a suit of the *puisne* mortgagee in a suit of the kind above stated is bound to claim any relief in respect of the prior mortgage, and where it is ascertained from the pleadings that neither of these parties seeks any relief against the other, in the said suit the prior mortgagee should be at once discharged from the list of the defendants thereto.

S. 85 of Act IV of 1882 demands that all persons interested in a property which has become the subject-matter of a mortgage suit, should be brought before the Court in order that any dispute between them and plaintiff which any party may desire to have decided in that suit, may, if possible, be dealt with. But the section merely directs the joinder of such persons; it does not require the retention to the end of the suit of those who are, on inquiry, found to claim no relief, or against whom no relief is claimed, in that suit. 14 C. P. L. R., 154, 14 C. P. L. R., 177, *referred to*, 20 C. 527 *followed.* GHULAJI TELI *v.* FAKIR SHAH. **17 C. P. L. R., 1904, P. 139.**

Sup: Govt. acts (IV of 1882) (*Contd.*)

416. S. 85.—See S. 43, 85, 86, 92—5. O. C. 335. No. 74 *supra.*

417. S. 85.—See S. 67, 85, 99—24. A. 549—No. 267 *supra.*

418. S. 85.—See S. 74, 85, 24. A. 179 No. 317 *supra.*

419. S. 85.—See S. 75, 85, 86, 91—5. B. L. R. 892 No. 323 *supra.*

420. S. 85.—See S. 82, 85, 91—A. W. N. 1903. P. 150-25. A. 446 (F. B.) No. 352 *supra.* —(For other cases See Mortgage suits under the heading Mortgage suits without impleading other mortgagees).

421 S. 85, 86, 88—*Subsequent mortgagee—Suing for redemption and for foreclosure.*

There is nothing in the Transfer of Property Act or in the Code of Civil Procedure which will prevent a *puisne* mortgagee from combining in one suit a prayer to redeem a prior and to foreclose his own mortgage.

Although in 6. B. 404, 3. A. 432, 22. C. 33 and 22. B. 701, it has been held that in a suit for sale or foreclosure by a *puisne* mortgagee the prior mortgagee need not be joined as a party and although it was held in 12 C. P. L. R. 86 that in such a suit the prior mortgagee could be only a proforma party, yet it appears that S. 85 was enacted to enable the Court to make an effectual decree adjusting the rights of all parties concerned and the obvious intention of the Legislature must be given effect to in a reasonable manner 53. L. J. Ch. 741 and 54 L. J. Ch: 1145, 12. C. 100, 40 L. J. Ch: 599, 8. R. R. 283, 5 L. J. Ch: 92, 18. L. J. Ch: 281, 55. L. J. Ch: 226, referred to. S. 28. C. P. C. is not contravened by this procedure. LAKHMI CHAND TILOKCHAND *v.* GANPATI. **14 C. P. L. R. 1901. P. 177.**

422 S. 85, 88—*Mortgage of joint family property by father—Suit for sale against him without joining sons—Son's suit for declaration on attachment of the property in execution of the decree against the father 1 O. C. 53*—See Specific Rlief Act (I of 1877) S. 42 Col: 428.

423. S. 85, 81, 82, 95, 56, 60. *Authority of Court to introduce unnecessary complications—Mortgagee not compellable to distribute liability among mortgaged properties—Contribution, right of, against properties not included in suit—Marshalling not compellable so as to prejudice mortgagee—Power of Court executing mortgage decree.*

There is nothing in the provisions of the Transfer of Property Act to support the view that as between a mortgagee and the holders of the equity of redemption, the mortgagee is bound to distribute his debt rateably upon the mortgaged properties. 5 M. 387 referred to. He may, however, be compelled to do so when by his act he has prejudicially affected the rights of the holders of the properties to contribution among themselves. Where some only have been compelled to pay the whole debt, they are entitled to contribution from the other parties who are liable, though the properties in their hands have not been

Sup: Govt. acts (IV of 1882) *(Contd)*

included in the suit. 2 A. 807, followed. 20 B 615, followed. *Semble*: Where, however, the mortgagor sells not merely the equity of redemption but conveys a portion of the property itself free from any liability to contribute to the mortgage debt, the purchaser may insist upon the mortgagee proceeding, in the first instance, against the property in the hands of the mortgagor. Marshalling cannot be enforced so as to compel a mortgagee to proceed against a security which may be insufficient or may involve him in litigation to realise. 9 C. 406 distinguished. *Obiter:* It is competent to the Court in executing a mortgage decree to exercise its control in bringing the different items of property comprised in the decree to sale in a particular order to adjust the equities of the parties before it who are interested. KRISHNA AYYAR *v.* MUTHUKUMARASAWMIYA PILLAI. **29 M. 217.**

424. S. 85, 86, 88 & 89.—Puisne *mortgagee party in a suit by first mortgagee—Decree directing mortgagor to pay second mortgagee also, validity of—Rate of interest after date fixed for payment of decretal amount—Right of second mortgagee to redeem first mortgage.*

A suit was brought by the first mortgagee to recover a certain sum due to him from the mortgagors. In the suit, the second mortgagee also was made a party defendant. The Subordinate Judge directed that, on defaults in the payment of the amounts due to the first and second mortgagees, the mortgaged properties should be sold and the sale proceeds distributed in the manner provided in the Transfer of Property Act. The contractual rate of interest was allowed to the mortgagees up to the date fixed for payment and thereafter the interest was to be 3 p. c. per annum. There was no provision in the decree allowing the second mortgagee to redeem the first mortgage by paying off the debt due to him.

Held, the object of making a second mortgagee a party defendant is that the property may be sold free of his encumbrance, not to enable him to practically obtain a decree against the principal defendant without bringing a suit properly framed for that purpose. The provisions of Ch. III of the Court-Fees Act would be defeated if the decree be allowed to stand as it did.

Held, also, that the plaintiff mortgagee is entitled to interest at the rate stipulated in the bonds till the date fixed for payment and thenceforward until payment, at the Court rate of 6 p. c. per annum.

Held, further, that the decree of the lower Court should be modified so as to enable the second mortgagee to redeem the first mortgage. 24 C. 190; 29 C. 43; 25 M. 103 (114) and 27 Ch. D. 215, *refd. to.* 5 C 101 and 22 C. 101. *distd.* A. O. D No. 49 of 1900 decided by Maclean, C. J., and Banerjee, J., on the 1st August 1901, *relied on.* L. J. MACKINTOSH *v.* N. S. WATKINS. **1 C. L. J. 31.**

Sup: Govt. acts (IV of 1882) *(Contd.)*

425. S. 85 and 91 (f)—*Mortgage after attachment.*

In this case the property attached by the decree holder in execution of a decree for money was mortgaged by way of conditional sale by the judgment-debtor to a third person. The mortgagee brought a suit against the judgment-debtor, without impleading the decree holder, of whose interest he had notice, and obtained possession of the property on the confession of the judgment debtor. Subsequently the decree-holder caused the property to be sold. *Held*, that the auction-purchaser was entitled to redeem the property and to recover possession from the mortgagee.—*5 Cal, 148; 4 Mad., 1, at p. 64; 5 B. L. R., 691, referred to.* GHULAM HUSAIN *v.* DINA NATH. **W. N., A. 1901, p. 143.= 23 A. 467.**

426. S. 85, 96—*Mortgage decree need not reserve rights admitted by all parties—Decree must be construed with reference to pleadings.*

There is nothing in the provisions of the Transfer of Property Act, which requires that a decree in a mortgage suit should in terms reserve rights admitted by all the parties and order the sale to be subject to them and S. 96 of the Act does not militate against this view. *Quere*, whether S. 85 of the Act requires such persons, whose rights are admitted to be made parties. Where the decree omits to reserve such rights, it ought to be construed with reference to the admissions contained in the pleadings or made in the course of the case and ought not to be so construed as to grant a larger measure of relief than is prayed for or to negative rights admitted by all parties.—SRINIVASA RAO SAHEB *v.* YAMUNABHAI AMMALL. **16 M. L. J. 50 = 29. M. 84.**

427. S. 85, 93, 97—*Mortgagee holding two mortgages over same property—Suit for sale based on earlier mortgage alone—Maintainability.*

In 1880, B executed a simple mortgage over certain lands in favour of A. In 1886, B mortgaged the same lands to A with possession. A now brought a suit on the earlier mortgage for sale of the mortgaged property subject to the later mortgage:

Held that the suit could not be maintained. 20 A. 322 referred to.—DORASAMI *v.* VENKATA SESHAYYAR. **11. M. L. J. 373 = 25 M. 103**

428. S. 88—*Decree fixing interest up to date of payment*—See interest. PRAYAG KOPRI *v.* SHYAM LAL. **31 C. 133.**

See also 29 C. 43, and 16 M. L. J. 160 = 3. C. L. J. 85 (P. C.) and it has been finally decided by the Privy Council in 34 C 150 that after the day fixed for payment the matter passes from the domain of contract to that of judgment and that the rate of interest that should be fixed after the date fixed for payment is 6 per cent per annum, which is the Court rate of interest.

429. S. 89.—*Mortgage by conditional sale—Informal and irregular decree—Execution—Absolute order.*

Sup: Govt. acts (IV of 1882) (*Contd.*)

The plaintiff mortgagee sued upon a mortgage by conditional sale praying that the defendant should be debarred from redeeming the property if the money was not paid within a certain time. The Court decreed "the claim with costs with interest at 6 per cent per annum to be paid within 2 months."

Held, that the decree, though irregular and informal, was in effect a decree for foreclosure under S. 86. T. P. A.

Held, further, that after the decree had been made absolute and was not appealed against, the defendant could not object to the delivery of possession to the plaintiff. JOGENDRA CHANDRA ROY *v.* RAM NATH BHATTA CHARYA. **4. C. L. J. 533.**

430 S. 86.—*Does not bar a personal decree being granted for costs against a mortgagor.* See mortgage conditional sale. DHONDU PANDIT *v.* MAHANT DAULAT PURI. **3. N. L. R. 97.**

431. S. 86.—*Suit to enforce registration—Personal undertaking to repay the loan.*— See Registration Act (3 of 1877) S. 17, 23, 94, 49, 73 and 77—MAUNG KYAN *v.* SITHAMBARAM CHETTY. **4. L. B. R. 1907 P. 88.**

432. S. 86.—*Decree of foreclosure—Award of cost against decree holder.*

When a plaintiff has obtained a foreclosure decree under S. 86 T. P. A. and a defendant is entitled to recover costs against the plaintiff personally under the same decree S. 247 C. P. C. does not operate to bar the defendant from executing his decree, 4 C. 442, 17 B. 32, 5 A. 272, 16 A. 395, 23. M. 121, 6. A. 351 referred to.— CHHOGMAL *v.* GOVIND PRASAD. **16. C. P. L. R. 1903. P. 73.**

433. *Amount to be entered in notice—Interest—Costs—Jurisdiction—Oudh Laws Act XVIII of 1876 S. 10—Suits Valuation Act S. 11.* See Pre-emption—SAKINA BIBI *v.* ABDUL HAFIZ, **2. O. C. 103.**

S. 86.—*See Mortgage redemption, adverse possession of mortgagee*—MAKHAN *v.* BHAGIRAT, **8. O. C. 33.**

434. S. 86. See S. 43, 85, 86, 92—5 O. C. 335 No. 74 *supra.*

435. S. 86. See S. 52, 86, 87—29 A. 76 No. 106 *supra.*

436. S. 86 See S. 58, 60, 86—28 B. 378. No. 186 *supra.*

437. S. 86. See S. 74, 83, 86—9 C. W. N. 577. No. 321 and 27 A 325 No. 322 *supra.*

438. S. 86 See S. 75, 85, 86, 91—5 B. L. R. 892 No. 323 *supra.*

439. S. 86. See S. 85, 86, 88—14 C. P. L. R. 1901 P. 177. No. 421 *supra.*

440. S. 86. See S. 85, 86, 88, 89—1 C. L J. 31 No. 424 *supra.*

441. S. 86, 87. *Mortgage—Redemption possible at any time until an order absolute under s. 87 has been made.*

A mortgagor who has obtained a decree for redemption may pay in the decretal amount, and obtain redemption at any time up to the making of an order absolute under S. 87 of the Transfer of Property Act, 1882. Nor is the mortgagor deprived of his right to redeem by the fact that under an order of Court, not being an order under S. 87, the mortgagee has been put into possession of the mortgaged property. (23 A. 446) and (27 C. 705), followed.—SALIG RAM *v.* MURADAN, **A. W. N. 1903 P. 20=25. A. 231.**

Sup: Govt. acts (IV of 1882) (*Contd.*)

442. S. 82 and 87.—*Stay of proceedings.*

Under section 87 of the Transfer of Property Act, if the payment, provided for in the previous preliminary decree, be not made within the time allowed, the plaintiff may apply for foreclosure, and the Court has no right to do otherwise than to pass a decree for foreclosure. The section does not give inherent jurisdiction to the Court to stay proceedings; on the contrary, it makes it imperative on the Court to pass a decree for foreclosure. AKSHYA KUMAR BARORI *v.* SURJA KUMAR CHATTERJI.— **6. C. W. N. 654.**

443. S. 86 and 87.—*Decree under—Claim by mortgagor to redeem before the expiry of the term allowed.*

Where, in accordance with the provisions of S. 86 and 88 of the Act, a conditional decree for sale was passed fixing a date for payment, the mortgagor could not claim to redeem before the expiry of the term allowed, on payment of the principal money and cost together with interest calculated up to the actual date of payment, though it was open to him to move the Court before passing a conditional decree to accelerate the date fixed for payment. (66 L. T. Ch. 689 refd. to). KHUMAN SINGH *v.* BHOLANATH, **1 N. L. R. 106.**

444 S. 86 to 88—*Scope of—Decree for foreclosure—Order absolute, effect of.*

Per Stanley, C. J:—The decree passed under S. 86 is not a money-decree, nor is the order absolute passed under S. 87 such a decree. The order absolute for foreclosure, so far from directing the payment of the mortgage-debt, has the effect of discharging the debt. (35 C. D. 123 refd. to). If in a foreclosure-suit, the mortgagor thinks fit to pay the mortgage-debt, and thus save his interest in the property, he does so by reason of the obligation, which he undertook when he executed the mortgage security, and with a view to preserve the property, and not in obedience to any order of the Court. Any payment made by him will not be in execution of the decree. The decree *nisi* puts him under no obligation to pay the debt, but simply declares what the consequences of non-payment will be. Similar observations apply to the order contemplated by S. 88 of the Act.

The mortgage security does not lose its character until an order absolute for foreclosure is passed. It remains a debt secured upon the property. It is only when the order absolute for foreclosure has been passed, that the debt is discharged and, in

lieu of it, the mortgagee acquires the absolute ownership of the property SHAM SUNDER *v.* MOHAMED IHTISAM ALI, **2. A. L. J. 180 (F. B.)=A. W. N. (1905), 70=27. A. 612. (F. B.)**

445 s 86, 87—*Order absolute for foreclosure without notice to defendant in foreclosure suit—Application to set order aside.*

A plaintiff in a foreclosure suit obtained a decree for foreclosure under s. 86 of the Transfer of Property Act, and, the time limited for redemption by the defendant having expired without being extended, the plaintiff obtained, under s. 87, but without notice to the defendant, an order absolute debarring the defendant from redeeming, and also for delivery of possession of the mortgaged property. On the contention being raised, on appeal, that the order was null and void for want of notice to the defendant:

Held that the view of the majority of the Court in 25 M 244, which related to proceedings under s. 89, was applicable to proceedings under s. 87, and that such proceedings are proceedings in execution of the decree passed unger s. 86. In the present case, the application had been made within one year of the decree, and, in consequence, under s. 248 of the Code of Civil Procedure no notice was necessary to the defendant. The case, 22 M 133, proceeds upon the view that the defendant could apply for an extension of the time for redemption only if and when the plaintiff applies for an order absolute under the second paragraph of s. 87 a view which has been dissented from by the Full Bench in 25 M 300—PANDU PRABHU *v.* JUJE LOBO, **27 M. 40.**

446 s. 86, 88, 89—*Mortgage—Sale of mortgaged property—Execution of decree—Right to redeem—Order absolute for sale—Stoppage of sale by payment of mortgage debt—Civil Procedure Code (Act XIV of 1882), s. 291—High Court Circular Order No 13 of 27th April 1892.*

The concluding words of S. 89 of the Transfer of Property Act, *viz.*, "thereupon the defendant's right to redeem and the security shall both be extinguished" relate to the actual sale and distribution of the proceeds and not merely to the passing of the order absolute for sale. A mortgagor judgment-debtor is entitled to stop the sale of the mortgaged property in execution of a mortgage decree by payment of the debt before the sale actually takes place, although an order absolute for sale may have already been passed. 25 M 244, 25 B 104, 19 A 205 and 31 C 379 followed; 6 C. W. N. 769 and L. R. 22 Ch. D. 98 referred to.—BIBIJAN BIBI *v.* SACHI BEWAH, **8. C. W. N. 684 ; F. B. =31. C 863.**

447 s. 86, 88—*Decree for sale on a mortgage—Rate of interest after date fixed for payment.*

Where a decree for sale on a mortgage gives interest after the date fixed by the decree for payment of the mortgage debt, it is not necessary that such interest should be at the contractual rate. 26 C 39; 2 C. W. N. 249 ref. to. LACHMI NARAIN *v.* UMAN DAT. **1907 A. W. N. 60=4 A. L. J. 219=29 A. 322.**

448 S. 86, 88, 94—*Decree fixing day for payment—Interest after day fixed—Interest up to realization:*

The Judicial Committee did not intend to lay down in 25 I. A. 179 that interest at the mortgage rate should be allowed up to the time of actual payment of the mortgage money to the mortgagee. The scheme and intention of the Transfer of Property Act in regard to mortgage decrees for sale is that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagor should henceforth depend, not on the contents of his bond, but on the directions in the decree. The directions for payment to the parties contained in S. 88 of the Act cannot be read literally because S. 94 contemplates a final adjustment and provides for payment of subsequent costs and there is nothing in the Act which precludes the subsequent interest also being taken into account.

Held, that the High Court was not only right in allowing interest after the fixed day, but also in allowing it at the Court and not at the mortgage rate on the aggregate amount due on the date fixed for payment. Sources of the power of the Court to allow interest after the fixed date suggested. 25 I. A. 179; 26 C. 39 expl.; 28 I. A. 35 foll. 24 C. 766; 21 M. 364 ref. to.—RANI SUNDER KOER *v.* RAI SHAM KRISHNA. (LORD DAVEY.) **9 B. L. R. 304=11 C. W. N. 209=4 A. L. J. 109=17 M. L. J. 43=34 I. A. 9 P. C.=34 C. 150.**

449. s. 86, 87—*Deposit of mortgage-money after time fixed by decree—Mortgagor's right to redeem—Application for order absolute for foreclosure.*

In a mortgage by conditional sale, the mortgagor is entitled to redeem at any time prior to an order absolute for foreclosure is passed against him even if he exceeds the time fixed by a decree of Court for payment of the mortgage-money.

Held, also, that a decree under section 86 of the Transfer of Property Act is a decree *nisi*. It can have no final force and effect until completed by an order absolute under section 87. 19, A. 180 dissented from, 16 C. 246, followed. MUSAMMAT BUTA *v.* USMAN. **1 O. C., 91.**

450 s. 86, 88—*Compound interest—Interest for period between date fixed by decree for payment and date of realization—Interest*

Sup: Govt. acts (IV of 1882) *(Contd.)*

on costs—See Interest. ALLAHABAD BANK LD. *v.* SAYAD MOHAMED JAWAD. **2 O. C. 37.**

451 S. 86, 88—*Court's discretion to award interest from date of decree to that of realization.*—See Hindu Law, Stridhan Mitakhra—Daughter inheriting property from mother. LALA SHEO PERTAB BAHADURSINGH *v.* ALLAHABAD BANK LD. **2 O. C., 130.**

452. S. 86, 88, 89.—*Decree for sale of moveable and immoveable property—Decree not made absolute—Execution of decree.*

A sued B and C upon a deed of mortgage by which some immoveable property and an elephant were hypothecated and obtained a decree for sale of the same in default of payment. The decree was prepared according to S. 88 T. P. A. A took out execution against C (the present possessor of the elephant), applying for attachment and sale of the elephant. C. objected that the decree had not been made absolute, and that until that had been done, it could not be executed. The Court of first instance allowed the objection, and dismissed the application. The District Judge, on appeal, set aside the order of the Lower Court.

Held, that there was nothing to prevent execution as to the moveable property upon the decree as it stood (which contained an express stipulation that it must be made absolute after the time fixed) before sale could be made, as the provisions of section 86 to 89, Act IV of 1882, apply only to mortgages of immoveable property. SARDAR KARAN SINGH *v.* DWARKA SINGH. **4 O. C. 301.**

453. S. 86, 89.—*Application for order absolute—C. P. C. of 1882, s. 462.*

A obtained a decree for sale under S. 86, against B who was a minor. The decree was passed in accordance with a compromise effected without the leave of the Court between A and the guardian *ad litem* of the minor B.

The decree-holder applied for an order absolute for sale under s. 89, T. P. A., whereupon objection was taken on the part of the minor that under section 462, Civil Procedure Code, the decree was irregular.

Held, that the objection on the score of section 462, Civil Procedure Code, could not be entertained in proceedings under section 89, Act IV of 1882, which are proceedings in execution of decree. BASDEO *v.* SHEO ADHIN. **1 O. C. 49.**

454 S. 86, 88—*Court's power to award interest after date fixed for payment—Construction of decree.*

S. 86 and 88 T. P. A. do not empower a Court to award future interest on the mortgage money for any period subsequent to the date fixed for payment by the decree *nisi*. In decrees *nisi* for sale drawn under S. 88 the Court can award interest subsequent to the said date; but such power debars the section; it is a power derived from a long course of practice which has not been

Sup: Govt. acts (IV of 1882) *(Contd.)*

forbidden by the Legislature, and rests on equity and good conscience. (26 C. 39 referred to.) Where a decree *nisi* for sale under S. 88 does not give the date up to which interest from the date of suit is to run, it should be interpreted to award such interest only up to the dies datus. Where a Court desires to award interest beyond that date such desire should be expressly stated in the decree 23 A. 181, 20 A. 397, 26 C 39, 21. A. 351, 19 A. 174, 16 C. 39 discussed. SETH GHASI RAM MAHESHRI *v.* RAJA GOKAL DAS. **17 C. P. L. R. 1904 P. 164.**

455 S. 87—*Final order for foreclosure or redemption is a decree and appealable—Redemption after due date—Discretion—Equity.*

Every application to initiate a proceeding under S. 87. T. P. A. is a plaint and the proceeding itself is a suit. An order making foreclosure absolute, likewise an order that a redemption has taken place is a decree and is therefore appealable 3 N. L. R. 55, 18 C. 500 referred to. 27 C. 705 dissented from. A mortgagor can as of right redeem the mortgage property before the date fixed for redemption in the foreclosure or redemption decree. On default in payment the decree holder can apply for an order absolute and the Court is bound to pass such an order, unless it extends the period of redemption, on a sufficient cause. The mortgagee's right to foreclose after the due date is subject to an equitable relief allowed on proper grounds to the mortgagor. The Court can reasonably exercise its discretion having regard to the conduct of the mortgagor in granting the equitable relief. 2 N. L. R. 137, 3 N. L. R. 55 followed, 27 C. 305 dissented from.—LAKSMI BAI NAIKIN *v.* RAM CHANDRA MALHAR. **3 N. L. R. 143.**

456. S. 87.—*Proceedings between decree* nisi *and order absolute—Notice before order absolute*—Ex parte *order absolute Extention of time for redemption*—See Mortgage foreclosure. SETH BHAGWANDAS *v.* SHRIDHAR. **3 N. L. R. 55.**

457. S. 87.—*Decree absolute for foreclosure*—Khas *and Symbolical possession—Execution of decree.*

A fresh cause of action arises when a judgment-debtor remains in *khas* possession, inspite of symbolical possession having been delivered to his decree-holder in execution of a decree absolute for foreclosure. 58 L. J. Ch. D. 118, 21 L. J. Q. B. D. 367, 22 B. 637, 25 B. 358, 24 C. 715, 20 B. 351, 30 C. 710, 9 W. R. 454, 10 W. R. 396, 7 C. 418, 19 A. 499, 21 A. 269 *referred to* and *discussed.* RAPO RAO PATIL *v.* GOBIND RAO. **16 C. P. L. R., 1903, P. 107.**

458. S 87.—*Order absolute for foreclosure C. P. C., S. 258—Plea of payment of the mortgage debt.*

In an application under s. 87, T. P. A. for an order absolute for foreclosure of the mortgaged property, S. 258, C. P. C. is no bar to an inquiry into the plea of payment of the mortgage-debt. 29 C. 651, 12 C. P. L. R. 82, 12 A. 61, 13 A. 278, 25 M. 244, 22 B. 771, 26 B.

Sup: Govt. acts (IV of 1882) *(Contd.)*

121, 8 C. P. L. R. 113, 25 C. 133 *referred to* and *discussed.* SITARAM AMRIT BRAHMAN *v.* DHARMU. **16 C. P. L. R., 1903, P. 111.**

459. S. 87.—*Application for possession of foreclosed property—Proceeding in execution—Separate suit for possession—Decree absolute.*

An application for possession of foreclosed property under s. 87, T. P. A. is not a proceeding in execution and is not governed by any limitation, and Art. 178 L. A. does not apply to it. A separate suit for possession lies upon a decree absolute for foreclosure which contains no direction for delivery of possession. 11 C. P. L. R. 141, 51 L. J. Q. B. 367, *followed.* 22 C. 924, *referred to.* JAKA PATEL *v.* MT. JAMNA. **16 C. P. L. R., 1903, P. 114.**

460. S. 87.—*Formal order for possession—Execution proceedings—Foreclosure decree.* **C. P. C., s. 331.**

When a foreclosure decree absolute contains no direction for delivery of possession of the mortgaged property to the decree holder, such possession can not be obtained merely by applying for execution of the decree under the Code of Civil Procedure 1882; nor can such a decree by itself be made the basis of proceedings under S. 331 of that code.

The proper course for enforcement of the decree holder's right to possession under such a decree is by way of an application under S. 87 T. P. A. for a formal order for possession. Coupled with such an order possession may be obtained by execution proceedings in the ordinary way. 15. B. 641, 11. C. P. L. R. 141, 16. C. P. L. R. 114 followed. RAM CHANDRA BANIA *v.* BALKRISHNA GANPAT RAO DESHPANDE. **17. C P. L. R 1904. P. 62.**

461. S. 87.—*Notice to judgment debtor before making order absolute—Exparte order absolute—Application for order absolute—Decree for foreclosure*—See C. P. C. S. 108.—JAFRI BEGAM *v.* LAKHSMIDHAR. **4. O. C. 238.**

462. S. 87.—*Decree for foreclosure regarding a portion of mortgaged property subsequent to order absolute regarding remaining portion—Alteration of foreclosure decree before being made absolute*—See C. P. C. S. 244—RAJARAM *v.* SHEOPAL SINGH. **7. O. C. 137.**

463. S. 87.—*Foreclosure decree—Occupancy right—Rent Act XXII of 1886 S. 5, 33, 108—Loss of proprietary right—Oudh Laws Act XVIII of 1876 S. 25*—See Occupancy right—SURAJ BAKSH *v.* BHAGWANDIN—**Bd's. S. D. No 7 of 1903.**

464. S. 87.—*Foreclosure decree—Sums paid by the mortgagor—Order absolute, prayed for a portion of the decretal amount.*

Held, that where a mortgagor pays only a certain sum under a foreclosure decree but fails to pay up the whole and an application is made by the mortgagee for an order absolute to foreclose the mortgaged property in lieu of the unpaid portion, the mortgagor cannot ask the Court that the sums paid by him under the decree should be returned to him before the decree is made absolute. SYED FIDA HUSAIN AND ANOTHER *v.* LALA CHHANGA MAL, **10. O. C. 354.**

Sup: Govt acts (IV of 1882) *(Contd).*

465. s. 87.—See Ss. 52, 86, 87—29 A. 76 No. 106 *supra.*

466. s. 87.—See Ss. 86, 87—25 A. 231 No. 441 and 6C. W. N. 654 No. 442 *supra.*

467. s. 87.—See Ss. 86, 87—27 M. 40 No. 415 *supra.*

468. s. 87.—See Ss. 86, 87—1 O. C. 91 No. 449 *supra.*

468 (a). s. 87.—See Ss. 92, 93, 82—2 M. L. R. 137, No. 619 *infra.*

469. s. 87, 89.—*Mortgage—Order absolute for sale or foreclosure—Notice—Order passed* ex-parte—*Powers of Court to set aside.*

A Court has power to deal with an application by a mortgagor to set aside an order made under section 87 or section 89 of the Transfer of Property Act without notice to the mortgagor on the ground that it was made *ex-parte.*

The Court has an inherent power to deal with an application to set aside the order made *ex-parte*, and can set it aside upon a proper case being substantiated. *Tara Pado Ghose* v. *Kamini Dassi* (I. L. R., 29 Cal. 644) *dissented from.* BIBI TULSIMAN *v.* HARIHAR MAHTO. **9 C. W. N., 81 = 32 C. 253 (F. B.)**

470. s. 87, 89.—*Mortgage, redemption of—Right of redemption after the decree absolute—Mistake of the Court in drawing up the decree, form of order.*

In the case of a mortgage by way of conditional sale, until an order in terms of paragraph 2 of S. 87 of the Act is made by the Court on an application by the mortgagee, debarring the mortgagor absolutely from redeeming the property, the mortgagor is entitled to redeem, even though an order absolute in terms of S. 89 has been made. 27 C. 705, 16 C. 246, 22 M. 133 *followed.* ALIMEA CHOWDHURI *v.* ROSHAN ALI MATBAR. **3 C. L. J. 533.**

471. s. 88—*Section 244 (c) C. P. C. (1882)—Decree of Appellate Court directing accounts to be taken—Order declaring the amount due—Appeal.*

The High Court decree directed that an account be taken of what will be due to the decree-holder for principal and interest on the mortgage on a future date. The original Court declared, in Court, under section 88 of the Transfer of Property Act, the amount so due. The decree-holder appealed against the order of the original Court.

Held, that the order appealed against was really one falling under section 244 (c) of the Civil Procedure Code and was open to appeal.

Held, also, that a decree for sale, passed under section 88 of the Transfer of Property Act, is the final decree in the suit, and that all proceedings taken subsequent to that decree, for the purpose of

Sup: Govt acts (IV of 1882) *(Contd.)*

enforcing and working out such decree, are proceedings in execution of that decree. A decree for sale, passed under that section, may declare the amount due on the mortgage at the date of such decree, or direct, as was done in this case, that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage on a future day, which is to be fixed by the decree itself.

The Court which is to declare the amount due by virtue of the appellate decree is the Court which passed the original decree. THE ARYAN BANK OF VIZAGAPATAM *v.* KAMMA VENKATA NARASAYYAMMA. **13 M. L. J. 212=26 M. 237.**

472 s. 88—*Sale of mortgaged property in execution of a simple money decree—Subsequent sale of same property in execution of a decree on the mortgage—Rights of the two auction purchasers* inter se.

One L mortgaged a certain property belonging to him in favour of one N who instituted a suit and obtained a decree for sale of the mortgaged property. The property was sold under the decree and was purchased by R. Prior to the institution of the suit by N, the same property was attached and sold in execution of a simple money decree and was purchased by B who thereupon had obtained possession of property. B was not impleaded in the suit brought by N on his mortgage and consequently was not bound by the proceedings in that suit. The present suit was brought by R against B for recovery of the mortgage-debt or for possession of the mortgaged property.

Held that B must be allowed to redeem the property on payment of the amount of the mortgage-debt, as ascertained on the date of the mortgage decree. In default of their doing so, their right would be foreclosed and possession of the property delivered to the plaintiff. 26 M 537 19• A 541 and 21 A 235 referred to.—RAM PRASAD *v.* BHIKARI DAS, **26 A. W. N., 1904, p. 108=26. A. 464.**

473 s. 88—Under a decree under this section interest should be calculated on the basis of the bond from the date of the bond up to the date fixed by the decree for the repayment of the money due (29 C 43 at P. 51 Refd. to) BROJO LAL RAI CHOWDHURY *v.* TARA PRASANNA BHATTACHARJI, **3 C. L. J. 188.**

474 s. 88—*Mortgage—Interest—Rate of, due from the date fixed by the decree for payment up to date of realization.*

Section 88 of the Transfer of Property Act does not limit the interest at the contract rate to the date fixed by the decree for payment of the principal and interest, nor does it preclude the interest from extending over the time down to realization of the entire amount due—RAJA BALWANT SINGH *v.* AMOLAK RAM.— **28 A. 223=3 C. L. J. 185=1. M. L. T. 65=16. M. L. J. 160. (P. C).**

Sup: Govt. acts (IV of 1882) *(Contd.)*

475. S. 88—*Suit for sale of property subject to a charge.*

There is no objection to the sale in execution of a decree for sale on a mortgage, "subject to the charge" of property which is liable to a charge for maintenance in favour of a particular person. 13 A. 432 dist.—LALMAN *v.* MOHAR SINGH. **1907 A. W. N. 18.=3. A. L. J. 448=29 A. 205.**

476 s. 88—*Property subject to charge of maintenance—Suit maintainable.*

A sued for the sale of properties mortgaged to him which were subject to a charge of maintenance.

Held that A did not occupy the position of a second mortgage and could maintain the suit. The person entitled to maintenance had only a charge on the properties and was not a mortgagee. 13. A. 432 distinguished. LALMAN *v.* MOHAR SINGH. **3. A L. J. 848.**

477 s. 88—*Decree for sale of mortgaged property—Simple money—Decree—Application to execute, in execution of decree for sale.*

The moatgagees sued the mortgagors on their mortgages. Attachment before judgment was made of a certain simple money decree obtained by the mortgagors against the respondents, at the instance of the mortgagees (the appellants). Having obtained the decree under s. 88, Act IV of 1882 the appellants issued execution against the simple money decree.

Held, that the decree of the appellants could be enforced only against the mortgaged property, and the execution therefore was illegal.—ALLAHBAD BANK LD *v.* RAJA PERTAB BAHADUR SINGH, **5. O. C., 130.**

478 s. 88—See S. 56, 67, 81, 83—3. M. L. T. 287 (F. B.) No. 170 *supra.*

479 s. 88—See S. 85, 86, 88—14. C. P. L. R. 1901 R. 177 No. 421 *supra.*

480 s. 88—See S. 85, 88—1. O. C. 53.—No. 422 *supra.*

481 s. 88—See S. 85, 86, 88, 89—1. C. L. J. 31 No. 424 *supra.*

482 s. 88—See S. 66, 88—1. N. L. R. 106 No. 443 and 27. A. 462 No. 444 *supra.*

483 s. 88—See S. 86, 88, 89—31. C. 863 No. 446 *supra.*

484 s. 88—See S. 86, 88—29. A. 322 No 447 *supra.*

485 s. 88—See S. 86, 88, 94—34. C. 150 No. 448 *supra.*

486 S. 88—See S. 86 88—2. O. C. 37 No. 405 and 2. O. C. 130 No. 451 *supra.*

487 S. 88—See S. 86, 88, 89—4. O. C. 301 No. 452 *supra.*

488 S. 88—See S. 86, 88—17. C. P. L. R. 1904. P. 164 No. 454 *supra.*

489 s. 88, 89—*Mortgage—Order absolute for sale—Limitation Act (XV. of 1877), Sch. I, art. 179.*

A decree under s. 89 of the Transfer of Property Act is capable of execution and an application under s. 89 to make an order absolute for the sale of the mortgaged property is an application for the execution of that decree: and for this purpose, the date of the

Sup: Govt. acts (IV of 1882) *(Contd.)*

decree and not the date of the order absolute for sale, is the starting point of limitation. The plaintiff applied under s. 89 for an order absolute for sale, stating that he could not get justice unless he realised the money by the sale, and accordingly requested that the decree might be made absolute. The order on this application was "Decree made absolute."

Held, that the order was carelessly worded. It should have been an order absolute for sale, and until such an order was passed, the application should be considered as pending 25 M. 244 followed.—TALAPOORI APPIAH *v.* MARAM REDDI RAMI REDDI, **1. M. L. T. 294=16. M. L. J. 503.**

490. S. 88, 89.—*Execution of decree—Decree for sale on a mortgage—Civil Procedure Code, S. 248—Decree made absolute without notice being served under S. 248—Validity of decree.*

So long as an order under s. 89 making absolute a decree for sale under S. 88 of the Transfer of Property Act, 1882, subsists it is enforceable, and its operation cannot be impugned. If for any reason, the order under S. 89 is defective, the remedy of the judgment-debtor is to get it set aside in accordance with law; but until it is set aside, the decree which it makes absolute is capable of enforcement, and its validity cannot be questioned in execution proceedings. 13 A. 278, 3 A. 424 21 C. 19 *distinguished.* RAM JAS *v.* SHEO PRASAD. **A. W. N., 1905, P. 241=2 A. L. J. 640=28 A. 193.**

491 S. 88, 89—*Martgage—Prior and subsequent incumbrances—Sale of mortgaged property and redemption of previous mortgages by purchaser—Liability of subsequent mortgagee to pay amount paid by purchaser and interest on such amount.*

The property mortgaged with the plaintiff was previously mortgaged to other persons. The defendants purchased the property and redeemed the previous mortgages. The plaintiff brought a suit for recovery of his money and obtained a decree for sale of the property under section 88 of the transfer of Property Act. It was provided in the decree that he would not be entitled to bring the mortgaged property to sale unless he paid off the prior mortgages. Upon application made under section 89 of the Transfer of Property Act—

Held, that the plaintiff was bound to pay not only the amounts that had been paid by the purchasers of the property to redeem the previous mortgages but also interest upon those amounts—no interest, however, could be allowed after the date when the purchasers recovered possession of the property—*19 All., 527 explained and followed. 24 All., 185 referred to.*—SRI RAM *v.* KESRI MAL.—**W. N. A., 1903, p. 219=26 A. 185.**

492. S. 88, 89 *Civil Procedure Code, S. 235—Execution of decree—Limitation Act (XV of 1877), sch. II, arts. 178, 179.*

Sup: Govt. acts (IV of 1882) *(Contd.)*

Held that an application, framed as an application under S. 235 of the Code of Civil Procedure for execution of a decree under S. 88 of the Transfer of Property Act, being in substance, though not in form, an application for an order absolute under S. 89 of the Act, is an application for execution made in accordance with law, and as such will give a fresh starting point for limitation. 13 All. 278; (20 All. 302); (24 All. 542) *referred to.*—BALDEO PRASAD *v.* IBN HAIDER. **A. W. N. 1905 p. 136.=27. A. 625.**

493. S 88, 89—*Execution decree for sale* See Limitation Act, Art. 178—UDIT NARAIN *v.* JAGAN NATH.—**1 A L J. 15.**

494. S. 88, 89—*Civil Procedure Code (Act XIV of 1882), Sections 231 and 258—Satisfaction of mortgage decree by one of several decree-holders—Rights of other decree-holders.*

One of several joint-decree holders cannot bind the others by a certificate of satisfaction of the whole decree. The other decree-holders can take steps to recover the decree-money due to them. 4 C. L. R., 70 *followed.* TAMMAN SINGH *v.* LACHHMIN KUNWAR. **A. W. N. 1904. P. 22=26 A. 318**

495. S. 88, 89—*Assignment of decree passed under S. 88, Transfer of Property Act before filing of appeal*—Lis pendens, *C. P. C. (1882), S. 372.*

A decree under section 88 of the Transfer of Property Act 1882 is, on the face of it, not a final decree, but *nisi.* The *lis* would probably not be completed before the actual sale, and certainly not before the passing of the order absolute.

A transferree of such decree would be bound by the result of the appeal filed against his transferror after the date of the transfer without the transferree having been made a party to the appeal. He would not be less bound if he were made a party to the appeal after the expiry of the period of limitation provided for filing the appeal. He may be made a respondent under section 372, Civil Procedure Code, but he can take only such pleas as his assignor could have raised. CHUNNI LAL *v.* ABDUL ALI KHAN. **W. N. A., 1901, p 91=23 A. 331.**

496. S 88, and 89.—*Mortgage*

A decree under section 88 of the Transfer of Property Act cannot be legally executed against a person whose name does not appear in the order absolute under section 89 of the Act, *I. L. R*, 19 *All.*, 520, *followed.* BHAGWAN DAS *v.* MANSUMRAT DAS. **W. N. A., 1901, p. 23.**

497 S. 88, 89—*Decree for sale after redemption of prior mortgages—Payment of money due on the prior mortgages after the time limited by the decree—Effect of such payment.*

In a suit for sale on a mortgage in which there were prior mortgages to be redeemed, the plaintiff obtained a decree for sale conditioned on his redeeming the prior mortgages within two months. He did not do so, but about four months after the date of the decree paid the money due on the prior mortgages into Court.

Sup: Govt. acts (IV of 1882) (*Contd.*)

Held that the defendant having taken no steps to redeem, the plaintiff was entitled to the benefit of this payment, though made after time, and to a decree absolute for sale. 20 All. 446, 20 All. 375 and 24 All. 44 referred to. 19 All. 180 distinguished.—DEBI PRASAD *v.* JAI KARAN SINGH, **A. W. N. 1902. P. 125 = 24 A. 479.**

498. S. 88, 89—*Order absolute for sale of part of the property mortgaged—Appeal from decree—Application for further order for sale of entire property for an amount including interest accrued pending the appeal.*

Certain mortgagees in whose favour a decree for sale of the mortgaged property had been passed, obtained an order absolute for sale of a portion of the mortgaged property. The judgment-debtors appealed from the decree for sale, and pending the appeal, the amount realizable by sale of the mortgaged property was increased by the accrual of interest. The judgment-debtors' appeal was dismissed.

Held that under these circumstances, there was no objection to the decree-holders, after the dismissal of the judgment-debtors' appeal, applying for and obtaining a further order absolute for sale of the whole of the mortgaged property for an amount including the interest accrued due subsequently to the passing of the first order.—SAT NARAIN *v.* RADHA KISHAN, **A. W. N. 1903. P. 30 = 25. A. 264.**

499. S. 88 and 89.—*Civil Procedure Code, S. 258—Payment out of Code not certified.*

Applications for an order absolute for sale under section 89 T. P. A. are applications for the execution of decree under section 88 of the Act (13 A 278, 25 M. 244 refd. to). To such applications section 258 of the Code of Civil Procedure is applicable, and bars the recognition of payments made out of Court in pursuance of the decree unless such payments are certified to the Court in the manner prescribed by the section 28 M. 473 followed, 24 M. 412, 8 C. W. N. 102 dissented, HAKIM SINGH *v.* RAM SINGH, **A. W. N. 1908, 103.**

500. S. 88, 89, 90.—*Mortgage—Decree for sale—Portion of property sold privately—Personal decree against mortgagor—Civil Procedure Code, S. 305.*

Where a decree for sale of the mortgaged property under S. 88 and an order absolute for sale under S. 89 of the Transfer of Property Act had been passed but the property instead of being sold by public auction in its entirety was privately sold in part with the consent of the judgment-debtor and the sale proceeds were found to be insufficient to satisfy the whole mortgage debt:

Held that the mortgagee was entitled to a personal decree against the mortgagor for the balance of the mortgage-debt.—UDIT NARAIN SINGH *v.* BAQAR SAJJAD, **A. W. N. 1905, p. 124. = 2. A. L J. 353.**

Sup: Govt. acts (IV of 1882) (*Contd.*)

501—S. 88, 89, 92—*Redemption by* puisne *mortgagee after time—No steps for execution against* puisne *mortgagee.*

A puisne mortgagee plaintiff may be allowed to redeem a prior mortgagor by paying the amount due to him though the time fixed for the purpose in the decree has pased, where the defendant prior mortgagee has not taken any steps against him in the meantime. 24 A. 479 foll., 21 C. 818; and 22 B. 771 referred to.—SAUDAGARMAL *v.* JAN ALI.—**1 A. L. J. 300.**

502 S. 88, 89, 93—*Payment after date fixed in decree for sale on a usufructuary mortgage. Mortgagee not applying for sale when ousted and possession given to mortgagors —Mortgagee subsequent to outser contesting delivery of possession to mortgagors—S. 2, 244 and 310 A, C. P. C. applicable in execution interest.*

A decree directed sale in default of payment, on a usufructuary mortgage. The mortgagor paid the money, some months after the fixed date, into Court and applied in the form of an application for execution of a decree, and obtained possession of the mortgaged property. The mortgagee had not, when ousted, applied for an order for sale under S. 89, T .P. A. He refused to receive the money and contended that the Court had no power, in execution-proceedings, to permit the mortgagors to pay it into Court and to direct delivery of possession to them, as they had not paid it on the fixed date.

Held, that a decree for sale, under S. 88 T. P. A. is final and to all subsequent proceedings the provisions of the Civ. Pro. Code are applicable (25 M. 244 referred to). Therefore unless there is something in the decree to debar him from so doing, the judgment-debtor can stop execution by payment of the debt, at any time after the decree has been passed, and before the execution sale is complete and it is not finally complete until he has had his opportunity of obtaining its recission under S. 310-A C. P. C.

The decree for sale does not debar the mortgagor of any right in default of payment; the only penalty affixed to the default is the liability to have the property sold (31 C. 863 referred to).

The mortgagors can be regarded as decree-holders under S. 2. C. P. C. By their default, they only lose the privileges of a decree-holder but they do not thereby lose their rights as judgment-debtors to pay the debt into the Execution-Court in satisfaction. A mortgagor can obtain possession of his property in execution-proceedings after paying money into the Court executing the decree. (19 M. 40 dissented, 24 M. 244, 25 M. 300 referred to).

After the decree directing the sale, the usual Court rate of interest, *i. e.*, 6 per cent is to be allowed.—AUDIPURANAM PILLAY *v.* GOPALASAWMY MUDALLY **3 M. L. T. 281.**

Sup: Govt. acts (IV of 1882) (*Contd.*)

503 S. 88 and 89—*Foreclosure decree cannot be executed before it is made absolute.*

A foreclosure-decree, passed under S. 88 T. P. A. must be made absolute under the provisions of S. 89 before execution thereof; till then it is incapable of execution.—28 C. 73; 18 C. 139 and 22 C. 931 referred to 12 A 539 *concurred.*—BANSIDHAR *v.* ABUTABB **8 O. C. 75.**

504. S. 88, 89.—*Restrictions attached to sale of land—Sale of land—Sanction of superior authority—Oudh Laws Act XVIII of 1876, S. 20—C. P. C., S. 266—Practice.*—See Execution of decree. FIDA HUSAIN *v.* KAILASA. **3 O. C. 1.**

505 S. 88, 89.—*Defect in form of decree—Execution of decree not made absolute.*

A, a mortgagee, obtained a decree against B, his mortgagor, empowering him to recover his money from the mortgaged property by attachment and sale. A portion of the property was sold in execution. A subsequently applied for sale of the remaining portion of the property to which B objected that the decree could not be executed as it was not made absolute under section 89, T. P. A.

Held, that the decree, having been partly executed on the previous occasion and no objection having been taken to its form, was capable of execution. NOBIN CHANDER CHATERJI *v.* MAZHAR ALI KHAN. **2 O. C. 337.**

506. S. 88, 89.—*Sale of mortgage property in execution of a decree—Objection taken after a portion of mortgaged property was sold in execution—Order absolute*—Res-judicata.—See *Res-judicata.* INAYATUL RAHMAN *v.* SADIK HUSAIN. **5 O. C. 251.**

507 S. 88, 89 *Mortgage—Decree for sale on a mortgage—Prior and subsequent mortgagees—Rights of purchasers of the mortgaged property who have paid off prior incumbrances.*

Where a subsequent mortgagee is seeking to bring to sale the property mortgaged to him and there are parties, defendants to the suit, who have purchased the property and paid off prior mortgages, the plaintiff is not entitled to an order absolute for sale unless he pays, not merely the amount which such defendants paid in respect of the prior mortgages, but the full amount due on such mortgages. But where such defendants had obtained possession of the mortgaged property, it was *held* that, having the usufruct, they were not entitled to interest after the date of such possession. 19 A 527 and 24 A 185 followed. SRI RAM *v.* KESRI MAL. **I. L. R., 26 A 185.**

508 S 88, 89—*Civil Procedure Code (Act XIV of 1882), s. 244, 310-A, 311, 540—Sale of mortgaged Property in execution of mortgage-decree—proceeding in execution.*

S. 310-A and 311 of the Code of Civil Procedure apply to sales of mortgaged property in execution of mortgage decrees. 25 C 703 commented on. 22 M 286, 19 A 205 and 25 B 104 approved. An appeal lies from an order passed upon an application made under s. 89 of the Transfer of Property Act.

Sup: Govt. acts (IV of 1882) (*Contd.*)

Per Sir Arnold White, C. J., and Moore, J.—Such an order is not an order made in a proceeding in execution and is not appealable as such. It, however, has the effect of a final decree, and an appeal lies therefrom under s. 540 of the Code of Civil Procedure.

Per Davies, Benson and Bhashyam Ayyangar, JJ.—An application made under s. 89 of the Transfer of Property Act is, in effect, an application for execution of the decree passed under s. 88, and an order made thereon is appealable under s. 244 of the Code of Civil Procedure. 21 C 818 and 22 C 931 discussed.—MALLIKARJUNADU SETTI *v.* LINGAMURTI PANTULU, **12 N. L. J. 279 = 25 M 244.**

509 S. 88, 89—*C. P. C. s. 244, 278 Execution of decree—Appeal treated as revision.*—MOHAMMAD YAHYA *v.* LOLTA DEI. **A. W. N. 1906 P. 62.**

510 S. 88, 90—*Decree, Execution of—Mortgage decree—Recovery of balance due on mortgage—Civil Procedure Code (Act XIV of 1882), s. 230—Decree for payment of money—Limitation—Continuation of previous application for execution.*

A combined decree under s. 88, 90 of the Transfer of Property Act is contrary to the procedure prescribed by that Act. When such a decree is passed and the decree holder proceeds to execute it for the realization of the balance after the mortgaged property has been sold, the provisions of s. 230 of the Civil Procedure Code shall apply and an application for execution after the expiry of twelve years from the commencement of proceedings against the person and other property of the judgment debtor will be barred. *Kartick Nath Pandey* v. *Juggernath Ram Marwary,* (I. L. R., 27 Cal. 285), explained, *Fazil Howladar* v. *Krishna Bundhoo Roy,* (I. L. R.., 25 Cal. 580), referred to; *Jadunath Prasad* v. *Jagmohan Das* (I. L. R., 25 All. 541), dissented from—CHANDI CHARAN ROY CHOWDHRY *v.* AMBICA CHARAN DUTT, **I. L. R. 31 C 792.**

511. s. 88, 90—*Land acquisition—Compensation—Application for execution*

Held, that where the property covered by the mortgage was under the land acquisition proceedings converted into money the lien which was attached to the property was transferred to that which then represented the property, namely, the compensation money standing to the credit of the mortgagor with the Collector, and the mortgagee was entitled to take out in execution of a decree for sale of the mortgaged property the money, and he need not obtain a future decree under S. 90, T. P. A. (16 A. 178 diss. from.) JAHIRI CHOWDHRANI *v.* AMAR KRISHNA SAHA. **6 C. L. J. 745.**

512. S. 88, 90—*Morgage decree—Liability for costs.*

In preparing decree under S. 88 it will be opposed to that Act, to the practice of the Courts of equity in England and inequitable to make the mortgagor personally liable for costs, in any case, before

Sup: Govt. acts (IV of 1882) (*Contd.*)

the sale proceeds have proved insufficient to satisfy the mortgagee's claim. 32 Beav. 213, L. R. 7 Ch. 507 refd. to. Under s. 90 payment can be enforced personally against the mortgagor if the sale proceeds prove insufficient to satisfy the mortgagee's claim, and the words "the amount due for the time being on the mortgage" include costs also 20 A. 523 refd. to. KAMALLAMMA *v.* NARASIMHA CHARLU. **6 C. L. J. 745=17 M. L. J. 317=30 M. 464.**

513. S. 88. 90.—*Composite decree.*—See C. P. C., S. 230. JADU NATH *v* JOGMOHAN DAS. **A. W. N., 1903, P. 98=25 A. 541.**

514. S. 88, 90.—*Mortgage—Attachment of property in execution of supposed decree for balance of mortgage-debt—C. P. C. S. 24?.*—See Execution of decree. MATA GHULAM SINGH *v.* KANDHAI BUKSH. **6 O. C. 59.**

515. S. 88, 90.—*See Limitation Act, Art. 179.* MUNAWAR HUSAIN *v.* JANI BIJAI SHANKAR. **A. W. N., 1905, P. 132=2 A. L. J., 376=27 A. 619.**

515 (a). S. 88, 90.—See S. 90, 88—29 A. 12 No. 539 *infra.*

516. S. 88—97 *Mortgage—Interest up to date of realization of mortgage money.*

It is the duty of the executing Court to carry out the orders of the decree into effect, as being conclusive between the parties, whether it may or may not be disputable in point of law.

Held, that the power of Court passing a mortgage decree is not limited to grant interest only up to the date fixed for the payment of money due on mortgage. Interest may be awarded up to the date of realization.

19 All., 174, overruled, 21 Cal., 766, S. C., 1 Cal., W. N., 550, 21 Mad., 361, 21 All., 361, approved. 26 Cal., 43 S. C. 2 Cal., W. N. 633 referred to. MAHARAJAH OF BHARATPUR *v.* RANI KANNO DEI. **5. W. N. C., 137=8. B. L. R. 51=28. I. A. 35=23. A. 181 (P.C.)** *But See 34. C. 150 (P. C.) No 448 supra.*

517 S 88. 100 *Tenanacy Act, S. 43—Holdings as security for the payment of Revenue or rent—Suit for arrears of rent—Land Revenue Act, S. 65 and 118.*—See Land Revenue Act S. 65 and 118. KHEM CHAND *v.* DHANRAJ. **16 C. P. L. R. 1903. P. 52.**

518. S. 89.—*Order absolute for sale of mortgaged property, application for—Decree—Execution—Uncertified payment to decree-holder—Appeal—Civil Procedure Code (Act XIV of 1882), S. 244, 258, 540, 578—Court-fee, insufficiency of—Error affecting merits or jurisdiction.*

Proceedings under S. 89 of the Transfer of Property Act are not proceedings in execution of a decree, but in continuation of the original suit; and an appeal from an order absolute made under that section lies under the provisions of S. 540 of the Code of Civil Procedure as an appeal from an original decree. *Tiluck Singh* v. *Parsotein Proshad*, (I. L. R., 22 Cal. 925) and

Sup: Govt. acts (IVof 1882) (*Contd.*)

Tara Prosad Roy v. *Bhobodeb Roy*, (I. L. R., 22 Cal. 931), relied upon. The decision of the majority of the Full Bench in *Mallikarjunadu Setti* v. *Lingamurti Pantulu*, (I. L. R., 25 Mad. 244) dissented from, and that of the minority (Sir Arnold White, C. J. and Moor, J) followed. In an application under s. 89 of the Transfer of Property Act for an order absolute for sale of the mortgaged property, S. 258 of the Civil Procedure Code is no bar to an inquiry into the plea of payment of the mortgage debt.—PRAMATHA CHANDRA ROY *v.* KHETRA MOHAN GHOSE, **I. L. R, 29 C. 651.**

519 S. 89.—*Civil Procedure Code (XIV of 1882), S. 244—Execution of decree passed on usufructuary mortgage—Continuation of possession by mortgagees subsequently to decree—Claim to set off profits thus accrued from decree amount—Application for order absolute.*

By a decree passed on a compromise in a suit for the amount due under a mortgage defendants were ordered to pay Rs. 770 to plaintiffs within a year, and in default of payment the amount was to be recovered by sale of the mortgaged and other property. By the terms of the mortgage, possession was given in lieu of interest, but the decree was silent, as to possession and interest. Upon an application being made for execution of the decree by sale of the property referred to in it, the District Judge held that if the petitioners had continued in possesion of the mortgaged property ever since the date of the decree, it would be necessary to take an account to ascertain whether the decree had been satisfied, and dismissed the petition:

Held that such an order was wrong, inasmuch as it went behind the decree instead of executing it.

Held also, that the application, in which the decree-holder stated that there had been default in payment of the decretal amount and applied for sale, was an application for an order absolute for sale.—APPA RAO *v.* KRISHNA AYYANGAR. **I. L. R. 25 M. 537.**

520. S. 89.—*Order absolute for sale—Notice to defendant of application—Practice.*

Notice need not be given to a defendant before an order absolute for sale is made under S. 89 of the Transfer of Property Act.—KRISHNA AYYAR *v.* MUTHUSAMI AYYAR, **12. M. L. J. 62=25. M. 506.**

521. S. 89.—*Application for oder absolute—Limitation*—See Limitation Act Arts: 178, 179—BALDEO PRASAD *v.* IBN HAIDER, **A. W. N. 1905. P. 136=2. A. L. J. 371=27. A. 625.**

522. S. 89. *Execution-sale—Mortgage decree—Mode of Execution—Sale of Mortgaged property—Order absolute for sale.*

An order absolute for sale under the provisions of the Transfer of Property Act is not indispensably necessary as a condition

Sup: Govt. acts (IV of 1882) (*Contd.*)

precedent for the sale of a mortgaged property in execution of a mortgage decree; it is sufficient that there is an order for sale passed on the application of the decree-holder. *Siva Pershad Matty* v. *Nundo Lall Kar Mohapatra* (I. L. R., 18 Cal., 139) and *Tara Prosad Roy* v. *Bhobodeb Roy* (I. L. R., 22 Cal., 931), referred to. PHUL CHAND RAM *v.* NURSINGH PARSHAD MISSER. **I. L R., 28C. 73**

523. s. 89. *Effect of order absolute for sale—Non-joinder in execution.*

Where the equity of redemption has under S. 89 T. P. A. been extinguished by an order absolute for sale before a court sale of the same held in execution of a simple money decree, all that the auction purchaser is entitled to do is to save the property and avert a re-sale of it by paying off the amount due under the mortgage. The mere fact that he was not made a party to the proceedings taken in execution of the mortgage-decree would not confer on him a right to the mortgaged property which could avail against the subsequent purchaser at the sale held in such execution. INDERJET *v.* GHULAM MOHI UD-DIN. **1 A. L. J. 699.**

524 s. 89—*Order absolute—No notice necessary.*

An absolute order can be made under S. 89 T. P. A. without previous notice to the mortgago.—BIBI TULSIMAN *v.* HARIHAR MEHTO. **9 C. W. N. 81=32 C. 253 (F. B.).**

525. S. 89.—*Prior and subsequent mortgages—Satisfaction by* puisne *mortgagee—A portion of prior mortgage.*

J, a prior mortgagee brought a suit for the sale of the property mortgaged to him impleading the *puisne* mortgagee M. In that suit, a prayer by M that the account might be taken on his mortgage was refused. J having realised the greater portion of his claim by the sale of a portion of the mortgaged property, the balance of his decree was discharged by M. M now applied under s. 89 of the Transfer of Property Act for an order absolute for sale not only of the remaining property comprised in the prior mortgage a portion of which he has paid up, but also of the property covered by his own mortgage.

Held, that no order could be passed in favour of M in respect of his own mortgage, but he was entitled to have his prayer granted in respect of the property comprised in the prior mortgage. *Bansidhar* v. *Gaya Prasad*, (I. L. R., 21 All., 179) referred to. JAMNA DAS *v.* MISRI LALL, I. L. R., 26 All., 501; **A. W. N., 1904, p. 103.**

526 s. 89—*Civil Procedure Code (Act XIV of 1882) Section 291—Mortgage—Redemption—Mortgagor's right to redeem before sale.*

Held, by the Full Bench, that a mortgagor has the right to redeem at any time until the sale of the mortgaged property has been completed and that section 89 of the Transfer of Property Act does not prohibit the exercise of such right after the passing of an order absolute for sale and before the sale under such order has actually taken place. BIBIJAN BIBEE *v.* SM. SACHI BEWA. **8 C. W. N. 684=31. C. 683 (F. B.).**

527. s. 89—*Order absolute for sale of a portion of the mortgaged property only—Proceeds of sale of such portion insufficient to satisfy the decree.*

If an order absolute for the sale of a portion only of the mortgaged property has been obtained by the mortgagee decree-holder and the proceeds of the sale of that portion prove insufficient to satisfy the decretal debt, there is nothing in law to prevent the decree-holder from obtaining a further order to sell another portion of the mortgaged property, provided that his application is within limitation.—BALKISHANJI MAHARAJ *v.* MITHU LAL. **A. W. N. 1903. P. 17-25. A. 212.**

528 s. 89—*Civil Procedure Code, s. 108—Decree* ex parte *set aside as against one only of the joint judgment-debtors—Order absolute for sale.*

A mortgagee sued his mortgagors (three in number) for sale of the mortgaged property, and obtained a decree for payment of Rs. 2,270, or in default, for sale. One of the judgment-debtors, as against whom the decree was *ex parte* applied under s. 108 of the Code of Civil Procedure, and got the decree set aside as against himself. Subsequently whilst the decree against the other two mortgagors became final, the third mortgagor succeeded in proving that the amount of the mortgage-debt was only Rs. 1,556-15-0 and a decree was passed against him accordingly. On application by the decree-holder for an order absolute for sale the Court, under these circumstances, directed that an order absolute under s. 89 of the Transfer of Property Act should issue for the sale of all the mortgaged property but that the property belonging exclusively to that judgment debtor who had successfully objected, should not be sold, until the mortgaged property belonging to the others had been sold, and had failed to realize a sum sufficient to satisfy the smaller decree. SHAIDA HUSAIN *v.* HUB HUSAIN. **I. L. R. 25 A. 42.**

529 s. 89—*Limitation Act (XV of 1877), Schedule II, Articles 178 and 179.*

An application for execution of a decree which directs that in default of payment the debt should be recovered by sale of the property mortgaged must be deemed to be an application under section 89 of the Transfer of Property Act to which no period of limitation would apply. GANU *v.* NARAYAN VITHAL. **5. B. L. R. 540.**

530. s. 89.—*Effect of order absolute—Jurisdiction of Court to adjourn sale.* See C. P. C. S. 291. SHYAM KISHAN *v.* SUNDAR KOER. **31 C. 373.**

531. s. 89—*Order absolute for sale—Plea of payment—Enquiry.* See C. P. C. S. 258.

Sup: Govt. acts (IV of 1882) (*Contd.*)

PRAMATHA CHANDRA *v.* KHETRA MOHAN. **29 C. 651.**

532. s. 89.—*Civil Procedure Code, s. 291—Execution of decree—Payment of decretal amount into Court.*

Where after an order absolute for sale of mortgaged property is passed under s. 89 of the Transfer of Property Act, the person holding the equity of redemption pays into Court before the sale the decretal amount with costs the execution proceedings shall cease. MISRY LAL *v.* MITHU LAL. **A. W. N. 1905, p. 168=28. A. 28.**

533 s. 89—*Execution-sale—Mortgage decree—Civil Procedure Code (Act XIV. of 1882), s. 310 A, as amended by Act V. of 1894.*

The provisions of s 310-A of the Civil Procedure Code (Act XIV. of 1882) as amended by Act V. of 1894 are applicable to sales held in execution of mortgage decrees passed under the Transfer of Property Act (IV. of 1882). S. 304 to 319 of the Code of Civil Procedure apply to all sales of immoveable property. KRISHANJI *v.* MAHADEV. **I. L. R., 25 B. 104.**

534. s. 89.—*Mortgage—Order for sale—Discharge by third party.*

Where a mortgage debt, for the payment of which a sale has been ordered, is satisfied by a third party, who obtains a security for the advance made by him, such security is not extinguished by s. 89 of the Transfer of Property Act, and the incumbrance, in respect of which the sale was ordered, enures for the benefit of the party making the payment. SHIAM LAL *v.* BASHIR-UD-DIN. **I. L. R., 28 A. 778; 3 A. L. J. 630.**

535 s. 89—*Person entitled to make application for order absolute—His successor's minority*—See Limitation Act S. 7. BHAGAT BIHARILAL *v.* RAM NATH. **A. W. N. 1905. P. 163=2. A. L. J. 453=27. A. 704.**

536 s. 89—*Mortgage—Prior and subsequent mortgages—Discharge of previous mortgage by subsequent mortgagee—Rights of intermediate mortgagee—Civil Procedure Code (Act XIV of 1882), Section 310 A.—Effect of order absolute for sale.*

It is settled law that in the absence of clear proof to the contrary, it is to be taken that, when the money of a person interested in immovable property, as for instance, the owner of the equity of redemption or a *puisne* mortgagee, goes to discharge an interior encumbrance affecting it, the presumption is that the anterior encumbrance enures to the advantage of the party making the payment, if it is for his benefit so to treat it. If after the sale of the properties in execution of a mortgage-decree a person lends money on the security of the mortgaged property to enable the mortgagor to set aside such a sale under section 310 A of the Code of Civil Procedure, the lender presumably obtains a lien on the property as the previous mortgagee had.—*10 Cal, 1035 referred to and followed.*

The provisions of section 89 of the Transfer of Property Act ought not, in reason, to be so construed as to render the application of this principle impossible where an order absolute for sale had been made on the ground that such order extinguished the security. *L. R. 29 I. A. referred to.*—VANMIKALINGA MUDALI *v.* CHIDAMBARA CHETTY. **29. M. 37.**

537 s. 89—*Mortgage—Order absolute for sale, Pendency of appeal, no ground for refusal of—Extension of time by Court.*

The pendency of an appeal against a decree under section 88 of the Transfer of Property Act is of itself no ground for refusing to make an order absolute for sale under section 89 of the Transfer of Property Act.

A Court has no power of its own motion, to extend time provided in section 89 of the Transfer of Property Act for making an order absolute. RAM GOLAM LAL SAHU *v.* CHOWDHRY BABU BARSATI SINGH. **10. C. W. N. 910.**

538 s. 89—*Application for order absolute not in accordance with the Civil rules of practice*—See Limitation Act Art. 179 (4)—RAMARGYAN *v.* QADAR BACHA SAHIB. **3. M. L. T. 2, 54=17. M. L. J. 596.**

539. s. 89—*Informal decree—Enforcement of decree not in accordance with s. 89.* See Compromise decree. ABIR PARAMANIK *v.* JOHAR MOHAMAD MONDAL. **6. C. L. J. 95=11 C. W. N. 879=34 C. 886.**

540. s. 89. *Order absolute—Application by judgment debtor to raise decretal amount by sale or mortgage. C. P. C. S. 305—Sufficient cause—Appeal. C. P. C. S. 244 (c).* See execution of decree. CHANDRIKA BAKSH *v.* BIRJBIHARI LAL. **3 O. C. 42.**

541. s. 89. Proceedings on an application under S. 89 are proceedings in execution of decree. Mt. ALAH RAKHI *v.* RANJIT KHAN. **3 B. R. 61=4 O. C. 123.**

542. s. 89. See S. 76, 84, 89, 92—34 C. 223 No. 328 *supra.*

543. s. 89. See S. 82, 89—4 C. L. J. 317. No. 351 *supra.*

544. s. 89. See S. 85, 86, 88, 89—1 C. L. J. 31 No. 424 *supra.*

545. s. 89. See S. 86, 88, 39—31 C. 863 No. 416 *supra.*

546. s. 89. See S. 86, 88, 89—4 O. C. 301 No. 452 *supra.*

547. s. 89. See S. 86, 89—1 O. C. 49 No. 453 *supra.*

548 s. 89. See S. 87, 89—32 C. 253 No 469 and 3 C. L. J. 533 No. 470 *supra.*

549. s. 89. See S. 88, 89—16 M. L. J. 503 No. 489, 28 A. 193 No. 490, 26 A. 185 No. 491, 27 A. 625 No. 492, 1 A. L. J. 15 No. 493, 26 A. 318 No. 494, 23 A. 331 No. 495, A. W. N. 1901, P. 23 No. 496, 24 A. 479 No. 497, 25 A. 264 No. 498, A. W. N. 1908, P. 103 No. 499, 2 A. L. J. 353, No. 500, 1 A. L. J. 300, No. 501, 3 M. L. T. 281, No. 502, 8 O. C. 75, No. 503, 3 O. C. 1 No. 504, 2 O. C. 337 No. 505, 5 O. C.

Sup: Govt. acts (IV of 1882) *(Contd.)*

251 No. 506, 26 A. 185 No. 507, 25 M. 244 No. 508, A. W. N. 1906, P. 62, No. 509 *supra*.

550 S. 89, *90— Decree for sale-Mortgage decree—Partial discharge of decree by part of property being sold privately—Sale through Court of rest of property—Right to order under section 90.*

A mortgagee decree-holder did not cause the whole of the property comprised in the mortgage, and ordered to be sold by the decree under section 88 and subsequent order absolute under section 89 of the Transfer of Property Act, to be actually sold by auction, but part of the property was sold with the consent of the decree-holder by private sale and the money obtained was credited in the partial discharge of the amount of the decree, and the rest of the mortgaged property was sold through Court. The decree not being fully satisfied, the decree-holder applied for a personal decree against the judgment-debtor under section 90 of the Transfer of Property Act.

Held, that under the circumstances a substantial compliance with the provisions of section 90 had taken place and the decree-holder was entitled to a decree under section 90, if the balance was recoverable otherwise than from mortgaged property.—UDIT NARAIN SINGH *v.* BAQAR SAJJAD.—**2 A. L. J. 353 = A. W. N. 1905 P. 129.**

551 S. 89, *90—Mortgage-Release of portion of mortgaged property—Mortgagee's right to release—Personal decree against mortgagor.*

The sale contemplated by S. 89 of the Transfer of Property Act is the sale of the whole or of a sufficient portion of the mortgaged property. A personal decree under s. 90 of the Transfer of property Act can only be made, where the net proceeds of the sale under s. 89 are insufficient to pay the amount due on the mortgage. A mortgagee may release a portion of the mortgaged property from the debt, but he cannot by doing so impose upon the mortgagor a personal liability, to which otherwise he would not be subject. Where the mortgagee released substantial portions of the mortgaged property and the purchasers of those portions from the mortgage debt, there being no consent or acquiescence on the part of the mortgagor, and there being nothing to show that the amount which the purchasers paid to the mortgagee was the full and true value of the property, which they purchased. *Held* that the mortgagor was entitled to claim to have the mortgaged property sold before a decree could be passed against him under section 90. *Sheo Parsad* v. *Behari Lal* (I. L. R., 25 All. 79), dissented from.—RAM RANJAN CHAKRAVARTI *v.* INDRA NARAIN DASS, **10 C. W. N. 862 = 33 C. 890.**

552 S. 89 *& 90—Mortgage decree—Relinquishment of a portion of mortgaged property—Decree absolute—Personal decree.*

In a mortgage suit, the plaintiff got a decree for the sale of the whole of the mortgaged properties. Subsequently, as on account of some of them having been previously mortgaged, there was no possibility of realizing any thing from them, he relinquished his claim against them and got the decree made absolute for the sale of other properties. *Held* that as, rightly or wrongly, the respondents obtained an order for the sale of a portion only of the mortgaged properties, that order was final between the parties. The proceeds of the sale being insufficient to pay off the debt, the party was entitled to apply under s. 90 of the Transfer of Property Act, conditions precedent having been satisfied.—GHAFUR HASAN KHAN *v.* MUHAMMAD KIFAYAT-ULLAH KHAN, **I. L. R. 28 A. 19 A. W. N. 1905 P. 155 = 2 A. L. J. 413.**

553 S. 89. *90—Decree for sale—Sale*

S. 88 of the Transfer of Property Act for sale of all the property included in the mortgage, and in pursuance of the decree, some of the mortgaged property was sold in India, and, at the request of the mortgagor, to enable a better price to be obtained, some of it was subsequently sold in England. The mortgagee then applied for a decree under s. 90.

Held that the sale which took place in England must be treated as a sale had in connection with the decree passed in this country, and that the defendants appellants could not be heard to say that the property ordered to be sold was not exhausted by proceedings under s. 89, and that a decree could be passed under s. 90. *Badri Das* v. *Inayat Khan*, (I. L. R., 22 All. 404), referred to.

Held further, that limitation must be held to run from the date of the sale in England. GAJADHAR LAL *v.* THE ALLIANCE BANK OF SIMLA, **3 A. L. J. 445 = 28 A. 630.**

554. S. 89, *.90—Decree for sale against a portion of the mortgaged property—Right of mortgagee to relinquish claim against other portions of the mortgaged property, and to proceed against unencumbered prop'rty.*

A mortgagee obtained a decree under section 89 of the Transfer of Property Act for sale of a portion of the mortgaged property, relinquishing his claim against the other portion, and failed to realize the entire amount of his debt by sale of the property included in decree. He applied for an order under section 90 of the Transfer of Property Act. An objection was raised on the ground that as all the property comprised in the mortgage had not been sold, the mortgagee had no right to obtain a decree under section 90.

Held, that whether or not the Court was wrong in passing a decree under section 89 for sale of a portion of the mortgaged property, the Court would not be justified without impeaching and setting aside that decree, in holding that no order could be passed under section 90.

Semble, there seems no reasonable objection to the abandonment by a mortgagee of his claim in respect of a part of his security, and to his seeking relief by sale of the unencumbered property of the

mortgagor. SHEO PRASAD *v.* BEHARI LAL, **W. N., A., 1902 P. 203 25. A. 79.**

555. S. 89, 93.—*Mortgage Decree—Suit for redemption—Application for possession—Execution of decree—Limitation Act, 1877, Schedule II, Articles 178, 179—Transfer of Property Act, 1882 S. 89, 93—Code of Civil Procedure, Schedule IV, forms 128, 129.*

An application to be put in possession of mortgaged property under the decree passed in a suit for redemption is not an application for execution of a decree within the meaning of Article 179 of Schedule II of the Limitation Act, and is not governed by any of the provisions of that Act.

Thakur Prasad v. *Fakir-Ullah*, (*1894*) I. L. R. 17 All., 106: *Narayana Nambi* v. *Poppi Brahmani*, *(1866)* I. L. R. 10 Mad., 22; *Chintaman Damodar Agashe* v. *Balshastri*, (*1891*) I. L. R. 16 Bom., 294; *Sasivarna Tevar* v. *Arulanandam Pillai*, (*1897)* I. L. R. 21 Mad., 261; *Puran Chand* v. *Roy Radha Kishen*, (*1891*) I. L. R. 19 Cal., 132; referred to.

Tiluck Singh v. *Parsotein Proshad*, (*1895*) I. L. R. 22 Cal., 924; *Pramatha Chandra Roy* v. *Khetra Mohan Ghose*, (*1902*) I. L. R 29 Cal., 651; *Hatem Ali Khundkar* v. *Abdul Gaffur Khan*, 1903, 8 C. W. N., 102; followed. MAUNG PE *v.* MA BAW. **4. L. B. R. 1907 P. 83.**

556. S. 89, 104.—*Civil Procedure Code, S. 258—Limitation Act, sch. II, Art 173 A—Mortgage—Payment made before decree absolute—Order absolute for sale.*

S. 258 of the Civil Procedure Code does not apply to an application made under s. 89 of the Transfer of Property Act, that section not having been made applicable by any rule issued by the High Court under S. 104 of the Transfer of Property Act. That being so, the limitation prescribed by Art. 173-A cannot govern a case where payment is made before a decree absolute. *Kedar Nath Raut* v. *Kali Charan* (I L. R 25 Cal. 703) followed. Any question that arises as to an order absolute for sale is not a question relating to the execution of the decree. Until a decree absolute is made under S. 89 of the Transfer of Property Act, there is in fact no decree capable of execution. The Court to which an application is made under S. 89 of the Transfer of Property Act has full power to ascertain what balance of the mortgage-debt is really outstanding at the time of the application and to make the order absolute for the realisation of the amount only. *Tiluck Singh* v. *Parsotein Proshad* (I. L. R. 22 Cal. 924); *Ajudhia Proshad* v. *Baldeo Singh* (I. L. R., 25 Cal. 133) followed.—HATEM ALI KHUNDKAR *v.* ABDUL GAFFUR KHAN, **8 C. W. N. 102.**

557 S. 89 and 104—*Execution —Adjustment—Power of executing Court to enforce—Civ. Pro. Code, S. 244 and 258.*

After the passing of order absolute for sale the mortgagee agreed, upon receipt of some money, to give up his claim for compound interest and to allow a certain remission.

Held, that the Court executing the decree was competent to give effect to the adjustment 8. C. W. N. 684=31. C. 863.

Quære—Whether S. 258 of the Civ. Pro. Code applies to proceedings in execution of a mortgage decree 41. W. N. 474, 8. C. W. N. 102 Refrd to. HARISH CHANDRA MONDOL *v.* JAGABANDHU DUTTA, **12. C. W. N. 282.**

558 S 90.—*Mortgage decree—Personal Decree.*

S. 90 contemplates the making of a supplemental decree in the special case provided for by that section, namely, the nett proceeds of any sale of the mortgaged property proving insufficient to pay the amount due for the time being on the mortgage, and does not apply to a case where the original decree is a personal one against the mortgagor, under which the mortgagee can, in execution, proceed against any property of the mortgagor other than that comprised in the motgage. It does not seem reasonable that a Court should make a supplemental decree under s. 90, when the decree holder can obtain all he wants by putting in force an existing decree in his favour, against the judgment-debtor. DINA NATH MITTER *v.* BIJOY KRISHNA DAS, **7 C. W. N 744.**

559 S. 90—*Mortgage—Decree for sale—Half of mortgaged property exempted from sale on suit by a third party—Remainder insufficient to satisfy the mortgage debt.*

A mortgagee held a decree for sale and an order absolute for sale of the property comprised in his mortgage. Before, however, the sale could be carried out, a third person succeeded in establishing his title to half of the property mortgaged. The decree-holder brought to sale the remaining half of the property covered by his decree, but the amount realized proved insufficient to satisfy the mortgage debt. *Held*, that, under such circumstances, there was no bar to the decree-holder obtaining a decree over against the unhypothecated property of the mortgagor under s. 90 of the Transfer of Property Act, 1882. *Muhammad Akbar* v. *Munshi Ram*, (A. W. N., 1899, p. 208,) and *Badri Das* v. *Inayat Khan*, (I. L. R., 22 All. 404), distinguished.—KEDAR NATH *v.* CHANDU MAL, **I L R. 26 A. 25. A. W. N. 1903. P. 179=26. A. 25.**

560 S. 90—*Civil Procedure Code (Act XIV of 1882), s. 206 Decree in variance with judgment—Appeal against order for amendment of decree.*

In execution of a decree for sale under S. 88 of the Transfer of Property Act, the property ordered to be sold was sold without satisfying in full the mortgage debt. An application was made to the execution Court for a further order under s. 90 of the Act. The application was granted, but when the decree was prepared in accordance with that order, the decree-holder made

Sup: Govt. acts (IV of 1882) *(Contd.)*

an application alleging that there was a variance between the judgment and the decree which had been prepared in pursuance of it. The Court passed an order allowing the application in part.

Held that no appeal lay from this order. —KISHAN PRASAD *v.* RADHA MADHO PRASAD, **A. W. N., 1904, p 268.**

561 s. 90—*Civil Procedure Code (Act XIV of 1882), s. 244—Mortgage—Suit for sale—Premature suit decreed on confession of judgment—Subsequent suit for balance of mortgage-debt.*

M made a usufructuary mortgage of a shop. The mortgage deed stipulated that in the event of the shop proving insufficient for the discharge of the mortgage, the mortgagee was to recover any balance due to him from a dwelling house specified in the deed. Subsequently to the mortgage, that house was sold to K subject to the mortgage. Before the expiry of the term of the mortgage, the mortgagee brought a suit for the recovery of the mortgage money together with a sum that he had spent in repairing the mortgaged shop, praying that the mortgaged shop might be sold and that in the event of the sale proceeds being insufficient for the satisfaction of the mortgage money, the dwelling house may be sold. The suit was decreed as against the heirs of the mortgagors some of whom appeared and confessed judgment but was dismissed as against the purchaser of the house on the ground that the suit was premature, the term of the mortgage having not yet expired. After the expiry of the term of the mortgage, the mortgagee brought the present suit to recover the unsatisfied portion of the mortgage debt by the sale of the dwelling house.

Held that the suit was not barred inasmuch as in the former suit, it was decided that the plaintiff's claim against the dwelling house was yet premature and so the defendant purchaser could not now plead that the plaintiff's claim in the present suit ought to have been included in the former suit. Neither s. 90 of the Transfer of Property Act, nor s. 244 of the Civil Procedure Code applied to the present suit. —GANGA RAM *v.* KANHAIYA LALL, **A. W. N., 1904, p 236 = 27 A. 254.**

562 s. 90 – *Succession Certificate Act (VII of 1889), Section 4—Succession Certificate—Mortgage-debts.*

Section 4 of the Succession Certificate Act, 1889, limits the necessity of a certificate under the Act to those suits where the Court is called upon to pass a personal decree against the debtor of a deceased person for the payment of his debt; the section does not apply to a suit for a sale on a mortgage. 19 Cal., 336; 22, Cal., 143; 26, Cal., 339, followed. 19 All., 259. not followed. 15, Bom, 105, distinguished. NANCHAND KHEMCHAND *v.* YENAWA. **6. B. L. R. 582 = 28. B. 630.**

Sup: Govt. acts (IV of 1882) *(Contd.)*

563 s. 90—*Fraud—Abuse of process—Purchase* benami *for decree-holder—Estoppel.*—

Where upon an application for sale the decree-holder obtains leave to purchase in the property upon the undertaking to pay the full decretal amount for it, and the property is purchased *benami* for him, at a less sum, and the judgment-debtor does not object at the time :—

Held upon the decree-holder applying for a personal decree for the balance, that the judgment debtor having the remedy to get the sale set aside in due course of law, cannot object to the decree-holder executing his decree for the balance, although the purchase by the decree-holder was an abuse of the process of the Court.—DURGA *v.* BHAWAN DAS. **1. A. L. J. 486**

564 s. 90—*Order in execution*—Res-judicata. See. C. P. C. S. 13—LAKSHMI AMMAL *v.* SABRA NARAIN PILLAI. **14. M. L. J. 103.**

565 S. 90.—*Limitation Act (XV of 1877), Schedule II, article 178.*

In the decree passed under Section 88 of the Transfer of Property Act property which was not hypothecated under the mortgage-deed was included by mistake.

Property mortgaged was sold, and order for sale of property not mortgaged but included in the decree, was passed. Subsequently the judgment-debtor obtained amendment of the decree and the property not comprised in the mortgage was excluded from the decree. The decree-holder applied, within three years from the order amending the decree but several years after the sale of the mortgaged property, for an order under section 90 for the property not mortgaged to be sold to satisfy the balance remaining due under the decree.

Held, that the application was not barred, it was only after the amendment that the condition precedent to the granting of a decree under section 90 was satisfied and the right to ask for a decree under that section accrued. FAZAL HUSAIN KHAN *v.* SHOHRAT SINGH **A. W. N. 1902 P. 50.**

566 s. 90—*Mortgage—Prior and subsequent mortgages—Transfer of Property Act IV. of 1882, s. 90—Application to recover costs from* puisne *mortgagee.*

A prior mortgagee, in a suit upon his mortgage, prayed for an order for costs against a *puisne* mortgagee personally. No such order was contained in the decree passed under s. 88 of Transfer of Property Act (IV of 1882).

Held that the prior mortgagee was not entitled to a decree under s 90 of the Act against the *puisne* mortgagee for the amount of the costs. RAM LAL *v.* SIL CAND. **A. W. N. 1901. P. 181 = 23. A. 439.**

567 s 90—*Decree provided personal remedy only when remedy against property was exhausted—Money-decree in execution could not be passed till sale of property was made or attempted.*

Sup: Govt. acts (IV of 1882) *(Contd)*

A mortgage-decree provided that no personal liability could attach to the defendant unless and until the remedy against the property was exhausted. The plaintiff, instead of bringing the property to sale, applied for a money-decree in execution under section 90 of the Act. *Held*, that a sale, or at least an attempt to sell, is a necessary condition precedent to the passing of the money-decree under s. 90, unless something happened subsequently to the passing of the conditional decree which had the effect, wholly or in part, of extinguishing or casting a cloud over the title of the mortgagor. (17 M. 309; 28 C. 12 and 26 A. 25, referred to. 25 A. 79, followed) GULAM ABBAS *v.* BRIGBHAN **1. N. L. R. 39.**

568 S. 90—*Application under s. 90 T. P. A. dismissed under S. 102 C. P. C.—Such dismissal debars a fresh application.*

The proceedings on an application under s. 90 T. P. A. are a continuation of the orginal suit. The dismissal of such application, under S. 102, C. P., C., debars the mortgagee from making a fresh application. (21 A 453, Diss. 25 M. 244 (287), not followed) RAMDAYAL *v.* MOHAMMAD GHOUSE **1. N. L. R. 143.**

569 S. 90—*Personal decree—Abandonment of claim to sell a non-saleable part of the property ordered by the decree to be sold,*

Held, that on the true construction of the provisions of the Transfer of Property Act 1882, a mortgagee is entitled at any stage to abandon his claim against any portion of the mortgaged property and then obtain a decree under S. 90, for any balance due after crediting the amount realized by the sale of the property actually sold A W. N. 1899, p. 208, dist., 25 A 79; 26 A. 25, 28 A. 19 ref. to.—PIRBHU NARAIN SINGH *v.* AMIR SINGH. **A. W. N. 1907 P. 83=29 A. 369.**

570. S. 90—*Mortgaged property wholly nonsaleable—Decree under S. 90 not obtainable.*

Where the mortgaged property is such as the mortgagee could by no possibility bring to sale, being an occupancy holding of which the mortgagor was not the tenant, in execution of decree under his mortgage, *held* that no decree under S. 90 T. P. A. could be granted. 26 A 25 dist.—PIRBHU NARAIN SINGH *v.* BALDEO MISRA. (PER KNOX, J.) **1907 A. W. N. 69; 4 A. L. J. 157; 29 A. 260.**

571. S. 90—*And Limitation Act—Art. 178.*

In making a decree under S. 90, T. P. A., the Court has to see whether the personal remedy was barred at the date of the institution of the suit and not whether it would be barred at the date of the application under S. 90. Art. 178 of Limitation Act does not apply to an application under S. 90. T. P. A. (22 C. 924 foll). The mortgage suit having in this case been brought within the period of limitation provided

Sup: Govt. acts (IV of 1882) *(Contd.)*

by Art. 119 of Sch. II of the Limitation Act.

Held, that the application under S. 90, T. P. A., was not barred though made more than three years after the date of the decree for sale.—SHEIK RAHMAT KARIM *v.* SHEIKH ABDUL KARIM. **6 C. L. J. 119 =34. C. 672=11 C. W. N. 674.**

572. S. 90.—*Sale of the property after the usual period of six months—Personal liability for the balance—Attachment of property—Son born to mortgagor before the sale of the non-mortgaged property under the personal decree entitled to have exempted from sale—His share in the property.*

A got a decree in 1902 on his mortgage directing that the mortgaged property should be sold on failure to pay the money within six months, and that if the sale proceeds were insufficient to pay off the amount the balance was to be recovered from B personally. In June 1903 the mortgage property was sold in execution of the decree. In that very month A, under the personal decree for the balance, got attached a house belonging to B which was not comprised in the mortgage. On the 4th August 1903, the sale was set aside on B's application. B then applied on the 17th August 1903 to have the attachment of the house raised. The Court directed the attachment to be maintained, but ordered that the property should not be sold until the proceeds were found insufficient. In September 1904 B's son C was born. In November 1904 the mortgaged property was again sold and in January 1905, A applied for sale of the house whereupon C applied to have the attachment removed from his one half share in the house.

Held, that the decree in so far as if directed personal payment by B was passed in disregard of the provisions of S. 90, T. P. A. It was clear from the words of the section that direction should have been made in a supplemental decree to be passed when the net proceeds should be found insufficient. The original decree should merely have reserved to the plaintiff liberty to apply for a decree under S. 90, that the personal decree was contingent on the ascertainment of the balance and only become operative and capable of execution when that balance was ascertained. It was therefore open to C to establish any circumstance which affected the validity of the attachment as against his interest in the house, and C's interest therein should be released from attachment. DAMODRA *v.* VYANKU. **8 B. L. R., 199=31 B. 244.**

573 S. 90—*Application for a personal decree—Limitation Act Art. 116.*

Held that even in the absence of an express personal covenant to pay the mortgage money the mortgagee can obtain a personal decree under section 90 T. P. A. against the mortgagor if the requirements of the section are otherwise fulfilled ; a personal covenant to pay is implied in and is an essential

Sup: Govt. acts (IV of 1882) (*Contd.*)

part of every simple mortgage (11. B. 475 dissented, 21 M 242 Reld to).

Held also that on an application under section 90 it is the date of filing the suit which has to be looked to in considering the question whether the balance is legally recoverable from the defendant and not the date of this application (20 A 386 followed) JANGI SING *v.* CHANDER MOL, **A. W. N. (1906). 161.**

574. S. 90—*Mortgage decree—Order for sale—Costs—Costs if can be recovered from the mortgagor personally.*

The costs awarded by a decree directing the sale of mortgaged property from part of the mortgage decree and the decree-holder must proceed to recover the cost by a sale of the mortgaged property in the first instance, and it is only when the mortgaged property is found to be insufficient (14 C 185, 10 A 179 Dissented 20 A 523 followed) to satisfy the decree that the decree holder can proceed against the other properties of the mortgagor in the manner provided by S. 90 T. P. A. RAJ KUMAR SING *v.* SHEO NARAIN SING, **12 C. W. N. 364.**

575—*Application by mortgagee's heir for suplementary decree—Succession certificate if necessary* .See Succession Certificate Act VII of 1889—SAHADAO SUKUL *v.* SHEIKH SAKHAWAT HUSSEIN. **12 C. W. N. 145.**

576 s. 90, 65 (*c*) *Prior and subsequent incumbrancers—Implied covenants binding upon the mortgagor.*

A *puisne* mortgagee of property, upon which there existed several prior incumbrances, obtained a decree for sale after redemption of the prior incumbrances. The prior incumbrances were redeemed and the mortgaged property was put up to sale; but the sum realized by the sale was not sufficient to cover even the amounts due upon the prior incumbrances, not to mention the amount due upon the mortgage in suit.

Held that, having regard to s. 65 (*c*) of the Transfer of Property Act, 1882, the *puisne* mortgagee decree-holder was entitled to a decree under s. 90 of the said Act in respect of the deficit due upon the prior incumbrances as well as in respect of the deficit upon his own mortgage.—ALI JAN *v.* MARIAM BIBI, **A. W. N. 1903. P. 202=26. A. 93.**

577. S. 90—*Mortgage-decree—Decree for sale of property not mortgaged—"Such sale."*

A suit was brought on a mortgage-bond which hypothecated *malikana* rights and a decree was passed under section 88 of the Transfer of Property Act for sale of the *proprietary* rights as prayed by the mortgagee. The property was sold but the decree was not wholly satisfied. The decree-holder applied for a decree under section 90 of the Transfer of Property Act. The judgment-debtor contended that the application did not lie, for the *malikana* rights had not been sold.

Sup: Govt. acts (IV of 1882) (*Contd.*)

Held, that the contention had no force, for the provisions of section 90 were duly complied with.

That the words 'such sale' in section 90 of the Transfer of Property Act mean a sale under the preceding sections of the Act. *25 All., 79 referred to.* SHIAM SUNDER LAL *v.* GANESH PARSHAD.—**3 A. L. J., 465=A. W. N. 1906. P. 205=28. A. 674.**

578. S. 90—*Effect of decree under S. 90 for purposes of Limitation—Application for execution of mortgage decree after partial satisfaction by a previous execution*—See Limitation Act, Art: 179—MADAN MOHANDAS *v.* NOBINKISHORE DEB. **3. C. L. J. 291.**

579. S. 90.—*Bond payable by instalments—Default in payment—Application under S. 90 T. P. A.*—See Limitation Act, Art: 75—BASANT LAL *v.* GOPAL PARSHAD. **3. A. L. J. 463.**

580. S. 90—*Mortgage decree—Application for a decree under S. 90 T. P. A.—Step in aid of execution—Meaning of application in accordance with Law.* See Limitation Act Art: 179—PURANCHANDRA MANDAL *v.* RADHANATH DAS. **4. C. L. J. 141=33. C. 867.**

581 S. 90—*Construction of mortgage bond—Promise to pay—Personal liability—Application for balance of debt—Liability of properties other than mortgage*—See Mortgage PARBATICHARAN ROY *v.* GOBINDA CHANDRA KUNDU. **4 C. L. J. 246.**

582 S. 90—*Application to set aside* exparte *decree under S. 90. T. P. A.*—See C. P. C. S. 108—GURDIN PANDY *v.* RAI GOKALCHAND BAHADUR. **9 O. C. 288**

583 S. 90—*Decree for sale of mortgaged property—Application for recovery of balance due after sale of mortgaged property*—See Limitation. BISHESHAR DAYAL *v.* MOHAMMAD IBRAHIM KHAN. **6 O. C. 39.**

584. S 90—*Application for decree for recovery of balance due on mortgage—Limitation Act arts. 178 and 179.*

Held, that an application under section 90 T. P. A. cannot be considered an application "for the execution of a decree" within the meaning of article 179 of the Limitation Act, but it is an application in execution proceedings and is governed by article 178 of the Act. RAM RAGHUBIR *v.* MUSAMMAT ZAHUR-UN-NISA. **6 O. C. 114.**

585. s. 90. See S. 67, 90—5 B. L. R 952 No. 268 *supra.*

586. s. 90 See S. 88, 89, 90—2 A. L. J. 353. No. 500 *supra.*

587. s. 90. See S. 88, 90—31 C. 702 No. 510, 6 C. L J. 745 No. 511, 30 M. 464 No. 512, 25 A. 541 No. 513, 6 O. C. 59, No. 514, 27 A. 619 No. 515 *supra.*

588. s. 90. See S. 89, 90—A. W. N. 1905 P. 124 No. 550, 33 C. 890 No. 551, 28 A. 19 No. 552, 28 A. 660 No. 553, 25 A. 79 No. 554 *supra.*

589. s. 90, 88. Res judicata—*Personal and sale decree combined—Application for per-*

Sup: Govt. acts (IV of 1882) (*Contd.*)

sonal decree dismissed—Execution of original decree against person.

Where a combined decree against the mortgaged property and person under S. 88 and 90 of the T. P. A. has been passed, it is not necessary to apply for a personal decree after the sale of the hypothecated property. Any order passed on that application is without jurisdiction and cannot supersede the decree as originally made and cannot operate as a bar to the decree being executed. SADHO SINGH *v.* MAHARAJA OF BENARES. **3 A. L. J. 606=A W. N. 1906 P. 251=29 A. 12.**

590. S. 90, 92, 93. *Redemption of prior mortgage by* puisne *mortgagee—Execution of Decree.*

A suit was brought by a *puisne* mortgagee against the prior mortgagee for redemption of the prior mortgage. A decree was given in terms of s. 92 of the Transfer of Property Act ordering that upon the plaintiff paying a certain sum to the defendant or into Court, the plaintiff was to have redemption of the property, but if such payment was not made, the property mortgaged was to be sold. On the failure of the plaintiff to pay this sum, the property was sold, but the amount realized was not sufficient to cover what was due on the prior mortgage. The prior mortgagee sought to recover the balance of the decree by the arrest of the *puisne* mortgagee.

Held that this could not be done as the *puisne* mortgagee was not personally liable under the decree. The only penalty provided in the decree for the non-payment of mortgage money was a sale of the property and that had taken place.

Held, also, that the language of s. 90 of the Transfer of Property Act was not wide enough to cover the present case. *Ram Lal* v. *Sib Chand* (I. L. R., 23 All. 439) referred to. MATA AMBER *v.* SRI DHAR. **A W. N., 1904, P. 73=1 A. L. J. 220=26 A. 507.**

590. (a) S. 90, 100 *Mortgage—Vendor's lien for unpaid purchase-money—Suit for sale—Question of personal liability of mortgagor when may be decided*—Res-judicata.

The plaintiffs filed a suit for enforcement of their lien as vendors for unpaid purchase-money by sale of the property. The Court held, "the defendants cannot, either personally or their other properties, be held liable for any part of the amount claimed. The property sold to them can alone be liable." Subsequently they applied for a decree under section 90 of the Transfer of Property Act.

Held, that the application must be rejected, for the matter was *res-judicata*. The question was properly decided in the suit, and could not form subsequently the subject of an application under section 90 of the Transfer of Property Act. 14 *All.*, 513; (1 *All*, 486; 13 *All.*, 356; *W. N., All.*, 1890, *p.* 142, *referred to.*

Held, that the fact that the finding as to the personal liability of the defendants was not embodied in the decree, did not preclude the defendants from urging the plea of *res-judicata*, 7 *All.*, 606, *referred to.* UTTAM ISHLOK RAI *v.* RAM NARAIN RAI. **S. C., 3 A. L. J., 171; S. C., W. N. A., 1906, P. 44=28 A 365.**

591. S. 90, 100.—*Charge—Sale of property, the subject of a charge—Right of charge holder to get a personal decree against his debtor.*

Held by BANERJI, J. (RICHARDS, J., *dissentiente*) that a holder of a charge is, like a mortgagee suing for sale, entitled to ask for and obtain a decree under s. 90 of the Transfer of Property Act, provided that the balance due to him is legally recoverable from the defendant personally. *Chunilal* v. *Bai Jethi*, (I. L. R., 22 Bom., 846); *Har Lal* v *Muhamdi* (I. L. R, 21 All., 454) and *Musaheb Zaman* v. *Inayatullah* (I. L. R., 14 All., 513) *referred to.*

Per RICHARDS, J.—S. 100 of the Transfer of Property Act does not enable the owner of a charge, as distinguished from a mortgagee, to obtain a personal decree under s. 90 against the owner of the property charged, even when there is a balance recoverable from the defendant otherwise than out of the property sold. UTTAM ISHLOK RAI *v.* PHULMAN RAI. **2 A. L. J., 379=A. W. N, 1905, P. 144.**

592. S. 90, 101.—*Bengal Tenancy Act (VIII of 1885, ss. 165, 167—Sale with power to avoid all incumbrances—Procedure for annulling incumbrances whether necessary, when the incumbrances and the purchaser are one and the same person—Sale for arrears of rent—Mortgage lien—Extinguishment of charges—Personal covenant by mortgagor.*

When the mortgagee of a property purchases it at a sale in execution of a rent decree under s. 165 of the Bengal Tenancy Act, and takes out the balance of the surplus sale proceeds and applies it *pro tanto* to the satisfaction of a mortgage decree which he had obtained, his mortgage lien on the property is extinguished by his purchase, although he may not have taken steps to annul the incumbrance under s. 167 of the Bengal Tenancy Act. *Goluck Chunder Das* v. *Ram Shunker Dutt* (4 C. W. N., 268), dissented from. MASTULLA MANDAL *v.* JAN MAMUD SHA. **I. L. R., 28 C. 12.**

593. S. 91.—*Redemption.*—See Mortgage Redemption. PARMANAND *v.* LAKHMAN DAS. **27 A. 392.**

594. S. 91 (a).—*Persons entitled to redeem*—Raiyati *interest.*

The expression 'any person having any interest in or charge upon the property' used in this section means any person having an interest in or charge upon the property which is affected by the mortgage, and a *raiyati* interest is not such an interest. GRISH CHANDER DEY *v.* JURAMONI DEY. **5 C. W. N. 83.**

595. S. 91.—*Mortgage decree—Sale—Right of auction purchaser before confirmation of sale to deposit decretal amount and costs—Judgement-debtor's representative—Right to redeem.*—See C. P. C., Ss. 244 and 291. RADHA

Sup: Govt. acts (IV of 1882) *(Contd.)*

KISHAN MARWARI *v.* HEMCHANDRA BOSE. **11 C. W. N., 495.**

595 (a) S. 91—*Who may redeem—Perpetual lessee.*

The plaintiff was a perpetual lessee of the mortgaged premises from the mortgagor holding under a lease granted upon payment of a premium of Rs. 800, with a yearly rental of Rs. 40. By the terms of the lease the lessee was not liable to be ejected, even for non-payment of rent, while, if the title of the lessors proved defective, the lessee was entitled to a refund of the premium.

Held, that the lessee was under the above circumstances entitled to redeem. 19 M. 151; 6 C. 317; 21 C. 116; 8 C. 79 and 27 A. 472 referred to. RAGHUNANDAN PRASAD *v.* AMBIKA SINGH. **4 A. L. J. 703=A. W. N. 1907 P. 277=29 A. 679.**

596. s. 91—See S. 63, 83, 84. 91—4. O. C. 387 No. 246 *supra.*

597. s. 91—See S. 75, 85, 86, 91—5. B. L. R. 892 No. 323 *supra.*

598. s. 91—See S. 82, 91—25. A. 446 No. 352 *supra.*

599. s. 91—See S. 85, 91—23. A. 467 No 425 *supra.*

600 S. 91 *(a)*—*Landlord—Redemption of a mortgage—Absolute accupancy tenant—Foreclosure.*

A landlord has no such interest as would entitle him to redeem a mortgage of his holding by an absolute accupancy tenant (15. C. P. L. R. 89 followed). The ruling 8. C. P. L. R. 154 wherein the Court took it for granted that a *Malguzar* having an interest in the property could sue for redemption was held to be *abitor dictum.* The interest in the property referred to in this section means an interest actually in existence at the time the suit is instituted and therefore S. 41 Tenancy Act giving the landlord the right of pre-emption which may arise on foreclosure has no application. (6. B, 139, 13. L. J. Ch: 337, 35. L. J. Ch. 847, 39. L. J. Ch: 342, 57. L. J. Ch: 1085 discussed. GANPAT *v.* BHANGI. **15 C. P. L. R., 1902 P. 175.**

601. S. 91 (b)—*Mortgage—Prior and puisne mortgages—Suit for redemption of prior mortgage—Right of sub-mortgagee.*

In 1884 *G.* and others, the owners of the mortgaged property, executed a usufructuary mortgage in favour of *R.* and others. In the mortgage it was provided that the property might be redeem d in *Chait* of any year. In April 1900 the same mortgagors executed a further mortgage of the same property in favour of one *B.* This mortgage contained a provision that *B.* should get possession of the mortgaged property after redeeming the earlier mortgage of 1884. Subsequently *B.* sub-mortgaged the property in favour of the plaintiffs. Out of the mortgage money sufficient sum was left with the mortgagees to enable them to redeem the mortgage of 1884. The sub-mortgage provided that possession when obtained hould be retained up to the year 1314 *Fasli.* In it also the sub-mortgagor in express terms transferred his interest in the land, the subject matter of the mortgage, and agreed that the sub-mortgagees should remain in possession from 1308 to 1314 *Fasli* paying rent therefor to the proprietor of the *mahal.* The plaintiffs brought a suit to redeem the mortgage of 1884.

Held, that the plaintiffs were entitled to redeem the prior mortgage. *18 All. 113 distinguished, W. N., All., 1901, p. 153 overruled. 20 Mad. 35, 13 All., 432 referred to.* RAM SUBHAG *v.* NAR SINGH. **A. W. N. 1905. P. 58=2. A. L. J. 162 27. A. 473.**

See also 27. A. 511 under S. 85. T. P. A. No. 393 *supra.*

602. s. 91 (b)—*Hindu widow's mortgage—Reversioner's right to redeem—Onus—benami*

A sued to redeem a mortgage executed by a Hindu widow in favor of B on the ground that the mortgaged property was of the widow's husband and would come to the plaintiff as a reversioner on her death.

Held, that the reversioner has an interest in the property and is entitled to redeem within the meaning of sec. 91, cl. (*b*) T. P. A.

Held, also, that the burden of proving a transaction to be *ismfarzi* lies on the person alleging it (S. C. No. 271, followed) *Bhairon Bakhsh* v. *Baldeo Singh*, 7 O. C., 98, referred to. GUMANI SINGH *v.* CHAKKAR SINGH. **8 O. C., 349.**

603. S. 92—*Redemption—Loss of title-deeds—Security for deeds.*

In execution of a decree for redemption, the mortgagee judgment-debtor, who had been directed to deliver the title-deeds to the mortgagor decree-holder on receipt of the decree amount, but who having lost them was unable to return the same, cannot, in the absence of an express provision in the decree to that effect, be compelled to give security for the value of the property. SUBBARAYA IYEN *v.* PADMANABHA VADHYAR. **12 M. L. J. 63.**

604. *Redemption decree—Prior mortgagee's execution of decree and purchase without impleading* puisne *mortgagee—The Amount to be paid by* puisne *mortgagee to redeem prior mortgage*—See S. 74 No 318 supra. 24 A. 185—

605. S. 92—*Mortgage—Landlord and Tenant—Lease by mortgagee is extinguished on redemption—Jurisdiction of Civil and Revenue Courts—Suit by mortgagor against lessee from mortgagee.*

Under the provisions of Section 92 of the Transfer of Property Act the mortgagee is bound to re-transfer the property to the mortgagor after decree for redemption is passed, free not only from the mortgage but also from all encumbrances created by him.

Where the mortgagor after obtaining a decree for redemption of the mortgage

Sup: Govt .acts (IV of 1882) (*Contd.*)

brought a suit for possession of the land mortgaged against the tenants from the mortgagee in which he also prayed for a declaration that the land was his *sir*—

Held, that the latter prayer could not be granted by the Civil Court, but the suit for ejectment was cognizable by the Civil Court and not by the Revenue Court. RAM CHAND *v.* RAJ HANS. **3 A. L. J., 517. = A. W. N. 1906. P. 241.**

606. S. 92.—*Decree in suit for redemption*—*Held*, that in a suit for redemption of a usufructuary mortgage the decree must be granted in conformity with section 29 T. P. A., *i. e.*, in default of payment of money, the property should be sold.—ZOHRA BIBI *v.* SHEIKH MUSI RAZA, **2. O. C., 196.**

607. S. 92—*Accounts—Decree in suit for redemption—Subsequent suit for mesne profits*—See C. P. C. S. 13 Resjudicata. SHEO NATH *v.* GAYA PRASAD. **8 O. C. 302.**

608 S. 92—See S. 2, 92, 93—25 B. 101—No. 2 *supra.*

609 S. 92—See S. 43, 85, 95—5 O. C. 335 No. 74 *supra.*

610 S. 92—See s. 60, 92, 93—A W. N. 1901 P. 194 No. 235 *supra.*

611 S, 92—See s. 76, 84, 89, 92—34 C. 222 No. 328 *supra.*

612 S. 92—See s. 88, 89, 92—1. A. L. J. 300 No. 501 *supra.*

613 S. 92—See s. 90, 92, 93—26 A. 507 No. 590 *supra.*

614 S. 92 & 93—*Power to enlarge period for redemption after its expiry—Appeal against order refusing enlargement.*

Under the proviso to section 93 of the Transfer of Property Act, an application to extend the time for redemption fixed by the original decree confirmed upon appeal may be made at any time before the decree absolute is made—9 *Sim.*, 304, 22 *Bom.*, 778, *followed.*

An order declining to enlarge period for redemption fixed by a decree is appealable.—*22 Bom., 771; 19 All., 520, followed.*—RANNGO *v.* BHOMSHETTI **3 B. L. R., 554.**

615 S. 92, 93—*Mortgage Application for enlargement of time—Application to be made to the Court of first instance not to the Appellate Court.*

Where a decree for redemption under S. 92 of the Transfer of Property Act 1882, has been made by an appellate Court, an application under the last paragraph of S. 93 must be made, not to that Court, but to the Court of first instance *Venkata Krishna Ayyar* v. *Thiagaraya Chetti*, (I. L. R., 23 Mad., 521), followed. *Oudh Behari Lal* v. *Nageshar Lal*, (I. L. R., 13 All., 278,) referred to.—SHEO NARAIN *v.* CHUNNI LAL. **I. L. R., 23 A. 88.**

616. S. 92, 93—*Decree for redemption—Omission to execute—Maintainability of subsequent suit on same mortgage*—Resjudicata—*Civil Procedure Code (Act XIV of 1882), S. 13, 244.*

Sup: Govt. acts (IV of 1882) (*Contd.*)

Where a suit for redemption has been instituted and a decree for redemption has been passed therein, but not executed, a subsequent suit is not maintainable for the redemption of the same mortgage. VEDAPURATTI *v.* VALLABHA VALIYA RAJA. **I. L. R., 25 M. 300.**

617. S. 92, 93—*Form of decree in a suit for redemption on a usufructuary mortgage.*

An order that the plaintiff's right to redeem shall be extinguished upon non-payment within the limited time for redemption is not a proper order when the mortgage sought to be redeemed is a usufructuary mortgage. Nevertheless where such an order has been made and the decretal money has not been paid within the time limited and the decree has been allowed to become final the plaintiff cannot thereafter bring a second suit for redemption. 24 A. 44 *referred to.*—LACHMAN SINGH *v.* MADSUDAN. **A. W. N., 1907 p. 137 = 4 A. L. J. 447. = 29 A. 481.**

618 S. 92, 94—*Redemption suit—Subsequent suit for profits received by mortgagee barred.*

In a suit for redemption there ought to be a complete and final settlement of all accounts, up to the time of actual redemption or sale. A mortgagor therefore who has obtained a decree for redemption and paid in what was found by the decree to be due from him cannot subsequently sue for profits realized by the mortgagee in possession, which might and ought to have been taken into account at the time of passing the decree. 26 B. 661 *referred to.* KAHSIPRASAD *v.* BAJRANG PRASAD. **4 A. L. J 763 = A. W. N. 1907 P. 281 = 30 A. 33.**

619. S 92, 93, 87—*Decree for redemption of mortgage by conditional sale—Mortgagee's right of foreclosure—Mortgagor's application for enlargement of time can for sufficient cause be granted even after due date Distinction between suits for redemption and foreclosure as to such indulgence.*

Held, that S. 93, T. P. A. compels the Court to make an order of foreclosure absolute if the date fixed for payment has passed without payment, but at the same time allows it, upon good cause shown and upon such terms as it thinks fit from time to time to postpone the date. (25 M. 244 refd. to). Just like the case of a mortgagor in a redemption suit, who allows the time for redemption pass without payment or applying for postponement of the date (19 M. 40, 25 M. 44 discussed) a mortgagee who meets an application for foreclosure must show good cause for his failure to pay on due date and obtain an order for extending the time (65 L. J. Ch. 375 followed).

The proviso to S. 93 construed in the light of the English Law Courts from which it has been borrowed, means that an application for enlargement of the time fixed in the decree for redemption can be entertained even after the expiry of the prescribed period (9 L. J. Ch. 113, 22 B. 771, 26 B 121, and 28 B. 103, followed). Comparing S. 87 and 93

Sup: Govt. acts (IV of 1882) *(Contd.)*

with the practice of the English Law Courts it would be according to the principles of equity to grant indulgence less readily to mortgagors, who have sued for redemption than to those against whom a suit for foreclosure has been instituted. (19 M. 40 ref., 21 C. 618, 22 M. 133, 24 A. 479, 25 A. 231, 16 C. P. L. R. 111, refd. to.) NAND LAL *v.* RAM RATAN LADHI. **2 N. L. R. 137.**

620. S. 92, 93, 94.—*Payment of mortgage money after the time fixed by Court—Mortgagor's right to pay before mortgagee's application for order absolute.*—See •Mortgage. HER DEO BUKSH *v.* SAJJAD HUSAIN. **5 O. C. 82.**

621. S. 92, 95, 199.—*Position of a co-mortgagor redeeming the whole property—Limitation Act, arts. 144 and 148—Adverse possession —Redemption from him.*

Held, that, when one of the several co-mortgagors redeems the entire property, it cannot be said that he has the same rights and stands exactly in the same position as the mortgagee with regard to the share of his co-mortgagors. The debt in the case of such a payment is entirely discharged and the mortgage is redeemed; and the redeeming co-mortgagor has no right in the shares of his co-mortgagors other than that of a charge on those shares for the money paid for redemption and the proper costs incurred in so redeeming. (14 A. 1, dissented, 26 B. 500 followed).

Held, further, that the limitation for redeeming the property from the hands of such a co-sharer is that of 12 years provided for by art. 144 of the Limitation Act and the limitation runs from the date when the redeeming co-mortgagor sets up his adverse possession. MAKHDUM KHAN *v.* MUSAMMAT JADI. **9 O. C. 91 (b).**

622 s. 93—*Redemption——Failure to pay money on date fixed—Court's power to enlarge time for payment.*

The failure to pay money on or before the date mentioned in the redemption-decree does not absolutely bar the mortgagor's right to obtain possession of the mortgaged property; since, the Court may, under s. 93 of the Transfer of Property Act (IV of 1882) upon good cause shown, enlarge the time for payment upon such terms as it thinks fit. The plaintiff, within three years of the date of the decree, produced in Court the decretal amount and prayed for possession of the mortgaged property.

Held that such an application could be treated as one for enlargement of time under s. 93 of the Transfer of Property Act, —ISHWAR LINGO *v.* GOPAL JIVAJI. **8 B. L. R. 719 = 28. B. 102.**

623 s. 93—*Mortgage—Redemption—Power to extend time for redemption fixed by decree —Discretion.*

Held, that having regard to the fact that under the decision of the Courts prior to the Full Bench decision reported in 25 *Mad.*, 300 a redemption decree was not regarded as a bar to a second suit for redemption and that the petitioners were thereby misled as to the necessity for redeeming strictly within the time limited by the decree on pain of altogether losing the right to redeem the Subordinate Judge might properly in the exercise of his discretion have extended the time for redemption granted by him in the appeal against the decree. SABAPATHY PATTER *v.* MANUKHAN. **13. M. L. J. 266.**

624 s. 93—*Mortgage Decree—Extension of time for payment.*

After a decree on a mortgage was passed, the mortgagor applied for extension of time for payment of the amount due on the decree.

Held that the proper Court to hear such an application is the Court of first instance, but the Appellate Court has also jurisdiction to extend the time in a case in which there is an appeal to itself. —BABU PRASAD *v.* KHIALI RAM, **3. A. L. J. 828 = A. W. N. 1906. P. 203.**

625 s. 93—See s. 2, 92, 93—25. B. 101 No. 2 *supra.*

626 s. 93—See s. 60, 92, 93—A. W. N. 1901. P. 194 No. 235 *supra.*

627 s. 93—See s. 86, 87—25. A. 231 No. 441 *supra.* See also s. 88, 89, 92—1. A. L. J. 300 No. 501 *supra.*

628 s. 83—See s. 88, 89, 93—3. M. L. T. 281 No. 502 *supra.*

629 s. 93—See s. 89, 93—4 L. B. R. 1907 P. 83 No. 555 *supra.*

630 s. 93—See s. 90, 92, 93—26 A. 507 No. 590 *supra.*

631 s. 93—See s. 92, 93—3 B. L. R. 554 No. 614, 23 A. 88 No. 615, 25 M. 300 No. 616, 29 A. 481 No. 617, 2 N. L. R. 137 No. 619, 5 O. C. 82, No. 520 *supra.*

632 s. 94—See s. 86, 88, 94—31 C. 150 No. 448 *supra.*

633 s. 94—See s. 92, 93, 94—5 O. C. 82 No. 520 *supra.*

634 s. 95—*Redemption by co-mortgagor.—His charge and adverse possession*—See Limitation Act article 148—VASDEO *v.* BALAJI **4 B. L. R. 178 = 26 B. 500.**

635 S. 95—*Mortgage—Co-mortgagors—Contribution.*

Held, by Stanley, C. J. and Burkitt, J. (Banerji, J., dissenting) that one of two or more mortgagors including the transferees of the equity of redemption from any of them, whose portion of the mortg[illegible]d property has been sold in execution of a decree for sale on the mortgage and has fetched at auction a larger sum than was rateably attributable to it, but has not discharged the whole of the mortgage debt has no right against his co-mortgagors to compel them to contribute and indemnify him to the exent by which the proceeds of the sale of his portion of the mortgaged property was in excess of the amount rateably due from it. He therefore does not acquire a charge in respect of such excess against his co-mortgagor's portion of the mortgaged property. *12 All., 110; 4 All., 58; 14 Cal., 809; 26 Mad. 686; 21*

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Cal., 142; 24 Mad., 96: 20 Mad., 23; 14 All., 273; 22 Cal., 100 referred to.

Per Banerji, J.—There is no distinction in principle between a case in which a payment has been made to avert a legal process and a case in which payment has been enforced by sale of the property of the claimant for contribution. In both cases his claim is based upon the ground that his property has contributed more than what it was liable for, and that the defendant has benefitted thereby.

Where one of the properties has contributed more than its rateable share of the mortgage debt, the owner of such property is entitled to claim contribution from the property which has not discharged its own quota of liability and to be indemnified for the loss sustained by him to the extent by which the owner of the other property has benefited. In determining, therefore, whether a claim for contribution in such a case can be sustained the test is whether the payment made by the claimant or the amount realized by the sale of his property exceeds the amount for which that property was rateably liable and whether the property from the owner of which contribution is claimed has to that extent been relieved of liability and has thus benefited. And it is immaterial whether the amount paid has been realized by coercive process and whether or not it has fully discharged the debt. There is no authority, for the proposition that a suit for contribution cannot be brought until the whole amount of the debt has been paid. Each case will depend on its own merit, it must be established in each case that the claimant has been indemnified and that his opponent has benefited by being eased to the extent of the amount claimed. IBN HASAN *v.* BRIJBHUKAN SARAN. **A. L. J., 1904 p. 148 = A. W. N. 1904 P. 74 = 26. A. 407.**

636. S 95—*Construction of Statute—Mortgage—Charge—Contribution—Limitation Act, Sch. II, Art. 132.*

Where the ordinary meaning of the language of a stature leads to a manifest contradiction of the apparent purpose of it, or to some inconvenience or absurdity, a construction may be put which will bring the language into accord with the apparent intention even though it is necessary to reject words altogether or to interpolate other words. S. 95 of the Transfer of Property Act must be read as if after the words ' and obtain possession thereof" some such words as "if the mortgage be in possession" were interpolated. The object of this section apparently is to give to a co-motgagor, independently of the nature of his mortgage, a charge on a share of a co-mortgagor for the proportion of the share of the mortgage debt paid by him to redeem the property. Art. 132 of Sch. II of the Limitation Act governs a suit for contribution brought by such co-mortgagor who has paid off the mortgage debt, against another co-mortgagor. BHUGWAN DAS *v.* HARDEI. **I. L. R., 26 A. 227; A. W. N., 1904, p. 3.**

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637. S. 95—*A purchaser of a part of equity of redemption redeeming the whole—Lien—Mortgage Redemption.*—RUGAL SINGH *v.* SATNARAIN SINGH. **A. W. N. 1904 P. 208 = 1 A. L. J. 675 = 27 A. 178.**

638. S. 95.—Meaning of "obtains possession" Joint decree against several mortgagors Redemption by one of the co-mortgagors—charge on anothers shares—*See Mortgage—Redemption.*—GHULAM MAULA KHAN *v.* BANNO KHANAM. **4 O. C. 273.**

639 s. 95—*Joint mortgage bond in ordinary form—Payment by one mortgagor and redemption of whole property mortgaged—Charge on property of co-mortgagors—Failure of plaintiff in suit for money paid on mortgage to prove that he executed bond as surety only—Right to contribution.*

The fact that a plaintiff has claimed too much on one cause of action does not preclude him from recovering what he is actually entitled to on another cause of action, provided that the pleadings are wide enough to cover such a claim. The construction of s. 95 of the Transfer of Property Act (IV. of 1882) should not limit its operation to mortgages under which possession passes, and therefore on redemption properly repasses; the better way is to construe it distributively, to make the condition of obtaining possession apply only to the cases in which its fulfilment is, from the nature of the mortgage, possible, and in other cases to make the charge follow on redemption. To raise funds for the defence of a relative, the plaintiff and defendants jointly executed a bond in the ordinary form, each pledging immovable property as security. The plaintiff eventually paid off the amount due on the bond and redeemed all the property mortgaged. In a suit in which he claimed the whole sum paid by him on the ground that he had executed the bond only as a surety, the defendants denied that he was a surety, and pleaded that he was only entitled to a rateable amount from each of them.

Held that the plaintiff's failure to prove that he was merely a surety on the bond did not preclude from him recovering a proportionate share from each of the defendants; and that under s. 95 of the Transfer of Property Act, he was entitled also to a charge for such amount on the defendant's interest in the property respectively mortgaged by them.—AHMAD WALI KHAN *v.* SHAMSHUL JAHAN BEGAM, **3 A. L. J. 360; 10 C. W. N; 625 = 3. C. L. J. 481 = 8. B. L. R. 397 = 23. A. 482 (P. C.).**

640 s. 95—*Purchaser of equity of redemption—Suit for contribution.*

The term "mortgagor" in s. 95 of the Act includes purchasers of quality of redemption who stand, for all other purposes, in the same position as mortgagors. (8 B. 497 referred to).

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The section must be read as if the words "obtains possession" ran as follows:—"Obtains possession when the mortgagee had possession under his mortgage." Therefore, the section must not be limited in its application to the case of usufructuary mortgages only. (26 A. 227 followed).

Where a purchaser of equity of redemption of a mortgage by conditional sale, the mortgagee not having possession, redeems the property, he may sue the mortgagors for contribution and bring their shares to sale.—MOHAN SETH *v.* KASHINATH, **3 N. L. R. 92.**

641 S. 95—See s. 55 (6) (b), 82, 95—9 O. C. 259 No. 165 *supra.*

642 S. 95—See s. 60, 83, 95—27 A. 178 No. 236 *supra.*

643 S 95—See s. 82, 95, 100—9 C. W. N. 865 No. 353 *supra.*

644. S. 95.—See S. 82, 95—4 C. L. J. 79 No 354 *supra.*

645. S. 95.—See S. 85, 81, 82. 95 etc. —29. M. 217 No 423 *supra.*

646. S. 95.—See S. 92, 95—9 O. C. 91 No 521 *supra.*

647. S. 96.—See S. 85, 96—29. M. 84 No 426 and 25. M. 108 No 427 *supra.*

648. S. 96, 97.—*Civil Procedure Code, S 295—Mortgage—Suit for sale of entire property by holder of usufructuary and simple mortgages over the same property.*

A mortgagee held several simple mortgages over properties *A* and *B*, and also a usufructuary mortgage of prior date over property *B*.

Held, that the mortgagee was not entitled to bring to sale the property covered by his simple mortgages, subject to the usufructuary mortgage held by him, nor could he bring to sale the whole property for the aggregate amount of his mortgages, simple and usufructuary.—BHAGWAN DAS *v.* BHAWANI. **A. W. N. 1903. P. 177 =26. A. 14.**

649. S. 96, 97.—*Appropriation of surplus sale proceeds by mortgagee—C. P. C. S. 295 proviso (c)—Interest to date of realisation, rate of.*

If a mortgagee receives any money out of the surplus sale proceeds of a share in the property mortgaged to him, sold in execution of a decree on a prior mortgage. from some of the mortgagors to whom the share belonged and against whom the decree was obtained, he is bound to apply the money to the satisfaction of his mortgage debt only in case he receives it by virtue of his security and not otherwise, although the payment might be made to him by the said mortgagors in satisfaction of other debts due to him from them. The Court is quite competent to allow in a mortgage decree interest at the stipulated rate up to the actual date of realisation. *Ram-sekar Koer* v. *Mahomed Medhi Hossein Khan*, (I. L. R., 26 Cal. 39; L. R. 25 I. A. 179), and *Maharaja of Bhartpur* v. *Rani Kanno Dei*, (I. L. R., 23 All. 181; L. R. 28

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I. A. 35), followed.—GANGA RAM MARWARI *v.* JAIBALLAU NARAIN SINGH, **I. L. R., 30 C. 953.**

650. S. 97—*Mortgagee having two mortgages over the same property sued for sale on the first mortgage—Subsequent suit barred —His remedy.*

Where a mortgagee, with two mortgages on the same property, obtained a decree for sale of the mortgaged property in satisfaction of the first mortgage, he is debarred from bringing a subsequent suit for sale on the second mortgage, even though he made no mention of the second mortgage in the plaint in the former suit (24 A 429, 25 W. 108 refd. to. 20 A. 322 Desstd). But it may be open to him, when the decree in the first suit is executed, to enforce his claim on the second mortgage under S. 97 of the Transfer of Property Act, by proceeding against any surplus that remains after satisfying the decree. KRISHNAMACHARIAR *v.* ANANGARACHARIAR, **17 M. L. J. 301.**

651. S. 97.—See Ss. 70, 82, 97—29 C. 803 No. 297 *supra.*

652. S. 97.—See Ss. 85, 96, 97—25 M. 108 No. 427 *supra.*

653. S. 97.—See Ss. 88, 97—23 A. 181 No. 516 *supra.*

654. S. 97.—See Ss. 96, 97—26 A. 14, No. 648 and 30 C. 953, No 649 *supra.*

655. S 98—*Usufructuary mortgagee's suit for sale—Covenant to pay.*—See mortgage deed construction. KANGAYA GURUKAB *v.* KALLEMUTHU ANNAVI. **14 M. L. T. 61 =27 M 526. F. B.** (See No. 137 *supra*).

656. S. 98.—See Ss. 58, (1) (d) and 98—27 B. 600, No. 191 *supra.*

657. S. 98—See Ss. 59 and 98—20 M. 300, No. 210 *supra.*

658. S. 98.—*Application of the section to anomalous mortgages created before T. P. A.—Mortgage called Ubhayapattam.*—See Mortgage redemption. NEEL KANDAN NAMBUDRIPAD *v* ANANTHA KRISHNA IYER. **1 M. L. T. 426 = 16 M. L. J. 462 = 30 M. 61.**

659. S. 98.—*Right to redeem—Clog—Penal condition—Hard and inequitable condition—Pecuniary compensation for breach of contract*—See Contract. Act IX of 1872, S 74, No. 306 col. 346. **6 O. C. 167.**

660. S. 98.—*Anomalous mortgage—Suit to recover money—An interest by sale of mortgaged property—Damages—Limitation Act, art. 146*—See Mortgage. RAM PERSHAD *v.* UMRAO. **7 O. C. 11.**

661. S 99.—*Whether S. 43, C. P. C. is controlled by S. 99, T. P. A.*—See C. P. C., section 43. GOVIND *v.* PARASHARAM. **2 B. L. R. 621 = 25 B. 161.**

662. S. 99 & 67.—*Public Demands Recovery Act (Ben. Act VII of 1880) Ss. 2, 7 (1), 8 (?), 10, 19—Agriculturists' Loans Act (XII of 1884) S. 5—Taccavi—What passes at a sale under the Public Demands Recovery Act—Right, title, and interest of the judgment-debtor—Hypothecation of land—Mortgage—Act XI of 1859, S.*

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5—Ben. Act VII of 1868, S. 1—Revenue sale law.

When a property is sold in enforcement of a certificate under Bengal Act VII of 1880, filed by the Collector to recover amount due to the Government for advance made under the Agriculturists' Loans Act, nothing but the judgment-debtor's right, title, and interest in the property at the date of service of the notice under s. 10 of Act VII of 1880 can pass to the purchaser. Such a sale has not the effect of a sale for arrears of land revenue or of an assignment to the purchaser of the mortgage-interest created in favour of the Government by the bond executed by the judgment-debtor under the Agriculturists' Loans Act. LACHMI NARAIN SINGH *v.* NAND KISHORE LAL DAS. **6 C. W. N., 484 = 29 C. 537.**

663. s. 99.—*Retrospective effect—Old Law.*

S. 99 of the Transfer of Property Act do not apply to sales perfected before the Transfer of Property Act came into force in execution of money decrees obtained by mortgagees on claims independent of the mortgage. *Mathuraman Chetty* v. *Ettappasami* (I. L. R., 22 Mad., 372): *Martand* v. *Dhondo*, (I. L. R., 22 Bom., 624), *referred to.* NANUVIEN *v.* MATHUSAMY DIKSHADAR, **15 M. L. J., 445.**

664. s. 99.—*Execution-sale—C. P. C., s. 287, cl. (e)—Proclamation of sale—Value of property—Executing Court—Right of mortgagee to bring mortgaged property to sale—Decree for interest—Legality of decree.*

S. 287, cl. (*e*), of the Civil Procedure Code does not require the executing Court to make an investigation, on the application of the judgment-debtor, into the question of the value of the property to be sold to record evidence and to come to a decision on the point. *Saadatmand Khan* v. *Phul Kuar* (I. L. R., 20 All., 412); (L. R, 25 I. A. 146) and *Sivasami Naickar* v. *Ratnasami Naickar*, (I. L. R., 23 Mad. 568), distinguished. S. 99 of the Transfer of Property Act does not prevent a mortgagee from bringing the mortgaged property to sale in execution of a decree for interest only, obtained in accordance with the terms of the mortgage bond. The executing Court cannot call the legality of a decree in question. *Maharaja of Bhartpur* v. *Rani Kanno Dei*, (I. L. R., 23 All., 181), followed. KASHI PERSHAD SINGH *v.* JAMUNA PERSHAD SAHU, **8 C. W. N. 264 = 31 C. 922.**

665. s. 99—*Mortgage of land—Subsequent sale of equity of redemption in execution of decree in favour of third party—Purchase of equity of redemption by mortgagee—Subsequent suit by mortgagor to redeem—Maintainability.*

In 1882, plaintiff's father mortgaged certain immoveable property belonging to the *tarwad* now represented by plaintiff; and, subsequently, the mortgagee purchased the equity of redemption of the lands at a sale which was held in execution of a decree in favour of a third party. Both

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the mortgage and the sale were binding on the *tarwad.* Plaintiff now sued to redeem the lands contending that she was entitled to do so inasmuch as the sale of the equity of redemption had not been effected in a suit for sale by the mortgagee on his mortgage:

Held that plaintiff was not entitled to redeem. *Erusappa Mudaliar* v. *Commercial and Land Mortgage Bank Limited* (I. L. R., 23 Mad. 377), not followed. IKKOTHA *v.* CHAKKIAMMA. **27 M. 428.**

666. s. 99.—*Sale of equity of redemption by mortgagor—Purchase by mortgagee—Non-joinder of parties.*

The purchaser of the equity of redemption of a part of the mortgaged property sued for and obtained a decree for redemption and got possession thereunder. But as he failed to pay the amount directed by the decree, the mortgagee in execution of a decree for cost and mesne profits brought to sale the equity of redemption and purchased it himself. Some 20 years after, the representatives to the purchasers of the equity of redemption brought a suit for redemption alleging that under s. 99 of the Transfer of Property Act, the purchase of the equity of redemption by the mortgagee was null and void. The legal representatives of the mortgagee were not made parties to the suit.

Held that the suit was bad for non-joinder of parties. The sale of the equity of redemption to the mortgagee was only voidable and not void and could not be impeached after a lapse of 20 years. MUHAMMAD ABDUL RASHID KHAN *v.* DILSUKH RAI. **A. W. N, 1905, p. 80 = 27. A. 517.**

667. s. 99.—*Mortgage—Suit for sale on a mortgage—Compromise resulting in a money decree—Mortgagee not competent to sell mortgaged property in execution of such decree.*

A mortgagee brought a suit for sale on his mortgage. The suit was compromised, and the mortgagee took a money decree, in which, however, the property originally hypothecated to him was set out as being charged.

Held that the mortgagee decree-holder could not bring the mortgaged property to sale in execution of his decree, but, if he wished to do so, he would have to institute a suit under s. 67 of the Transfer of Property Act on the decree. *Arbhoyessury Dabee* v. *Gouri Sunkur Panday* I. L. R., 22 Cal. 859, followed. HEM BAN *v.* BIHARI GIR. **2 A. L. J. 479 = A. W. N. 1905. P. 189 = 28. A. 58.**

668. s. 99—*Sale for arrears of rent—Rights of purchaser—Landlord having a mortgage of the holding.*

The sale of a holding in execution of a decree for rent obtained by a landlord, who also held a mortgage of the holding, is void, and the purchaser at the sale acquires no title against another mortgagee of the holding, who has purchased it under a de-

Sup: Govt. acts (IV of 1882) *(Contd.)*

cree on his mortgage. *Sheodeni Tewari* v. *Ram Saran Singh* (I. L. R., 26 Cal. 164), followed. BASIRUDDI *v.* KAILAS KAMINI DEVI. **I. L. R, 33 C. 113.**

669. S. 99.—*Not merely declaratory of old law—Purchase by mortgagee of equity of redemption in execution of decree not based on mortgage—Effect on the right of sons of mortgagor.*

S. 99 of the Transfer of Property Act is not merely declaratory of what was accepted and enforced as law before the passing of the Act and effect ought not to be given to the new restrictions imposed by that section so as to give them retrospective operation. *Muthuraman Chetty* v. *Ettappasami* (I. L. R., 22 Mad. 372), distinguished. When the mortgagee, at a Court-sale perfected before the passing of the Act and brought about in respect of a claim independent of the mortgage, purchases the right of redemption in the mortgaged property, such purchase passes to him the whole interest as effectually against the sons of the judgment debtor as against the judgment-debtor himself and the sons cannot sue to redeem the property so sold or their share therein. NANNUVIEN *v.* MUTHUSAMI DIKSHADAR. **15 M. L. J., 455=29 M. 421.**

670. S. 99.—*Execution of decree—Assignment of money decree—Application by assignee for sale of equity of redemption.*

H. obtained a simple money decree against the appellant and subsequently assigned the decree to *M.* The appellant had made a usufructuary mortgage of his property to *H.* The decree had no reference to the mortgage or the debt secured by the mortgage. In execution of the decree *M.* sought to bring to sale the equity of redemption of the appellant in respect of the property mortgaged to *H.*

Held, that there was nothing in section 99 of the Transfer of Property Act to prohibit *M.* to have the equity of redemption sold in execution of the decree assigned to him. *22 Cal., 813 distinguished.* BANH BAL *v.* MANNI LAL. **A. W. N. 1905 P. 42=2. A. L. J. 121=27. A. 450.**

671. S. 99.—*Possession obtained by mortgagees as auction-purchasers of the equity of redemption in execution of a decree obtained on another debt. Legality of—Subsequent mortgage-suit—Account between the mortgagor and the mortgagee—Equity.*

The prior mortgagees obtained a decree against the mortgagor on another debt due to them, and in execution of that decree purchased the equity of redemption themselves, and obtained possession of the property mortgaged In a suit by them to enforce their mortgage—

Held, that the plaintiffs' possession in execution of that decree was not in accordance with law, the proceedings being contrary to section 99 of the Transfer of Property Act; that in the account to be taken of the amount due on the mortgage to the plaintiffs, the amount realized by them during the period of their possession as purchasers under the decree obtained by them should be set-off against the amount due under their mortgage; and that the plaintiffs, mortgagees, were entitled to receive credit for the sum paid by them as purchase money. SHIBDAS DAS *v.* KALI KUMAR ROY. **7. C. W. N. 532, 30 C. 463.**

672. S. 99.—*Execution of decree—Sale—Irregularity of procedure—Sale of property of persons not party to proceedings—Null and void—Due representing of estate of a deceased debtor—De facto manager of Hindu family—Equity of redemption taken—Liability of mortgagee.*

Sales in execution of decree cannot be treated as void or be avoided on the grounds of any mere formal irregularities of procedure in obtaining the decrees or in the execution of them.

The Court has no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees and sales purporting to be made would be a nulity and might be disregarded without any proceeding to set them aside. *I Marsh 647 followed.*

The Indian Courts have properly exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family, and in refusing to distrub judicial sales on the mere ground that some members of the family, who were minors, were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased, and no prejudice is shown to the absent minors. But these are usually cases where the person named as defendant is, *de facto* manager of a Hindu family property, or has the assets out of which the decree is to be satisfied under his control.

A mortgagor cannot, by obtaining a money decree for the mortgage debt, and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken, and with the other safeguards usual in a suit on the mortgage. **9. C. W. N. 201=7. B. L. R. 1=2. A. L. J. 71.=32. I. A. 23=32 C. 296 (P. C.)**

673. S. 99.—*Regulation XVII of 1806, Sections 7 and 8—Mortgage by way of conditional sale—Money-decree on mortgage—Sale of equity of redemption—Purchase by mortgagee confers no title on him—Civil Procedure Code (Act XIV of 1882). Section 244—Execution of decree—Sale—Suit for possession—Plea that sale was illegal—Revision—Civil cases—Material irregularity.*

The plaintiff instead of proceeding to foreclosure his mortgage by way of conditional sale under Regulation XVII of 1806 brought to sale equity of redemption of the mortgaged property in execution

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of a decree for money obtained by him on the mortgage and purchased it himself and obtained formal possession through the execution Court. Afterwards he brought the present suit for possession of the property as owner. It was pleaded that the suit was bad, for the plaintiff should have proceeded under the Regulation XVII of 1806. The plea was accepted on appeal and the suit was dismissed among others on the ground that the sale was held in contravention of the provisions of section 99 of the Transfer of Property Act.

It was contended on revision that order of dismissal of the suit was wrong, for (1) the plaintiff was not bound to foreclose the mortgage under the Regulation, and the Transfer of Property Act was not applicable to the case and (2) that the plea was barred by section 241 of the Civil Procedure Code.

Held, that the contentions had no force and there was no material irregularity for the exercise of revisional powers by the Chief Court. Though the Transfer of Property Act was not in force in the Punjab the principle of section 99 of the Act was of general application. JAGAN NATH *v.* BUDHWA. **P. W. R., 1906, p. 27 = 157, P. L. R., 1906 = 2 P. R. 1907.**

674. **s. 99.**—*Attachment of mortgaged property—Sale in execution—Separate suit.*

Section 99 of the Transfer of Property Act, 1882, forbids the sale of the mortgaged property in execution of the decree at the instance of the mortgagee; but it is no bar to an attachment of the property. KAJI INUS KAJI BAPU *v.* KAJI INUS KAJIBA. **8 B. L. R. 573.**

675. **s. 99**—*Sale violating S. 99.*

A sale in contravention of S. 99, T. P. A., is only voidable and not void, and a person who has been a party to the decree and sale proceedings cannot subsequently seek to redeem the mortgagee purchaser, treating the purchase as a nullity. DHARAINKOTA VENKAYYA *v.* SURAYYA. **17 M. L. J. 325 = 30 M. 62.**

676 **S. 99.**—*Violated S. 244, C. P. C. when bars separate suits—Bar purchase by stranger—Suit to redeem—Suit to set aside sale.*

If property is sold in contravention of S. 99, T. P. A. and brought by a stranger, the proper course for the judgment-debtors is to seek to set it aside in execution and not by a separate suit. A sale in contravention of S. 99 of the Transfer of Property Act, is not void but only voidable; and where the mortgagee himself becomes the purchaser, he cannot by such sale and purchase free himself from his liability to be redeemed. But this equity does not arise against a stranger auction purchaser. MUTHU *v.* KARRUPAN. **17 M. L. J, 163 = 30 M. 313.**

677—**s. 99**—*Sale of mortgaged property in execution of simple money-decree accepted by mortgagee C. P. C. s. 311.*

Although the mortgagee disclaims all interest in his mortgage and asks for and obtains a simple money-decree, s. 99 debars him from bringing the mortgaged property to sale in execution of the simple money-decree (A. W. N. 1905 P. 152 followed). But if such a sale is held and confirmed and a certificate is granted to the auction-purchaser the sale cannot afterwards be impeached, because it violated s. 99 T. P. A. (A. W. N. 1903 P. 48, 12 C. W. N. 1, 10 M. L. J. 110, 26 C. 727, 29 A. 612 referred, 33 C. 293 diss).

Any irregularity in publishing a sale is a matter to be dealt with under s. 311, Civ. Pro. Code. KISHAN LAL *v.* UMRAO SINGH, **A. W. N. (1908), 49.**

678 **s. 99**—*Sale of mortgaged property in execution for costs confirmed—Subsequent suit for redemption.*

A portion of a mortgaged property was sold in execution of a decree for costs, otherwise than under the provisions of section 99 T. P. A. and was purchased by the assignees of the mortgagee decree-holder, and this sale was confirmed.

Held, that the mortgagor could not obtain redemption of the portion of the property so sold (18 A. 325 followed) although the integrity of the mortgage having been broken up he could obtain a decree for redemption of the unsold portion.—MADAN MAKUND LAL *v.* JAMNA KAULPURI, **A. W. N. 1908 P. 48.**

679. **s 99**—*Time to object—Contravention of provisions—Sale.*

Where the mortgagor takes no objection to a sale held in direct contravention of the provisions of s. 99, T. P. A. and the sale becomes final, neither he nor the mortgagee can dispute the title which the purchaser obtains thereunder. 18 A. 325 referred to.—MANGLI PRASAD *v.* PATI RAM.—**1. A. L. J. 360.**

680 **s. 99**—*Execution sale confirmed-Effect—Redemption Integrity of mortgage broken up.*

A sale held in violation of s. 99, T. P. A., if confirmed, cannot be impugned by the judgment-debtor even if the purchaser is a representative of the mortgagee. No subsequent suit can be maintained for redemption of the property affected by the sale, (18 A. 325 applied). But the portion of the mortgaged property not affected by such sale may be subsequently redeemed, as by the reason of the mortgagee purchasing the equity of redemption in respect of a part, the intergrity of the mortgage is broken up.—MADAN MAKUND LAL *v.* JAMNA KAULAPURI.—**2 A. L. J. 123.**

681 **s. 99**—*Sale in execution of money-decree—Void or Voidable sale—Plaint treated as an application under sec. 244 C. P. C.—Redemption suit.*

A mortgaged his property with possession to B. B, with the permission of the Court, bought the property in dispute, which was put to sale in execution of his money-decree. A sued to redeem the property or payment of the mortgage-money. The main defence was that B having purchased the equity of redemption, A had no subsisting title to redeem and that sec. 244 (c), Civil Procedure

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Code, barred the suit to set aside the sale and that, therefore, the suit for redemption could not be maintained.

Held, (per *Ryves*, A. J C.) that the sale was not void and could have been avoided at the option of the mortgagor within the meaning of sec. 99 of the Transfer of Property Act. The sale could have been impugned in execution proceedings under sec. 244 of the Code of Civil Procedure and not by a separate suit.

The plaintiff's pleader asked the Court to treat the plaint as if it had been an application under sec. 244 of the Code.

Held, that the plaint could be so treated; but under that section the sale could not be set aside because the sale had been confirmed and the order confirming the sale was final.

Held, (per *Scott*, J. C.) that the purchase of the equity of redemption by the mortgagee in execution of a money decree held by him would not be a cause of nullity for want of jurisdiction but a cause of irregularity in procedure only.

Held, that the words in section 99, Transfer of Property Act, "the mortgagee ...shall not be entitled to bring such property to sale otherwise than by bringing a suit under sec. 67, &c.," must be held to mean that the mortgagee had not the right to bring the property to sale in execution of a mere money decree, but that, if the mortgagor consents, he may do so and in any case the sale is valid until set aside in proceedings properly taken for that purpose. Muhammad Abdul Rashid Khan v. Dilsukh Rai, All. W. N., 1905, 80; Erusappa Mudaliar v. Commercial and Land Mortgage Bank, Limited; 23 Mad., 377; Khairaj mal v. Daim, 32 Cal., 296 (P. C.); Sheodeni Tewari v. Ramsaran Sing, 26 Cal, 164; Shib Das v Kali Kumar Roy, 30 Cal, 463; Durgayya v. Anantha, 14 Mad., 74; Martand v. Dhondho, 22 Bom. 624; Husain v. Shankargiri, 23 Bom., 119; Thakur Durga Singh v. Seth Jai Dayal, 7 O. C. 307; Mathuraman Chetti v. Ettappasami, 22 Mad., 372; Mayan Pathuti v. Pukuran 22 Mad., 347; Madho Pershad Singh v. Baij Nath Towari, 2 All. L. J. R., 356; and Biru Mahata v. Shyama Charn Khawas, 22 Cal, 483 referred to—BASDEO v. ARJUN, **8. O. C. 327.**

682 s. 99—*Mortgagee purchasing mortgagor's rights at an execution sale by a third party, at a fair price—C. P. C. s. 294—Trusts Act (II of 1882) s 88 and 90.*

A, the appellant and three others in execution of their money decree attached a certain village belonging to X their judgment-debtor on 6th May 1899. B also in execution of his decree for money against X attached the same village on 26th May 1899 and had it put up for sale on 26th Oct 1900 when it was purchased by J the respondent.

The respondent was at the time mortgagee of the village and his mortgage was entered in the sale proclamation as an encumbrance on the property. There was no evidence nor any suggestion that price paid was less than the market value, or that the respondent was guilty of any misconduct or that there was any irregularity in the conduct of the sale.

Held, that the purchase by a mortgagee of his mortgagor's right extinguished the right of the mortgagor to redeem and that, therefore, the mortgagor had no rights which could be put up for sale in execution of the decree of appellant. Under S. 88 and 90 of the Trusts Act, a mortgagee does not avail himself of his position as such merely by bidding at an auction for his mortgagor's property, nor does he gain an advantage for himself when he pays a price which is not only the full value of the property but is higher than any other person was prepared to pay at the sale. S. 294 of the Civil Procedure Code and S. 99 of the Transfer of Property Act did not apply to the case. THAKUR DURGA SINGH v. SETH JAIDAYAL. **7. O. C. 307.**

683. s. 99.—*Execution sale in violation of S. 99—Suit to set aside not maintainable*—See C. P. C. S. 244 cl. (c) GAYA PRASAD MISIR v. RANDHAR SINGH. **3 A. L. J. 456 = A. W. N. 1906 P. 206 = 28 A. 681**

684 s 99—*Sale by mortgagee of mortgaged property in violation of S. 99—Mortgagees possession not adverse—Minor not bound by such sale*—See mortgage redemption. JHABBA LAL v. CHHAJJU MAL. **4. A. L. J. 787.**

685. s. 99, 100. *Rent of absolute occupancy holding—First charge—Sale of holding in execution of a money decree—Purchaser.*

The rent of an absolute occupancy tenant is a first charge on that holding but if the landlord wishes to enforce that charge he must sue for sale and must implead all interested parties. If, however, he is content to take a money decree for arrears of rent he may proceed against any property of his judgment debtor, but if the holding be sold in execution of a money decree the purchaser will take the property subject to any charges which other persons may have upon it. The word charge in S. 43 C. P. T. Act has much the same meaning as it has in S. 100 T. P. A. (17 C. 301, 11 C. P. L. R. 95, 10 C. 609, 12 B. 678, 15 M. 303, 21 A. 309, 14 M. 74, 22 B. 624, 12 C. P. L. R. 26 referred to and discussed). BHAGWAN DAS v. TARA CHAND. **14 C. P. L. R. 1901 P. 17.** (*See also No. 702 infra*).

686. s. 99, 100. *Charge of maintenance on family property—Sale of property in execution of maintenance decrees without bringing a fresh suit.* See maintenance. VENKATA SUBBAMMA v. VENKANNA. **17 M. L. J. 217.**

687. s. 99. See S. 54, 99, 100—28 M. 54 No. 143 *supra*.

688 s. 99. See S. 58, 67, 99—32 C. 494 No. 188 *supra*.

689 s. 99. See S. 67, 85, 99 and 67, 99—24 A 549 No 267, 5 B. L. R. 952 No. 268 (a), A. W. N. 1905, P. 152 No. 269, 17 M. L. J.

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503 No. 270, 31 B. 462 No. 271, 35 C. 61 No. 272, 29 M. 424 No. 273, 7 O. C. 314 No. 274, 4 O. C. 231 No. 275, 30 C. 463 No. 276 *supra.*

690. s. 99. See S. 92, 95, 99–9 O. C. 91 No. 521 *supra.*

691. s. 99, 67. *Civil Procedure Code, s. 43–Sale of mortgaged property in execution of money-decree.*

If a mortgagee obtains a simple money decree upon his mortgage, he cannot sell the property comprised therein without instituting another suit under s. 67 of the Transfer of Property Act. S. 43 of the Civil Procedure Code is no bar to such a suit. BHOLA NATH *v.* MUHAMMED SADIQ. **A. W. N., 1904, p 2; I. L. R., 26 A. 223.**

692. s. 99, 67. *Compromise of mortgage suit–Money decree.*

A suit for sale on mortgage was compromised and with the consent of the mortgagee, a simple money decree was passed in his favour in which the property originally hypothecated was set out as being charged.

Held, that, in execution of this decree, the property could not be brought to sale. It was only by a suit under s. 67 of the Transfer of Pr perty Act that it could be sold. HEM BAN *v.* BEHARI GIR. **A. W. N., 1905 P. 189=2 A. L. J. 479=28 A. 58.**

693 s. 99, 67. *Sale—Decree—Setting aside sale—Void sale—Code of Civil Procedure (Act XIV of 1882), s. 244—Sale of mortgaged property—Money decree.*

A sale in contravention of the provisions of s. 99 of the Transfer of Property Act is void, although a third party is the purchaser and only a portion of the property was under mortgage, the sale being of the whole undivided property. *Sheodeni Tewari* v. *Ram Saran Singh* (I. L. R., 26 Cal. 164), and *Shib Dass Dass* v *Kali Kumar Roy.* (I. L. R., 30 Cal. 463), referred to. Such a sale may be set aside under s. 244 of the Code of Civil Procedure. *Mayan Pathuti* v. *Pakuram* (I. L. R. 22 Mad. 347). followed. SONU SINGH *v.* BEHARI SINGH. **I. L. R., 33 C. 283.**

694. s. 99, 67 and 100.—*Attachment by mortgagee—Application—Suit.*

S. 99 T. P. A. contemplates attachment by the judgment-creditor (even if he be a mortgagee): and he can do so by an application in execution of the decree. NATHUBHAI MOTILAL *v.* BAI UJJAM. **10 B. L. R., 274.**

695. S. 99, 132.—*Mortgage—Mortgagee holding a money-bond from mortgagor—Transfer of money-bond—Transferee suing upon money-bond can bring mortgaged property to sale subject to mortgage.*

In 1875 a mortgage of certain property was executed by the defendant in favour of B. In 1892 certain money was advanced by B. to the defendant and a simple money bond was passed by the defendant to him In 1903 the bond was transferred to the plaintiff, and on that bond the plaintiff sued the defendant and got a money-decree and in execution he attached the property which

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formed the subject of the mortgage of 1875, and applied to the Court to sell the said property subject to the aforesaid mortgage. It was contended that the plaintiff was barred by section 99, Transfer of Property Act from bringing the property to sale.

Held, that the contention had no force.

Held, also, that the plaintiff as transferee of the money bond did not take it subject to any liability or equity to which his transferor, the mortgagee, was subject with regard to the mortgaged property.—NARHAR CHINTAMAN DHAKRAS *v.* SHIVRAM GOVIND PRABHU. **7. B. L. R. 816.**

696. S. 100.—A co-mortgagor redeeming whole charge—*See Limitation Act Art 148* VASUDEO *v.* BALAJI **26 B 500.**

697. S. 100. *Charge—Document—Construction of.*

Some of the joint owners of a certain property executed a sale-deed in favour of the plaintiff. Before the execution of this deed two of them (vendors) had executed a mortgage of their share in favour of a third person. The deed of sale executed in favour of the plaintiff contained the following covenant:—"If in the future any person appear as a claimant of the property sold and make a claim in consequence of which there is any injury to the property sold or if we do not effect mutation of names or do not give possession, then the purchaser may recover his money with interest at Rs. 2 per month from our persons or the property sold or any other property, and we shall raise no objection.

Held, that this did not create any charge upon any specific property.

A document which creates a charge must be a document which creates a charge at the time and not merely the possibility of a charge HARJAS RAI *v.* NAURANG. **A. W. N 1905 P. 82=3 A. L. J., 223.**

698. s. 100.—*What does "charge" mean under S. 100, T. P. A., and S. 65 of the Bengal Tenancy Act—Difference between a mortgage and a charge—Equity cannot over-rule law.*

The word "charge" in section 65 of the Bengal Tenancy Act is not such a charge as is defined by S. 100 of the Transfer of Property Act, and does not require to be enforced in the same way. The provisions that rent is a first charge upon an under tenure, produce on the sale, held in execution of a decree for arrears of rent, the effect described in Ch. XIV of the Bengal Tenancy Act.

A mortgage does, but a charge does not, involve a transfer of an interest in specific immoveable property [25 M. 220 (237)], (1889) 23 Q. B D. 239 (242), followed.

A mortgagee can follow the mortgaged property in the hands of a transferee from the mortgagor, whereas the holder of a charge can enforce it against a transferee, only if it is shown that the latter has taken with notice of the charge [13 A. 28 (44), referred to].

Where a bond provided that the promissor would be personally responsible for the

payment of the money, and that, in case of default, the promissee could institute a suit to obtain a decree aud to recover the dues by attachment and sale of an under-tenure.

Held, that these terms did not create a mortgage, but merely a charge.

The expression in S. 100, T. P. A. "and the transaction does not amount to a mortgage," means that, if the relation created by the instrument is not that of a mortgagor and mortgagee and immoveable property has heen made security for the payment of money, there is a charge on the property. It does not mean that, if the transaction on the face of it purports to be a mortgage, but the instrument is not operative as such, for a defective execution or non-compliance with the formalities prescribed by the law, (*e. g.*, registration, stamp, &c.) the transaction is converted into a charge (26 C. 78, 26 C 246, 32 C. 729, 7 Bom., L. R. 934, followed, 10 M. 509 and 24 M. 509 and 24 M. 397, dissented).

Equity cannot contravene the express provisions, enactments or requirements of law and defeat its policy by supplying, under the pretext of amending defective instruments, those deficient elements of form, without which the agreement is absolutely void, even as between the parties thereto.

In contravention of S. 100, T. P. A., the Courts in India cannot apply indiscriminately the general equitable principle of English rule, *i. e.*, a mortgage, which is defective and is inoperative as such, operates as a good equitable lien, if it shows an intention of the parties to create a charge. ROYZUDDI SHEIKH *v.* KRITARTHANATH MUKHERJEE. **4 C. L. J. 219 = 33 C. 985.** *(See No. 700 infra).*

699. S. 100—*Charge—Maintenance charged on properties—Sale in execution invalid.*

Where a maintenance decree passed after the enforcement of T. P. A. supply declares it a charge on the property, the property so charged cannot be sold in execution of the decree without a fresh suit for the sale for it. VENKATASUBBANNA *v.* VENKANNA. **17 M. L. J. 217.**

700. S. 100.—*Whether a defective mortgage creates a charge.*

Where an instrument is intended to be a mortgage, but is invalid by reason of its not fulfilling the requirements of law, it cannot be held to be a charge as against a stranger to it.

Quære.—Whether it will amount to a charge as between the parties to it, (26 C. 78, considered). MITHIRAM BHAT *v.* SOMANATHA NAICKER. **24 M. 397.** *(See 33 C. 985 supra, No 688 supra.)*

701 S. 100—*Mortgage and charge distinguished.*

In mortgage there is a transfer of an interest in immoveable property; while in the case of a charge, the distinction between them is not one created by the Transfer of Property Act, but one which existed even before, as it has always existed and does exist under the English Law.—NARAYANA

AYYAR *v.* VENKATARAMANA AYYAR.—**25 M. 220.**—*(See also No. 698 supra).*

702 S. 100—*Suit for arrears of rent under Act XI of 1898—Charge*—See C. P. T. Act XI of 1898. SINGAIMURLIDHAR *v.* LALA PREM NARAIN, **3 M. L. R. 164.** *(Also No. 685 supra).*

703 S. 100—*Suit for redemption—Converted into a suit for recovery of immoveable property on payment of a charge.* See Pleadings—KARIM BAKSH KHAN *v.* MEHDI HUSAN KHAN **10 O. C. 17.**

704 S. 100.—*Charge—Kabuliat providing* haq chaharum.

Where a Kabuliat stipulated that the burden of paying *zar parjote* and *zar chaharum* shall remain first upon the materials of the house.

Held that these words alone are not sufficient to create a charge upon the property under this section.—RAJESHWAR SWAMI JANGAM *v.* BIHARI LAL. **2 A. L. J. 754.**

705. S. 100.—See S 39, 100—28. A. 655. No 54 *supra.*

706. S. 100.—See S. 54, 99, 100—28. M. 54. No 143 *supra.*

707. S. 100.—See S. 58, 59, 100—32. C. 729 No 182, 9. C. W. N. 1001. No 183, 7 C. L. J. 492 No 184 *supra.*

708. S. 100.—See S. 59, 100—17. M. L. J. 39 No 208, 7. B. L. R. 934 No 209 *supra.*

709. S. 100.—See S. 82, 95, 100—9. C. W. N. 865 No 353 *supra.*

710. S. 100.—See S 82, 100—26. A. 407 No 355 *supra.*

711. S. 100.—See S. 88, 100—16. C. P. L. R. 1903 P. 52 No 517 *supra.*

712. S. 100.—See S. 90, 100—428. A. 365 No 590 (a), A. W. N. 1905, P. 144, No 591 *supra.*

713. S. 100.—See S. 99, 67, 100—10. B. L. R. 274 No 694 *supra.*

714. S. 100.—See S. 99, 100—14. C. P. L. R. 1901, P. 17 No 685, 17. M. L. J. 217 No 686 *supra.*

715. S. 101.—*Bengal Tenancy Act (VIII of 1885), Section 65.*

A *raiyati* holding, subject of this suit, was sold in execution of a decree for rent and was purchased by the landlord, who commenced proceedings, under section 167 of the Bengal Tenancy Act, to have the plaintiff's mortgage of the holding annulled.

The notices required by that section were not duly served upon the plaintiff. The plaintiff brought a suit on his mortgage. The Court allowed the plaintiff to bring the holding to sale in satisfaction of his mortgage, but on the condition that he should first pay to the landlord the amount decreed on account of arrears of rent. It was contended on behalf of the plaintiff that the condition ought not to have been imposed for the rent charge must be taken to have been discharged.

Held, that the contention was not right. The charge continued to subsist under section 101 of the Transfer of Property Act, as it was for his benefit that the charge should

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continue to subsist after the purchase. The plaintiff must be regarded as a second mortgagee. S. M. MEHERUNNISA *v.* SHAM SUNDAR BHUIYA. **6 C. W. N. 834.**

716 s 101—*Mortgage—Lien on mortgaged property—Mortgagee, joint purchase of mortgaged property by—Mortgagor, objection to sale by.*

Where the mortgagee purchases the mortgaged property along with other properties and jointly with other persons in undivided shares, his lien upon the property is not extinguished, but is existing, it being for his benefit within the meaning of s. 101 of the Transfer of Property Act. A mortgagor is precluded from raising the objection that the sale of the mortgaged property in execution of the decree in the mortgage suit is invalid by reason of the decree *nisi* in that suit not having been made absolute, if such objection is not raised at an early stage of the proceedings.—GUNINDRA PROSAD *v.* BAIJNATH SINGH, **31 C. 370.**

717. s. 101.—*Purchase of equity of redemption by* puisne *mortgagee does not extinguish his mortgage.*

The mere fact that a *puisne* mortgagee has purchased from the mortgagor the equity of redemption being the amount due on his mortgage, does not extinguish that mortgage, and he is entitled to redeem the prior mortgage.—KADIR BUKSH *v.* JWALA PRASAD. **1. A. L. J. 288.**

718 s. 101—See s. 51, 101, 108—27 M. 211 No. 79 *supra.*

719 s. 101—See s. 90, 101—28 C. 12. No. 592 *supra.*

720 s. 103—*Notice by or to a person incompetent to enter into a contract.* See s. 83, 84, 103—27 B. 23 No. 370 *supra.*

721 s. 104—See s. 89, 104—8 C. W. N. 102 No. 556, 12 C. W. N. 282 No. 557 *supra.*

722 s. 105—*Lease—Service in place of rent*—See T. P. A. S. 106—8 C. W. N. 904 = 32 C. 243 No. 725 *infra.*

723 s 105, 107—Lease—Suit to recover rent from tenant—Stamp Act—Registration —*See Registration Act III of 1877 S. 3 No. 2 col. 457— 8 O. C. 197.*

724. S. 105, 107—Lease--Arrears of rent —Registration—Oral agreement to execute lease for seven years if admissible—Compensation for use of land—*See Evidence Act 1 of 1872 S. 91—No. 152 col. 198—9 O C 296.*

725. s. 106, 105.—*Lease of house--Rent—Professional service—Lease from month to month—Suit for ejectment—15 days' notice to quit.*

Where the defendant agreed to give his services as a family doctor to the plaintiffs in lieu of the rent of the house he was occupying, the lease must be deemed as one from month to month terminable on the part of either the lessor or lessee by 15 days' notice expiring with the end of a month of the tenancy. JOTISH CHANDRA MUKHERJI *v.* RAM NATH BHADRA. **8 C. W. N. 904 = 32 C. 243.**

Sup: Govt. acts (IV of 1882) (*Contd.*)

726. S. 106.—*Tenant of home—Stead land under a raiyat.*—See Bengal Tenany Act, S. 5 and 49. BABURAM ROY *v.* MOHENDRA NATH SAMUNTA. **8 C. W. N., 455.**

727. s. 106.—"*Expiring with the end of a month of the tenancy*"—*Monthly tenancy—Notice to quit—Presumption—Renewal of tenancy.*

Where the entry is made by the lessee in the middle of the month but rent is payable at the end of the calendar month the reasonable inference is that the parties intended that the monthly tenancy should coincide with the calendar month, it being perfectly open to the parties to agree that the monthly period of tenancy should be reckoned not from the date of lease or entry, but from another date.

A lease was given on the 13th of a month. The rent was made payable on the 30th:—

Held, that a fifteen days' notice to quit expiring with the end of the calendar month was a good notice.

Obiter:—Where the interest of the lessor determines altogether and the title passes to the remainderman and the lessee goes on holding under the remainderman, although in law a tenancy is created, yet in giving notice to quit, the commencement of the former tenancy must be looked to.

The same rule applies with greater effect to the case where parties, standing already in the position of lessor and lessee, enter into a fresh agreement, determining the previous tenancy thereby. ARUNACHELLA CHETTIAR *v.* RAMIAH NAIDU. **16. M. L. J. 533 = 30. M. 109.**

728. S. 136, cl 2.—*Landlord and Tenant—Ejectment—Notice to quit—Service of notice through post office by registered letter—Sufficiency of notice—Monthly tenancy.*

Service of notice, by a registered letter through the post office, is not necessarily a non-compliance with the provisions of the second clause of s. 106 of the Transfer of Property Act. *Rajoni Bibi* v. *Hafisonnissa Bibi*, (4 C. W. N. 572) followed. The fifteen day's notice referred to in s. 106 of the Transfer of Property Act means notice of fifteen *clear* days.—SUBADINI *v.* DURGA CHARAN LAW, **28 118.**

729. S. 106. 107.—*Oral or Unregistered lease, not for agricultural or manufacturing purpose considered a monthly tenancy.*

A tenant holding under a lease which is not written or registered but is governed by the T. P. A. and the land is not let out for a menufacturing or agriculturing purpose, must be taken to be a monthly tenant whose tenancy is terminable by 15 day's notice, even though the rent appears to have been payable yearly.—DEBENDRA NATH BHOWMIK *v.* SYSMA PROSANNA BHOWMIK. **11 C. W. N. 1124.**

730. S. 106, *and 108 Cl. (j)—Notice to quit land—Right of alienation of a purchaser from a deceased tenant's legaty.*

Sup: Govt. acts (IV of 1882) (*Contd*)

A lessee can under S. 108 cl. (c) T. P. A. transfer absolutely the whole or any part of his interest in the property unless prevented by a contract or local usage. A purchaser of the tenancy from the legatee of a deceased tenant is not a trespasser but is a lessee within the meaning of S. 108 Cl. *(j)* of T. P. A., and is entitled to a notice under S. 106 of the Act to quit land —HABUL *alias* PRIYA NATH CHANGA *v.* KASHIMANI DEBI. **5. C. L. J. 205.**

731. s. 106, *111 (h)—Landlord and tenant —Landlord's right to eject—Separate notice to quit the land—Permanent tenure—Tenant's right to compensation.*

Held, that separate notices to quit addressed to the defendants were valid when it appeared that the holding had been divided by them and they had paid rents to the landlord according to their shares separately.

Held, also, that it could not be presumed that the tenure was not a permanent one by the fact that it was held on payment of rent at uniform rate when the *kabuliyat* did not imply that the holding was hereditary or the rent was fixed in perpetuity.

Where it is not shown that the landlord or his representative have led the tenants to believe themselves to have a permanent interest in the land and to lay out money on it, the tenants are not entitled to claim any compensation for buildings erected by them before ejectment. 15. C. 631 followed. ISMAIL KHAN MAHOMED *v.* KALI KRISHNA MONDAL. **6. C. W. N. 134**

732. S. 106, *and 116.—Lease for purposes other than agricultural or manufacturing —Holding over—Termination—15 days' notice.*

The lease of immovable property which is neither for agricultural nor manufacturing purpose, must be deemed to be a lease from month to month, terminable on the part of either lessor or lessee by 15 days' notice expiring with the end of a month of tenancy. Where the plaintiff held under such a lease for three years and is allowed to hold over, the lease would terminate on 15 days' such notice.—THOILUKHO NATH ROY *v.* SARAT CHANDRA BANERJEA.—**8 C. W. N. 901.=32 C. 123.**

733. S. 107.—*How a lease can be made—D cum nt collateral to a permanent lease of immoveable property is not compulsorily registerable.* **6. C. W. N. 865=12. M. L. J. 479 =29. I. A. 138=25. M. 603 (P. C.)** (See Registration Act S. 17 No 19 Col 461 *ante*).

734 s. 107—*Lease of immoveable property* —Kabuliat *not a lease.*

In a suit for ejectment, the defendants contended that they could not be ejected as they hold under a lease. The evidence which they produced of the lease was a *kabuliat* signed and registered. The plaintiff

Sup: Govt. acts (IV of 1882) (*Contd.*)

was fully aware of the *kabuliat* and gave consent by being present at the time of registration.

Held that the *kabuliat* was not a lease of immoveable property by a registered instrument within the meaning of s. 104 of Transfer of Property Act.—NAND LAL *v.* HANUMAN DAS. **A. W. N., 1904. p. 46= 26. A. 368.**

735 s. 107—*Kabuliat is not a lease.*

A lease under s. 107 of the Transfer of Property Act cannot be created by a signature upon a *kabuliat* only. Until a *patta* is duly executed and registered, no right as a lessee can be acquired. Except by the production of such a registered document, no lease could be proved in a Court of Justice. *Nand Lal* v. *Hanuman Das*, (A. W. N., 1901, p 46; I. L R, 26 All 368) followed.—KASHI GIR *v* JOGINDRA NATH GHOSH. **A. W. N., 1904, p. 189 =1. A. L. J. 516=27. A. 133.**

736 S. 107—*Lease not signed by a lessor if valid.*—

A registered agreement or muchilika executed by the lessees only without the lessor signing it is not a lease by a registered instrument within the meaning of s. 107.—TURAF SAHIB *v.* ESUF SAHIB. **2. M. L. T. 270=17 M. L. J. 395=30 M. 322.**

737 s. 107, 117—*Lease for agricultural purposes—Reserving annual rent— Term exceeding 5 years. 24 M. 421—See Registration Act III of 1877-s 17. cl (d) No 71 col 430.*

738 s. 107—*Lease of right to enter upon and collect dues of lands*—2, A. L. J. 293 = A. W. N. 1905. P. 48=27. A. 462. (See Registration Act s. 3 and 17 No 4 col 457)

738. A. S. 107—See s. 105, 107—8. O. C. 197 No 723, 9. O. C. 295 No 724 *supra.*

738. B. S. 107—See s. 106, 107—11. C. W. N. 1124 No 729 *supra.*

739. s. 107—Kabuliat *executed on stamp and registered—Suit for arrears of rent—Landlord and tenant* Res judicata.

A sued B for arrears of rent as his lessee of certain villages. B admitted that he had executed a *kabuliat* in favour of A and that he had got possession and had collected the rents. But he contended that the relation of landlord and tenant or *thekadar* did not exist between the parties, as there had been no registered lease executed by A in B's favor, as required by law. In a former suit for arrears of rent on this very lease, B never raised the defence that there was no valid lease and a decree was passed on a compromise in A's favor.

Held, that the *kabuliat* executed by B. was a lease within the meaning of section 107 T. P. A. and that the relation of landlord and tenant subsisted between them by the practice in these Provinces, a duly stamped registered instrument executed by the lessee and accepted by the lessor either in writing or by his acts constitutes a good lease and establishes the relation of landlord and tenant between the parties.

Held, also, that B's defence was barred by *res judicata*.—HON'BLE MAHARAJA SIR PARTAB NARAIN SINGH *v.* RAGHO BEHARI. **7 O C., 169.**

740. S. **107,** 117—*Lease of right to receive collections of a village is not an agricultural lease. Oral evidence to prove lease exceeding one year inadmissible—Case not set up in plaint—Making new case for plaintiff.*—See Lease. JANG BAHADUR SINGH *v.* EHSAN ALI. **5 O. C., 222.**

741. S. 108—*Removal of buildings during continuance of lease—Rule of common law in India.*

Certain land was leased in 1875 to a tenant for twenty years, it being recited in the lease that the tenant took a lease of the land for constructing a building thereon for the purposes of trade. A building was erected, and it was not contended that it was of a kind different from or of a value out of proportion to what was in the contemplation of the parties when the lease was entered into. At the expiration of the term, the lessor sued to recover the land, but he did not claim that the tenant was no longer at liberty to remove the building (though this had not been removed during the continuances of the lease). On its being contended that the tenant was entitled to be paid the value of the building which he had erected on the land before he could be evicted:

Held that it is established that the maxim '*quicquid inadificatur solo solo cedit*' does not generally apply in India; and even in cases to which the English law as such was applicable, the Indian Legislature, by Act XI of 1855, departed from that maxim in the cases specified in s. 2 of that Act (corresponding to s. 51 of the Transfer of Property Act) Both under the Hindu and the Mahomedan law (as well as under the common law of India) a tenant who erects a building on land let to him can only remove the building and cannot claim compensation for it on eviction by the landlord *Mahalatchim Ammal* v. *Palani Chetti*, (6 Mad. H. C. R., 245), discussed. ISMAI KANI ROWTHAN *v.* NAZARALI SAHIB. **M. L. J., 1904, p. 25= 27 M. 211.**

742. S. 108.—*Landlord and Tenant—Repairs—Lease. Construction of—Admission.*

The lease contained a clause imposing upon the lessee, the liability to keep the premises in good and substantial repair. It contained no express covenant whereby the landlord bound himself to make any repairs or to keep the house fit for habitation.

In a letter the lessor wrote to the lessee some time after the execution of the lease: "When a house is rented on a repairing lease the lessee is the person that any mishap to the building is at the risk of the lessee (*sic*) except damage from an earthquake and the like."

Held, that the landlord was not liable to the tenant under the lease for damage caused to the leased building by hurricane, earthquake or the like. That the letter did not contain any admission of liability on the part of the landlord to execute repairs made necessary by hurricane, earthquake and the like; putting it at the highest, all that the letter showed was that the parties understood that the repairing clause of the lease did not impose upon the tenant a liability to execute structural repairs rendered necessary by any extraordinary cause such as an earthquake and the like. H. BOLTON *v.* F. G. DONALD. **3 A. L. J., 134=A. W. N. 1906 P. 56.**

743. S 108—See S. 55, 108—5. O. C. 78 No. 168 *supra.*

744. S. 108 a and 117—*This clause does not apply to agricultural leases as is apparent from S. 117 of the Act*—See Mining Rights SRIRAM CHAKRABURTI *v.* KAMUR HARI NARAINSINGHA. **10 C. W. N., 425 =3. C. L. J., 59=33. C. 54.**

745. S. 108 (c).—*A sub-tenant suing a tenant for value of crops distrained for arrears of rent due to landlord—Damages caused by reason of contract—Cause of action.*—See Sub-tenant and tenant. SURAJMAN *v.* BHAGWAN SINGH. **7 O. C. 351.**

746. S. **108, cl. (c).**—*Landlord and tenant—Lease—Ouster of tenant by paramount owner—Claim by tenant against his lessor for compensation for such ouster—Covenant for quiet enjoyment—Damages—Measure of damages.*

The words "without interruption" in 108 (c) of the Transfer of Property Act (IV of 1882) give a lessee in India the same rights as he would have under what is known in England as a covenant for quiet enjoyment in an unqualified form. In other words the lessee is protected against interruption by whomsoever it is occasioned. Where the interruption is caused by the paramount owner of the property, and not by a stranger, the lessor is bound to remove the interruption and if he fails to do so, he must indemnify the lessee. A held land under a lease granted by B for eleven years. B had no title to the land, which really belonged to C. In 1895, C dispossessed A.

Held, that under (c) of s. 108 of the Transfer of Property Act (IV of 1882) A was entitled to recover compensation from B. TAYAWA *v.* GURSHIDAPPA. **2 B. L. R., 107=25 B 269.**

747. S. 108 (c). See S. 55 (2) and 108 (c) 29 M. 353 No. 157 *supra.*

748. S. 108 (c), 117, 119.—*Principal applicable to cases not governed by T. P. A.*—See Landlord and tenant. PARMESHRI *v.* VITTAPPA SHANBAGA. **12 M. L. J. 189= 26 M. 157.**

749 S. 108 (j)—*Notice—Suit to recover royalty-Limitation Act (1877) Arts 110 and 116.*

Sup: Govt. acts (IV of 1882) *(Contd.)*

Where the condition was that a certain notice was to be given two months before the 30th of *Chaitra* (12th April), it was

Held, that a notice dated 1st *Falgoon* (13th February) was not a valid notice as it fell short of two months by one day.

Under s. 108 (j) T. P. A. all lessees including lessees holding under permanent leases are liable for rent even after they have transferred their rights to others.

A suit for recovery of royalty upon a registered document is governed by art. 116 and not by art. 110 of the Limitation Act (19 C. 489 followed). BHOLA NATH DAS *v.* RAJA DURGA PROSAD SINGH, **12 C. W. N. 724.**

750 S. 108 (j)—See s. 106, 108 (j)—5 C. L. J. 205 No. 730 *supra.*

751 S. 108 Cl (o), 114—*Leases before the Act.*

S. 108 Cl. (o) does not apply to a lease executed before the Act was passed. MEGH LAL PANDAY *v.* RAJ KUMMAR THAKUR GIRDHARI SIGH, **5 C. L. J. 208=11 C. W. N. 527=43 C. 358.**

752 S. 108 (7)—*Notice to quite addressed to a tenant as trespasser and not as a tenant is valid.*

See Ejectment. RAM CHARAN NASKAR *v.* HARI CHARAN GUHA. **7. C. L. J. 107.**

753 s. 108, 111—*Mere execution of lease is not equivalent to delivery of possession—Forfeiture of lease*

When a lessee for a fixed term is not let into possession, he is only entitled to be put into possession for the unexpired portion of the term of the lease, and to claim damages for the expired portion, but he is not entitled to claim to be allowed to remain in possession for the length of the expired portion after the expiry of the stipulated term.

The plaintiff, a lessee, sued the lessor to be put into possession of the lease-held property for the term of the lease to be allowed to remain in possession for the expired portion of the term after the expiry of the term.

It was contended on behalf of the lessor that the plaintiff was only an *ijaradar*, the ryots being in actual occupation of the land, the lessor, by the mere execution and delivery of the lease, had put the lessee in such possession as the subject-matter was capable of, and that without any further act on the part of the lessor it was open to the lessee to collect the rents and recover the same, if necessary, by instituting legal proceedings against the ryots.

Held, that the contention was not sound. The subject matter of the lease was capable of delivery in a manner analogous to the mode indicated by section 261 and 319 of the Code of Civil Procedure. Acceding to the common law of the land, which specially prevails in *zamindaris* and similar estates, the delivery of possession, when the owner transfers the estate or a portion thereof by sale, gift, lease or otherwise, is, by the issue of orders or notices to the *karnams* and other village officers, whose duty it is to collect rents from the persons in occupation of the land, and also, though not invariably, by a general proclamation addressed to the *raiyats* and other persons in occupation of the land, giving intimation of the transfer in question and requiring them to attorn and pay rents to the transferees. It is really this customary law that is embodied in sections 264 and 319, Civil Procedure Code, and adopted for the delivery by Court to the decree-holder or purchaser in execution of a decree of all descriptions of immovable property in the occupancy of a tenant or other person entitled to occupy the same, and not bound by the decree to relinquish such occupancy.

Held, also, that the plaintiff was only entitled to damages for the expired portion of the term.

He who lets agrees to give possession and not merely to give chance of a law-suit.

The lessee, who is not put into possession, is entitled to elect to claim either profits of immovable property to which he was entitled, but which have been wrongfully received by the defendant, or damages for breach of the obligation to put him in possession subject to the law of limitation applicable (to which arts 116 and 119 Limitation Act would apply.)

The measure of damages in such cases is the amount of profits with interest thereon at 6 per cent. per annum, which would have accrued to the plaintiff if he had been put in possession and was in enjoyment of the same during the term of the lease.

The lessee does not forfeit the lease by violating a provision of the lease that he would not act contrary to the lessor's interest by deposing against him in a suit. The *Zamindar* OF VIZIANAGARM *v.* BEHARA, SURYANARAYANA PATHULU. **M. L. J., 1902, p. 249=25 M. 587.**

754. S. 110. 111 (g)—Forfeiture of tenancy—*See Service Tenures. Bengal Tenancy Act VIII of 1885 S. 151, 181*—ANANDA MOJI *v.* LAKSHI CHANDRA. **3 C. L. J. 274=33 C. 329**

755. S 110 (g)—See Ss. 10. 110 (g)—28 A. 400, No. 45 *supra.*

756. s. 111—*Forfeiture of lease owing to denial of landlord's title—Pleading.*

Where a landlord, after the denial of his title, received rent from the tenant, he cannot make the denial a ground of forfeiture.

This section deals with the whole lease of the immoveable property comprised therein and not with a part of it; a denial of title by one of several joint lessees cannot therefore entail forfeiture.

A siut for *khas* possession for denial of landlord's title by one of two joint tenants can not lie when the other tenant has not been made a party thereto.

The tenants stuck to their lease and only questioned the right of the plaintiffs as

Sup: Govt. acts (IV of 1882) (*Contd.*)

transferees from their lessor, the alleged transfer being of a prior date to the lease.

Held That there was no denial of landlord's title entailing forfeiture of the tenancy.

Where the tenants could not obtain possession of the entire property leased to them, made reference to their lessors but got no satisfaction from them, and then took a lease of the part of which they could not get possession, from a stranger whom they found in possession.

Held—That there was no renunciation by the tenants of their character as such so as to entail forfeiture of this lease. SRIMATI FARMAN BIBI *v.* SHEIKH TASHA HADDAL HASAIN, **12 C. W. N. 687.**

757. s. 111—See s. 108, 111—25. M. 587. No 753 *supra.*

758 S. 111—*Landlord and Tenant—Determination of tenancy—Commencement of occupation of dwelling house—Profession by tenant to hold adversely to landlord—No determina- of tenancy.*

Where a tenant enters into occupation of a dwelling house as a tenant, the tenancy, in the absence of evidence to the contrary, will be presumed to be one from month to month; and until it has been legally determined in one of the modes specified in s. 111 of the Transfer of Property Act, limitation does not run against the landlord though the tenant may, in fact, profess to hold the property adversely to the landlord. *Srinivasa Ayyar* v. *Muthusami Pillai*, (I. L. R.. 24 Mad. 246), *Seshamma Shettati* v. *Chickaya Hegade*, (I. L. R. 95 Mad. 507), followed. —RAMASWAMI NAIK *v.* THAYAMMAR, **26. M. 488.**

759. s. 111—Co-lessors terminating tenancy—Intention to determine lease—Ejectment *See Landlord and tenant* BHIKARIRAM *v.* DHAKESWAR PERSHAD. **7 C. L. J. 483**

760. S. **111** *(d) and 117—Patni lease—Determination of —Merger of lease.*

A *patni* lease is determined by the lessor purchasing the interest of the the *putnedar* lessee, and the purchase in execution of a decree does not affect the merger in the reversion.

S. III (d) of the Transfer of Property Act applies in all cases where the interests of the lessor and lessee vest in one person whether by acts *inter partes* or by auction sales through court or by inheritance. There is nothing in the common law of India to restrict it to a case where the two interests vest by act of parties alone 19 C. 760 dist. S. 2 cl. (d) is no bar to such meger in cases where it takes place otherwise than by acts of parties.

Except in cases where a question of estoppel would arise, the mere intention or act of a person in whom the interests of both the lessor and lessee vest will not prevent the merger under S. 11, Cl. (d) of the Transfer of Property Act. PROMOTHO NATH MITTER *v.* KALI PRASANNA CHOUDRY.—**28 C. 744.**

Sup: Govt .acts (IV of. 1882) (*Contd.*)

761 S. 111—*(d)*—Lessor buying lessee's interest—*See estoppel—28 C. 744 at 750.*

762 S. 111 (g)—Landlord's right to eject a tenant transferring his dwelling house and its site in *abadi—See Landlord and tenant.*—RAMCHARAN *v.* BABU SHEODAYAL **10 O. C. 31.**

763 S. 111 (g) 117—Covenant against allienations--Forfeiture—*See Land-lord and tenant* PARAMESHRI *v.* VITTAPPA SHAMBAGA. **12 M. L. J. 189=26 M. 157.**

764. S. 111 (g) *See S. 110, 111 (g) 33 C. 329 No. 754 supra.*

765 s. 111 (h)—See s. 106, 111 (h)—6 C. W. N. 134 No. 731 *supra.*

766 s. 114—*Landlord and Tenant—Forfeiture of permanent tenancy for non-payment of rent—Relief cannot be granted where period of grace is allowed for payment of arrears of rent.*

A tenant having a permanent occupaucy is not entitled to relief against forfeiture of tenancy for non-payment of rent where the lease provided that rent was payable on a certain date and in case for a further period of 3 months after the date fixed, the tenancy would be forfeited, and payment of rent was not made within the further period of three months allowed to the tenant by the lease.

Even under section 114 of the Transfer of Property Act the exercise of the discretion to relieve against forfeiture may depend upon the circumstance whether the lease allowed a period of grace or not and in the former case, whether the period of grace is as reasonable period having regard to the nature and terms of the lease.—NARAINA NAIKA *v.* VASUDEVA BHATTA, **M. L. J., 1905 P. 208=28 M. 389.** For other cases see landlord and tenant forfeiture.

767 S. 114—See s. 108 (o), 114—43 C. 358 No. 751 *supra.*

768 S. 116—*Effect of lesssor's consent on tenant holding over—Death of tenant by sufferance—No representatives.*

This section which enables the lessor or his representative by his assent to convert a tenant by sufferance into a yearly or monthly tenant does not enable him by his mere assent, to convert the representative of a tenant by sufferance into such a tenant without the latter's own consent (T. R. 159, 1. Q. B. 736 referred to).

If a tenant by sufferance dies and his representative holds on, he holds as a trespasser. (8 M. 424 (427); 3 Bom. H. C. R. A. C. J. 27 referred to 18 B. 256, dissented from in 22 B. 893, and 24 B. 504, referred to. YADAPPALLE NURASIMHAM *v.* DRONAMRAJU SEETHARAMAMURTHY **18 M. L. J. 26.**

769—S. 116—*Holding over, liability of cotenants for—Estate of deceased co-tenant when liable for holding over.*

770. S. 116.—*Landlord and Tenant—Tenant holding over.*

Sup: Govt. acts (IV of 1882) *(Contd.)*

Where a tenancy for a fixed period expires and the tenant continues in possession on such expiry his possession is only by sufferance, and no relation of landlord and tenant can after that subsist in the absence of anything from which a new tenancy can be inferred—The relation will continue to subsist when the landlord has assented to the tenant's continuance in possession. BALAJI RAGHUNATH PHADKE *v.* RAMCHANDRA KASHI PATKAR, **4. B. L. R. 972 = 27. B. 261.**

771. S. 116.—See S. 106, 116—32. C. 123. No. 732 *supra.*

772. S. 117.—See S. 107, 117—24. M. 421 No 737 5. O. C. 222 No 740 *supra.*

773. S. 117.—See S. 108 (a) 117—33. C 64 No 741 and 108 (c), 117, 119—26. M. 157 No 748 *supra.*

774. S. 117.—See S. 111 (d), 117—28. C. 744 No 760 *supra.*

775. S. 117.—See S. 111 (g), 117—26. M 157 No. 763 *supra.*

776. S. 118—*Civil Procedure Code, 1882, Section 13.*—Res judicata *between defendants.—Transfer of Property Act, 1883, Section 118.—Exchange.*

The plaintiff sued defendants Nos. 1 to 6 for a declaration of his title to certain property and for confirmation of his possession therein. The Court gave a declaration in favor of the plaintiff as to a certain share of the property claimed, and also as to another share in favor of some of the defendants.

Held, that the declaration in favor of the defendants was superfluous and would not be binding on other defendants.

When an owner of a certain property gives it to certain persons who are jointly with him owners of another property and receives that property in exchange the transaction is an exchange within the meaning of Section 118 of the Transfer of Property Act and not a partition. It can only be effected by a registered deed.—*25 Cal., 210, distinguished.* MUSSUMMAT CHATRI KOER *v.* KHOBDARI RAI **5 W. N. C., 724.**

777. S. 118.—*See Registration Act III of 1877 S. 17, 49 No 51 col: 472—11. C. W. N. 342.*

778. S. 118.—*Exchange—A co-owner in a survey number transferring a divided share partly for cost and partly in exchange of another land—Right of pre-emption*—See Land Revenue Code, Berar. BABOO *v.* MARUTI **8. N. L. R. 138.**

779. S. 119—*Hindu Law—Female's estate—Alienation by widow with the consent of her daughter is binding on the daughter's minor son during his minority when his guardian has ratified it.*

A lease of property by a Hindu female with the consent of her daughther, which, after their death is ratified on behalf of the daughter's son, a minor, by the manager of his estate, is valid as against the minor at least during his minority.

Sup: Govt. acts (IV of 1882) *(Contd.)*

When a lessee surrenders his lease-hold rights under a particular lease and takes instead lease-hold rights in property not covered by the first lease, the arrangement does not amount to an exchange, such as is contemplated by section 118 of the Transfer of Property Act. WALIUL HASSAN *v.* MAHARAJ KUMAR GOPAL. **6 C. W. N., 905.**

780. S. 119—See Ss. 108 (c), 117, 119—26 M. 157 No. 748 *supra.*

781 S. 119.—See Limitation Act, S. 10 Art. 143. RAJAGOPALAN *v.* TIRUPANANTHAL THAMBI RAM. **17 M. L. J. 149 = 30 M. 316.**

782. S. 122—See Trust Act II of 1882. Ss. 1, 5. No. 4 Col: 544—13. M. L. J. 364.

783. S. 122, and 123.—*Deed of gift of immoveable property registered after the donor's death—Practice—Remand—Evidence taken by the District Court.*

A gift of immoveable property duly made by means of a registered deed is valid although the registration of the deed of gift took place after the death of the donor 20. A. 392 followed.

The general practice of the Muffasil Court, is that, when a remand, involving the taking of fresh evidence, is ordered, the District Court sends down the case to the first Court to take evidence and this is done in the interests of and for the convenience of the parties themselves. But nevertheless the District Court still retains power to take what evidence it may see fit to take, and record its findings upon it. KHUSHABA MANSING *v.* CHANDRABHAGABAI. **10 B. L. R. 536.**

784. S. 123.—*Hindu law—Transfer of possession not necessary when gift of immovable property registered—Evidence Act, s. 111—Gift to an agent—Undue influence.*

Held, that assuming that delivery of possession was essential under the Hindu law to complete a gift of immovable property, that law has been abrogated by s. 123 of the transfer of Property Act. *Dharmodas Das* v. *Nistarini Dasi*, (I. L. R., 14 Cal. 446), followed.

Held, also that there is nothing to prevent an agent from being the object of the bounty of his principal. If an agent can clearly show that a gift was made in his favour by a donor who was in a position to exercise a free and unfettered judgment with full knowledge of what he was doing, the gift will be upheld. PHUL CHAND *v.* LAKKHU. **A. W. N. 1903. P. 70 = 25. A. 358.**

785. S. 123—*Essentials of gift—Registration—No delivery.*

Under this section a deed of gift, if registered, is valid whether accompanied by delivery of possession of property or not. The fact that the Courts of the Central Provinces were erroneously of opinion that delivery of possession was necessary to give validity to the deed would not render the deed inoperative. BALBHADRA *v.* MUSSTT

Sup: Govt. acts (IV of 1882) (*Contd.*)

BHAWAR. **6 C. L. J., 233=11. C. W. N. 957.**

786. S. 123—*Hindu Law—Law in Bombay Presidency—*Benami *transaction—Purchase by husband in the name of his wife—Advancement for benefit or gift—Presumption.*

Held, that according to the law as it prevails in the Bombay Presidency, a purchase by a husband in the name of his wife does not raise any presumption of a gift to the wife or of an advancement for her benefit.

A transfer not effected in the manner required by S. 123 of the Act will not confer a valid title on the transferee. *Per Batty J.* BAI MOTIVAHOO *v.* PURSHOTAM DAYAL. **29 B. 306 (311)=6. B. L. R., 975.**

787 S. 123—*Right of subsequent mortgagee of a part of the mortgaged property to redeem whole—Its nature.*

Although a *puisne* mortgagee of a portion only of the property originally mortgaged can redeem the whole property, his right of redemption does not arise at the moment of the creation of his mortgage but when he asserts his right of redemption by suit and exists only so long as the prior mortgage on that portion of the security which is common to the two mortgages subsists and can be redeemed. BAIKANATHA NATH ROY CHOWDHURY *v.* MOHENDRA NATH ROY. **1. C. L. J. 65.**

788 S. 123—*Deed of gift registered—Possession—*

See gift—NANDU *v.* CHANDI DUTT, **5 O. C. 89.**

789 S. 123—*See Oudh Estates Act I of 1869—S. 13, 16, 17 and 22—Oral gift by Talugdar.* THAKURIAN CHABRAJ KOER *v.* B. GOPAL LAL. **9. O. C. 113.**

790. S. 123. See S. 3, 4, 123—33 C. 584 No. 9 *supra.*

791. S. 723—See S. 59, 123—24 A. 319 No. 211 *supra.*

792. S. 123. See S. 122, 133—10 B. L. R. 536 No. 783 *supra.*

793. S. 123 See S. 10, 12. 126—A. W N. 1907 P. 278 No. 43 and 4 A. L. J. 708 No. 44 *supra.*

794. S. 129. *How far effect Mohammadan Law—Gift without possession.* See Mohammadan Law gift. *Syed Ahmad* v. *Musa Koya.* 11 M. L. J. 1901 P. 227. ALABI KOYA *v.* MUSSA KOYA. **24 M. 513.**

795. S. 130. *A Hindu reversioner transferring his interest in inheritance—Actionable claim.*—See Transfer.—MATA PRASHAD *v.* Mt. AUDAN KUAR. **3 O. C. 215.**

796. S. 130, 131, 135. *Assignment of mortgage—Redemption—Actionable claim.* See Mortgage Redemption. JAWAHIR SINGH *v.* PARWAN SINGH. **4 O. C. 210.**

797 S. 130—See S. 8, 130, 135—17. M. L. J. 87. No 38 *supra.*

798 S 131—See s. 130, 131, 135—4. O. C. 210. No 796 *supra.*

799 S. 132—See s. 99, 132—7. B. L. R. 816. No 695 *supra.*

Sup: Govt. acts (IV of 1882) (*Contd.*)

800 S. 135 (b)—*Exception—Probate and Administration Act (V of 1881,) Section 128, 130, 131—Will. Construction of— Demonstrative legacy—Right of legatee as to* corpus—*Interest.*

The word "Labham" is generic and covers different kinds of profit, and in its ordinary and comprehensive sense means profit, gain or income as opposed to the *corpus* yielding the same and includes interest and dividends and income from immovale property, especially where other portions of the Will show such to have been the intention of the testator.

The exception in paragraph (*b*) of Section 135 of the Transfer of Property Act will apply only where the whole of the consideration for the transfer is a debt due by the transferor.

The rule that in the case of demonstrative legacies, the legatee is entitled to resort to the general assets on failure of the source intended will not apply where there are directions to the contrary by the testator.

Under the English Law, interest is payable on demonstrative legacies from the expiry of one year from the testator's death.

The same is the law in India, and the absence of a distinct provision in Sections 128, 130 and 131 of the Probate and Administration Act, with respect to interest on such legacies, do not imply an intention to disallow interest in such cases. CHINNAM RAJMANNAR *v.* TADIKONDA RAMACHANRA RAO. **29 M. 155.**

801. S. 135—*Purchase of property to which there are adverse claims is legal but the purchase merely for litigation is illegal*—See Actionable Claim No. 1 Cal. 10. **2 N L. R 17**

802. S. 135.—See S. 3 10. C. W. N. 755= 33. C. 702 No 6 *supra* col: 5(?).

803. S. 135.—See S. 6, 135—9. B. L. R. 838 No 34 *supra.*

804. S. 135.—See S. 8, 130, 135—17. M. L. J. 87=30. M. 235 No 38 *supra*, col: 558.

805. S. 135.—See S. 130, 131, 135—4. O. C. 210 No 796 *supra.*

806. S. 135.—*Tenant assigning his right to receive price of crops appraised under S. 42. N. W. P. Rent Act*—See U. P. Rent Act S. 42. MUTHRADAS *v.* MUNDIDHAR **A. W. N. 1902. P. 150=24. A. 517.**

807. S. 135 (d) *Actionable claim.*

A having an actionable claim for three years' profits of a *zamindari* share against B sold it to C. C sued B for the profits who contended that under no circumstances could B obtain a decree for an amount exceeding that for which he purchased the claim.

Held, that clause (*d*) of this section refers to the point of time at which the actionable claim is purchased and not to that at which the claim may be discharged and that the debt or claim which has been affirmed by the judgment of a competent Court or a claim which has been made clear by evidence and is ready for judgment is altogether

Sup: Govt. acts (IV of 1882) *(Contd.)*

beyond the operation of that section. AZIM ALI KHAN *v.* CHOWHARJA BAKHSH.—**3 O. C. 18.**

808 S. 138—Section 138 does not apply to a sub-mortgage by a mortgagee, but refers only to the transfer of a debt. SINGARAVELU UDAYAN *v.* RAMAIVER. **13 M. L. J. 306.**

52. Act V of 1882 (Easements Act.)

1. S. 4. *Lessee's right of privacy.*

A lessee or any other person who is in lawful possession of premises may maintain an action if his right of privacy is interfered with. KUNDAN *v.* BIDHI CHAND. **3 A. L. J. 670=A. W. N. 1906 P. 283=29 A. 64.**

2. S. 4. *Right of Privacy—Other open spaces of the same house overlooking its other parts—Apertures.*

B opened certain apertures towards A's house which was already overlooked by B's house in several places.

Held, that there was a substantial and material invasion of the right of privacy of A, the plaintiff. The apertures would permit a person to look on without being observed which could be guarded against from an open surface. I. L. R. 10 A. 358 dist. ABDUL RAHMAN *v.* BHAWAN DAS. **4 A. L. J. 445=A. W. N. 1907 P. 183=29 A. 582.**

3. S. 7. *Illus. (J)—Stream—Usufruct—Right to use and consume water without material injury to other like owners.*

With respect to riparian owners, the law is that each such owner has a right to the usufruct of the stream which passes through his land. The right is not an absolute and exclusive right to the flow of the water in its natural state, but to the flow of the water and the enjoyment of it subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence. Section 7, illus (J), of the Easements Act (V of 1882) shows that a riparian owner has the right to use and consume water for irrigating the land abutting on a natural stream, provided that he does not thereby cause material injury to other like owners. DINKAR *v.* NARAYAN. **7 B. L. R. 265=29 B. 357.**

4. S. 7. *Owner's right to protect his land from water following with it from a high way.* See Madras Municipalities Act IV of 1884. S. 3, 4, 21, 27, 261. MAHAMAHOPADYAYA RANGA CHARIAR *v.* THE MUNICIPAL COUNCIL OF KUMBA KONAM. **1 M. L. T. 333.**

5. S. 7, *15, 16, 33, 35. Prescription—Right to light and air coming from over neighbours land—Injunction.*

Every one has a natural right to so much light and air as pass vertically to his land such right does not extend to light and air coming laterally over the land of another. This right must be acquired by prescription as provided by S. 15 of this Act (2 B 660 Refr. to) Government land, held by the parties as tenants, gives no easement by prescription to a tenant against another unless it is also acquired against Government as reversioner or remainderman of the tenant.

Sup: Govt. acts (V of 1882) *(Contd.)*

No easement is affected by any change in the extent of the dominant or servient tenement (d).

A plaintiff, claiming relief for obstruction of easement of light and air must prove the presence of every element necessary to establish his prescriptive acquisition of the easement claimed by him.

Where a structure obstructing ones easement of light and air is allowed to be completed Court may not give a mendatory injunction, the where, by mandatory injunction, the injury to the defendant will be out of all comparison to the injury to the plaintiff by the obstruction of his easement (16 A 69, 72, 2 B 133 Ref.) See Col. 451 Specific Rel of. Act. No. 1 of 1877 s. 54, 55, BEHARI LAL *v.* SHEO LAL. **3 N. L. R. 114.**

6. S. 7, *17—Right to raise crest level of calingula of tank—Submersion of lands thereby —Right of owner of such lands to protect them from submergence.*

The defendants, being the holders of land situated below a tank, had, for a period of over twenty years, by means of a dam, raised the calingula of the tank higher than its crest level. The effect had been to collect an increased quantity of water in the tank and, from time to time, to throw it back on to the plaintiffs' lands, which were situated above the tank. The plaintiffs' lands were thus submerged. On a suit being brought by plaintiffs against the defendants for an order that the dam placed by defendants on the calingula should be removed so that water should be stored in the tank only to the height of the calingula.

Held that the defendants had not exceeded the right which they had been proved to have acquired. *Semble*, that, notwithstanding that right, plaintiffs were entitled to take measures to save their lands from being submerged. NARAYANA REDDI *v.* VENKATA CHARIAR. **24 M. 202.**

7, S. 10—See T. P. Act IV of 1882 S. 66 No. 253 Col. 617—124 P. L. R. 1902=35. P. R. 1902.

8. S. 13.—*Purchase of land by Government at sale for arrears of revenue—Right of irrigation by way of easement—Assessment of ryots in occupation.*

In 1846, certain villages, forming part of a zamindari, were brought to sale by Government for arrears of revenue, and bought by Government. The wet lands in these villages were irrigated by a tank in another village, which also formed part of the zamindari, but was not included in the sale. The zamindar had himself occupied the wet lands prior to the sale, and continued his occupation thereafter, as a ryot under Government. At a date prior to 1866, the zaminder sold his interest in the land, and at the settlement which took place in

Sup: Govt. acts (V of 1882) *(Contd.)*

that year, his vendee was assessed with a consolidated wet rate on it. In 1869, the Head Assistant Collector directed that the zamindar should be credited, yearly, with the difference between the consolidated wet rate and the dry rate. In doing this, he acted without the authority of Government. In 1894, the Board of Revenue directed that no portion of the assessment should be credited to the zamindar, who now sued for a declaration of his right, and for the amount since collected:

Held, that the melvaram right in the villages passed, by the sale, to the Government, who were entitled, by way of easement, to have the lands irrigated from the then existing source of irrigation, and to levy wet assessment on them. That the action of the Settlement department in assessing the consolidated wet rate was right, and that plaintiff was not entitled to the difference between the wet and dry assessment:

Held, also that the action of the Head Assistant Collector was beyond the scope of his authority, and not binding on the Government, who had neither authorized nor ratified it.—RAJA SURANENI VENKATA PAPAYYA RAU *v.* THE SECRETARY OF STATE FOR INDIA. **12. M. L. J. 1902. P. 432=26. M. 51.**

9. S. 13 c.—*Grant of village as* inam—*Right to water for irrigation—Area under wet cultivation at time of grant subsequently increased—Claim by* inamdar *for proportionate increase of water for irrigation.*

In 1859, a village with land comprising 339 acres was granted by Government, as *inam* to plaintiff. At the time of the grant, 106-09 acres were under wet cultivation. The area of land under wet cultivation was subsequently increased, and plaintiff claimed to be entitled to water for the irrigation of this increased area without paying assessment thereon, and in 1870, the Collector of the District permitted that increase. Plaintiff had now been assessed in respect of the increased area, and brought this suit for a declaration of his right and for a refund of the money paid by him under protest:

Held that plaintiff was entitled, under S. 13 *(c)* of the Easements Act, to irrigate 106-09 acres, and no more.

Also, that the action of the Collector in 1870 was unauthorised and had not been subsequently ratified by Government and was not binding on Government.—K. CHIDAMABRA RAO *v.* THE SECRETARY OF STATE FOR INDIA. **26 M. 66.**

10. S. 13. c.—*Meaning of "necessary for enjoying" discussed and explained.*

One Mrs. Wells sold a house to plaintiff Mohan Lal in 1902, the sale deed of which contained the passage in dispute as part of a double verandah running right across the north end of the premises as sold. She sold her second house a week after to Sher Khan, the sale deed of which did not include the passage. Sher Khan set up the defence that the passage was part of his house, was built for the convenience of persons occupying and resorting to that house, and that he would suffer great inconvenience if he was debarred from using it. There is no trace of the word "easement" in the pleadings nor was any mention made in the issues of "necessity" as such. The first court decided in Sher Khan's favour holding that Mrs. Wells on selling the other house with passage to Mohan Lal must be taken to have reserved the right to use the passages a right which passed by the conveyance to Sher Khan. The last part of this finding was rested on S. 13 (c) of this Act and plaintiff's claim was dismissed. On first appeal the Civil Judge held that the Lower Court had made out for the defendant a case which could not legitimately be drawn from his pleading and decided that the right of way over the passage was not necessary for the enjoyment of Sher Khan's house, even though sweepers and servants could not reach the back part of the premises without either using the passage or traversing the front room, and decided following Encyclopedia of the Laws of England Vol. 12 pages 572 and 573, that a way of necessity is not allowed if there is another way though inconvenient and decreed the claim. Sher Khan in second appeal urged that "necessary for enjoying" in S. 13 (c) had been wrongly construed as equivalent to "necessary for approaching."

Held after discussing the cases 26 C. 311, 57 L. J. Ch. 255, 57 L. J. Q B 198, gale on easements 7th edition pages 137, 151 and 152, 19 B. 797, 15 A. 270, 16 B. 552, 43 L J. Ch. 467, that where the quasi servient tenement is sold without express reservation of a right of way not absolutely necessary such right is not saved. Absolute necessity has not been made out and the Indian cases are against the appellant. The word enjoying is used in S. 13 (c) as some such general term was essential while approaching would suggest only the rights of way and would not include other easements apparent or continuous. SHER KHAN *v.* MOHAN LAL. **16 C. P. L. R. 1903 P. 156.**

11. S. 13 (e) and (f). See Evidence Act I of 1872 S. 92 No. 166 col. 205—15 M. L. J. 255=28 M. 495.

12. S. 13, cls. (e) and (f)—*Property partitioned—Right of way—Convenience no test of easement of necessity—Apparent and continous easement—Oral agreement as to easement where partition deed silent—Evidence Act, S. 92.*

The plaintiff alleged that after getting in partition a house and its adjacent land he proceeded to build a wall over the site, the defendant, who had no right of way over the site, and who had other means of access to his house, obstructed the building of the wall. Hence his suit for injunction and damages. The defendant set up on easement of necessity over the site, since his *parda* ladies could go only by

Sup. Govt. acts (V of 1882) (*Contd.*)

that land to the court-yard, and set up an agreement to the time of partition in support of his alleged right of way.

Held, the word 'necessary' in S. 13, cl. (c) of the Act must be taken in its ordinary sense. Convenience is no test of an easement of necessity. In this respect the Indian and the English Law are the same. As the defendant had a means of access to his property without going over to plaintiff's land, he could not have an easement of necessity over it. Moreover he was not entitled to an easement under cl. (f) of S. 13, since the easement, which he claimed, was not apparent and continuous. The oral evidence of the agreement was not admissible in evidence and the partition deed made no provision for the right of way claimed. Injunction granted but damages refused. SABAPATHY MUDALI *v.* KUPPUSAMY MUDALI. **15 M. L. J. 225** —(*See Col. 212*).

13. s. 13 (**f**)—*Easement of necessity.*

An absolute necessity is contemplated in clauses (*a*), (c) and (*d*) of Section 13 of the Easements Act, but in clause (*b*) only qualified necessity is contemplated. The distinction is obvious, thus a right of way may not be absolutely necessary, and yet necessary for the purpose of enjoying the property as it was enjoyed when the transfer of it took place. The existence of this last necessity has to be determined by reference to the prior use. CHHOTALAL BECHARDAS *v.* DEVSHANKAR MAGANLAL. **3 B. L. R., 601.**

14. s. 15.—See S. 7, 15, 16, 33, 35—3. M. L. R. 114 No. 5 *supra.*

15. s. 15, 28 (c)—*Right to light and air prescription—Actual damage.*

A sued B claiming relief upon the ground that his prescriptive right to light and air to a certain window has been interfered with by B.

Held that it is enough to show that the right has in fact been interfered with. The plaintiff is not obliged to show that he has suffered actual damage thereby. 1904 A. C. 179 and 1905 1 Ch. 480 not applied. 8 B. 95 ref to. KUNNI LAL *v.* KUNDAN BIBI. **A. W. N., 1907 P. 175=29 A. 571.**

16. s. 15, 47.—*Acquisition and extinguishment of easements—Period of user.*—

A sued B and C for an injunction to restrain them from allowing the rain water of their house to flow on his land. The Court dismisssed the suit on the ground that the defendant's easement being discontinued only 4 years before suit was not extinguished under S. 47 of the Easements Act until the lapse of 20 years from its total disuse.

Held that there was no acquisition of easement under S. 15 of the Act on the ground that the period of 20 years must be taken to be a period ending within 2 years next before the institution of the suit wherein the claim to which period relates is contested; and that S. 47 of the Act applies

Sup: Govt. acts (V of 1882) (*Contd.*)

only where an easement has been acquired under S. 15 of the Act. HAJI UMRANI *v.* GANESHBHAT. **9 B. L. R. 1101.**

17. s. 16.—See S. 7, 15, 16, 33, 35—3. N. L. R. 114 No 5 *supra.*

18. s. 17.—See S. 7, 17—24. M. 202 No 6 *supra.*

19. s. 23—*Alteration of easement—New windows higher than the old ones—Easements Act (V of 1882), S. 23.*

Plaintiff had two windows in the rear wall of his house. In 1886, he rebuilt his house and opened new windows, which were of nearly the same size, but were a little higher than that the old ones. In 1899, defendant built his house and blocked up these two new windows. The plaintiff sued for an injunction. The first Court dismissed the suit. The lower Appellate Court reversed the decree and granted an injunction, holding that the plaintiff did not lose his easement by changing the position of the windows, because the new ones were nearly of the same dimension, and as their position was higher than that of the old windows, the burden on the servient tenement was rather less than before. On second appeal

Held, reversing the decree and dismissing the suit, that the easement claimed in respect of the new windows which did not receive the same cones of light as were enjoyed through the old ones was quite distinct from the easement in respect of the old windows; and that, therefore, the easement respecting them could be acquired only by enjoying it for the required length of time.—BAI HARIGANGA *v.* TRICAMLAL, **26 B. 374.** *See for other cases, Easement under the heading light and air.*

20. S 28. *Easement—Particular mode of enjoyment—Relinquishment.*

The mere non-user of a mode cannot deprive a person of his right to enjoy the easement in that particular mode unless there was any intentional abandonment of that particular mode, giving rise to an agreement express or implied between the parties by which the person can be said to have relinquished it. The evidence as to relinquishment must be clear and unequivocal. VINAYAK MORESHWAR *v.* MARTAND TRIMBAK. **6 B. L R. 287.**

21. S 28, cl. (c). *Disturbance of easements—Meaning of disturbance—Injunction to prevent disturbance—Light and air—Physical comfort—Substantial damage.*

The Easements Act is not merely prescriptive; it defines the law relating to easements and thus differs from the English Act in its ambit. S. 28, (c) of the Act provides that the extent of a prescriptive right to the passage of light and air to a certain window, door, or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespective of the purpose for which it has been used.

Per curiam:—"In any case, I see no reason for withholding from disturbance its legal sense of an illegal obstruction, and for the purpose of Chapter IV that only can (in my opinion) be an illegal obstruction, for which, if done, a suit would lie. Therefore I hold that for an injunction there must be a threat of something more than mere obstruction, and so the plaintiff's first contention fails." To establish that the plaintiffs have suffered substantial damage to their rights to light and air they must show material diminution in the value of their heritage or material interference with their physical comfort. The expression "physical comfort" does not admit of precise definition, but it is sufficiently exact when applied as a test to a given state of things to allow the ordinary reasonable man to arrive at a practical determination. A man's physical comfort in relation to the access of light and air to his house at any particular time depend upon the conditions then actually obtaining, regardless of how these conditions came into being or when they may cease: it is a present fact uninfluenced by past history or future fate. Thefefore for the purpose of applying the test of the plaintiffs' physical comfort, we must look at the state of their property as it is, not as it was, or as it may be. FRAMJI SHAPURJI *v.* FRAMJI EDULJI. **I. L. R. 30 B. 319; 7 B. L. R. 825.**

22. s. 28 (*c*). See S. 15, 28 (c)—29 A. 571 No. 15 *supra*.

23. S. 28, *33, 51 (c)—Easement—Light and air—Accustomed business—Surrender of right—Physical comfort—English cases. Applicability of—*

The word "such" in section 51 (c) of the Easements Act can not be so construed as to mean "a building of the same dimensions." Rather, it is a word of relation used simply to refer to the antecedent adjectives—that is, to the *destroyed dominant* character of the building, just mentioned.

The combined effect of sections 28 and 35 of the Act, which must be read together, is that the mere circumstance that a plaintiff has a prescriptive right to the quantity of light which has entered certain openings of his house will not give him a cause of action against a servient heritage for disturbance caused to that right, but he must prove that such disturbance has either materially interfered with his physical comfort, or prevented him from carrying on his accustomed business as beneficially as he had done before.

Where a plaintiff having several sources of light does anything permanent so as to materially interfere with any one of them and considerably diminish the light coming therefrom, his act will be treated as equivalent to a surrender of his right and the question of material diminution of comfort must be determined as if that light still substantially exists. To determine the question of physical comfort by the light of such diminution, caused by the plaintiff's own act, would be to impose a greater burden on the servient heritage than it is liable to according to law.

In dealing with the right to air, English decisions are not of much avail in India, because the conditions in this country are different from those of England. In England more light is needed than here: whereas more air is needed here than in England. FRAMJI SHAPURJI PATHUCK *v.* FRAMJI EDULJI DAVAR. **7. B. L. R. 352.**

24. S. 28, *33, 35.—Easement—Light and air—Disturbance of easement, meaning of—Injunction—Substantial damage-Physical comfort.*

The Indian Easements Act 1882 is not merely prescriptive; it defines the law relating to easements and thus differs from the English Act in its ambit.

In the expression "disturbance of easement," the term "disturbance" is a word possessing a special legal significance in English law, and means an illegal obstruction, for which, if done, a suit will lie.

In order that an injunction may issue to prevent a disturbance of easement, there must be an apprehension of something more than mere obstruction.

To establish that the plaintiff has suffered substantial damage to his rights to light and air, he must show material diminution in the value of his heritage, or material interference with his physical comfort.

The expression "physical comfort" does not admit of precise definition, but it is sufficiently exact when applied as a test to a given state of things to allow the ordinary reasonable man to arrive at a practical determination. A man's physical comfort in relation to the access of light and air to house at any particular time depends upon the conditions then actually obtaining, regardless of how those conditions came into being or when they may cease; it is a present fact uninfluenced by past history or future fact. Hence, for the purpose of applying the test of the plaintiffs' physical comfort one must look to the state of their property as it is, not as it was, or as it may be. FRAMJI SHAPURJI PATHUCK *v.* FRAMJI EDALJI DAVAR. **7. B. L. R. 825.**

25 s. 33—See S. 7, 15, 16, 33, 35—3 N. L. R. 114 No. 5 *supra*.

26 s. 33—See s. 28, 33, 51—7 B. L. R. 352 No. 23 *supra*.

27 s. 33—See s. 28, 33, 35—7 B. L. R. 825 No. 24 *supra*.

28 s. 35—See s. 7, 15, 16, 33, 35—3 N. N. L. R. 114 No. 5 *supra*.

29 s. 35—See s. 28, 33, 35—7 B. L. R. 825 No. 24 *supra*.

30 s. 47—See s. 15, 47—9 B. L. R. 1101 No. 16 *supra*.

31 s. 51—See s. 28, 33, 51—7 B. L. R. 352 No. 23 *supra*.

32 s. 60.—*License—Revocation of.*

The plaintiffs were zamindars of two villages N and B. The defendant was occupancy tenant of the plaintiffs in B. It appeared that the defendant used to cultivate lands in N and the plaintiffs had allowed him to reside in the *abadi* of that village and to occupy the enclosure and the shed in dispute, the defendant having ceased to cultivate land in N the plaintiffs required him to vacate the land where the enclosure and the shed were situate.

Held, that the defendant was in the position of a license and the license was revocable; the defendant was allowed a period of one month to leave the property and to remove any goods which he may have been allowed to place thereon. SUNDAR LAL *v.* CHAJJU. **W. N. A., 1901, P. 42 (2).**

33 s. 60 (b)—*License—Revocation—Work of permanent character.*

A *kachcha* thatched house may be "a work of a permanent character" within the meaning of s. 60 (b) of the Easements Act, 1882, although the thatch of the house is renewed from time to time. *Winter* v. *Brockwel 8 east. 308 referred to.* NASIR-UL-ZAMAN KHAN *v.* AZIM-ULLAH, **I. L. R., 28 A. 3 A. L. J. 765=28 A. 741.**

53—Act VI of 1882 (Companies Act).

1. s. 4.—*Association of more than twenty persons for profit—Agreement of Association—Construction.*

When starting a *kuri* or *chit* fund, an agreement was entered into between the nine defendants and the other subscribers to the *chit* which while giving the defendants the right to conduct or manage the affairs of the *chit*, reserved to the body of subscribers, who were more than twenty, the right to control the defendants and showed that the defendants were only the agents of the subscribers.

Held, that the association was of more than twenty persons and required registration. 20 M. 68 distinguished. NARAYANASAMY *v.* JAMBU AIYAN. **12 M. L. J. 130**

2 s. 4.—"*Association.*

To constitute an association, within the meaning of S. 4 of the Companies Act, the existence of a legal relation between more than twenty persons giving rise to joint rights and obligations or mutual rights and duties is absolutely necessary.

Held, also that in the case before their Lordships there was no association within the meaning of S. 4 of the Companies Act. NEELAMEGA SASTRI *v.* S. APPIAH SASTRI. **16 M. L. J. 385=29 M. 477.**

3. s. 4—*What is 'association' within the meaning of s. 4—Legal relation creating joint or mutual rights necessary—Chit fund.*

To constitute an 'association' within the meaning of s. 4 of the Companies Act, the existence of a legal relation between more than twenty persons giving rise to

joint rights or obligations or mutual rights and duties is absolutely necessary. *Panchena Manchu Nayar* v. *Gadinhare Kumaranchath Padmanabhan Nayar*, (I. L. R., 20 Mad. 68 at p. 73), referred to and approved. Where more than twenty persons enter into an agreement by which a chitfund is created and it is clear from the agreement that the only proprietors of the fund are the two organisers and the other persons have entered into no contract with each other, the parties to such agreement do not form an association of which registration is necessary under s. 4 of the Companies Act. NEELAMBGA SASTRI *v.* APPIAH SASTRI. **16 M. L. J. 385; F. B.=29 M. 477.**

4. s. 4.—*Chit association of more than 20 persons unregistered. Registration—Suit to recover subscriptions paid to it.*

In this case, the question was whether a suit to recover the amount of subscription from a chit-fund was maintainable and whether the said chit-fund which was of more than 20 persons, with the object of gaining profits was illegal for want of registration under s. 4 of this Act.

Held, the terms of s. 4 show that an 'association,' to fall under that section, need not necessarily be a company or a partnership strictly so called, but that a combination of more than 20 persons associated together for a common purpose having for its object the acquisitions of gain, is enough.

Held that in this case, the chit-business was started and conducted by all the subscribers acting together, as a joint concern, whose number being more than 20 the "association" required registration under the Act and not having been so registered was an illegal association, and the prsent suit based on a contract founded upon that illegal association could not lie. (19 M. 31 followed, 20 M. 68, 22 M. 212, 1. M. H. C. R. 448 Dis). MADASAMI ASARI *v.* PECHI ASARI *alias* PECHI MUTHU ASARI. **1 M. L. T. 106.**

5. s. 4. *Registration of chit fund consisting of more than twenty subscribers is compulsory.*

A chit fund to fall under S. 4 of the Act must be an "association" of more than twenty persons, with joint rights and liabilities, with the object to join the profits. So if a chit concern is the business of one person alone, who is its proprietor, and the chit collections are under his control and at his absolute disposal, and the subscribers have nothing to do with the management of it, the chit fund is not the joint concern of the whole body of subscribers, nor have they joint rights and liabilities or mutual rights and duties, and registration of such a fund is not compulsory under the Act, though it may consist of more than twenty subscribers. (20 M. 68 followed, 19 M. 31 1 M. L. T. 106 dissented.) SUBBIER *v.* RAMIER. **2 M. L. T. 52.**

Sup: Govt. acts (VI of 1882) (*Contd.*)

6. S. 6, 41, 224. *Foreign Company not registered, suit by—Plaint, verification of, by Manager—Civil Procedure Code (Act XIV of 1882), s. 430, 435.*

A foreign Corporation is entitled to sue in its corporate character in this country, without being registered under the Indian Companies Act of 1882, or an Act of Parliament; and a plaint in such a suit can be verified on behalf of the Corporation by one of its principal officers, under s. 435 of the Code of Civil Procedure. A Corporation duly created according to the law of one State may sue and be sued in its corporate name in the Courts of other States. *Campbell* v. *Jackson*, (I. L. R. 12 Cal. 41), and *Yusuf Beg* v. *The Board of Foreign Missions of the Presbyterian Church of New York*, (I. L. R., 16 All. 420) distinguished. SINGER MANUFACTURING Co. *v.* BAIJNATH. **30 C. 103.**

7. S. 41. See S. 6, 41, 224—30 C. 103 No. 6 *supra.*

8. S. 45. *Company—Memorandum of association signed by member—Liability of member—Arrangement between member and Director to cancel liability. Effect of.*

A company was incorporated in 1896 under the Indian Companies Act. The appellant was a signatory of the memorandum, and he was, at the date of the suit and ever since 1901 had been entered as a member on the company's register of members. A suit was brought that his name may stand as a contributory of the company which was under liquidation. He sought to escape from this position by virtue of an arrangement made between him and one of the directors of the company in December 1896 whereby entries were made in the company's book of account purporting to canc l liability in respect of the shares. The declaration prayed for was granted.

Held, that the appellant was rightly declared to be a contributory of the company and the liquidators were not bound by the transaction of 1896. BHULABHAI AMICHAND *v.* GOPALRAV RAMCHANDRA. **7 B. L. R. 291.**

9. S 58—*Rectification of register—Evidence Act (I of 1872) S. 115—Estoppel—Hindu Law—Property held by head of* Mutt—*Presumption.*

The head of a *Mutt* applied for and was allotted shares in a company in his own name. Payments were made by him by way of calls on the shares, and by his successor in office, and the company credited the amounts paid by the successor towards the amount due as calls on the shares. Subsequently, plaintiff, another successor in the office, applied to have the company's share-register altered, so that the shares should stand in the name of the *Mutt*. This, the directors refused to do unless plaintiff provided them with a transfer from the original allottee (who was still alive) or an indemnity by the *Mutt*. Plaintiff did neither, and the shares were ultimately declared by the company to be forfeited. Plaintiff now sued the company, claiming that the shares were not the private

Sup: Govt. acts (VI of 1882) *(Contd.)*

property of the original allottee, but belonged to the *Mutt*, and that the forfeiture should be declared to be invalid, and that the company's register should be rectified. He adduced no evidence to show that the original applicant had utilised the funds of the *Mutt* in payment of calls.

Held that no presumption arose that the money paid belonged to the *Mutt*. Nor was the company estopped, by S. 115 of the Evidence Act, from denying that the shares were the property of the *Mutt*. On the refusal by the directors to transfer the shares to the name of the plaintiff he should have applied for rectification of the company's register, under s. 58 of the Companies Act, though such an application could not have been successful, as, in the circumstances, he could not have shown that the directors had acted capriciously and unreasonably in refusing to enter plaintiff's name on the register without a transfer from the original holder or an indemnity.—MAHANT KISHORA D SSJEE *v.* The COIMBATORE SPINNING and WEAVING COMPANY. **12. M. L. J. 439=26. M. 79.**

10 S. 58—*Suit by share-holders for right of voting—Jurisdiction—Cause of action.*

The plaintiffs were formerly Directors of a Company. As it incurred certain losses, the share-holders discharged the plaintiffs from their office as Directors and called upon them to make good the losses incurred and when they failed to do so, refused to allow them to vote at a meeting of the Company. Thereupon the plaintiffs brought a suit against these share-holders for a declaration of their right to vote.

Held that the plaintiffs were not bound to wait till their names were struck off the list of share-holders by the officers of the Company. They have a cause of action when they were not allowed to vote at the meeting and that there is nothing in Act VI. of 1882 to exclude the jurisdiction of the ordinary Civil Courts.—GOBIND PROSAD DAS *v.* AKHOY KUMAR DEY, **10 C. W. N. 906.**

11 S. 58—*174 and 169—Winding up of a company—Appeal—Limitation.*

The provisions of section 169 of the Indian Companies Act apply to an order passed under section 147 of the same Act.

An appeal against such an order cannot be entertained when the notice provided for by section 147 is not given within the time fixed.

All applications made for rectification of the register of share-holders of a company after liquidation must be made under and by virtue of the authority conferred by section 147 of the Companies Act.—ANAND SARUP *v.* SULTAN SINGH. **A. W. N. 1905. P. 75. =2. A. L. J. 311=27. A. 409.**

12 S. 61—*Resolution of directors necessary to effect forfeiture of share—Membership of company till date of winding up—Call before winding up—Limitation Act, Art. 112—New liability created by s. 61.*

A resolution of the directors was held

Sup: Govt. acts (VI of 1882) *(Contd.)*

to be necessary to effect a forfeiture of the appellant's shares, it was held that the appellants continued to be members of the company until the date of the winding up in the absence of any such resolution.

Consequently, even though the recovery of the unpaid portions of the call might have been barred under Art. 112 of the Limitation Act, if the company had sued for them, yet this did not affect the new liability created by s. 61 when the company went into liquidation. (L. R. 9 Ch. D. 595 refer e'; 20 B. 654 followed). YAIDISWARA AIYAR, *v.* SEVA SUBRAMANIA. **3 M. L. T. 390=31 M. 66.**

13 s. 77, 136, 173, 214—*Directors of a Company, misappropriation by—Power of Court to make an order under s 214 of the Companies Act rendering all the directors jointly liable for misappropriation—Winding up of company—Jurisdiction of District Court to wind up a company—Misfeasance and non-feasance—Liability of individual directors.*

S 214 of the Companies Act 1882 gives a summary remedy only against such Directors or other officers of a company as have been personally guilty of some act of misfeasance, and does not give the Court power to make an order against the Directors *en messe* for all acts of misfeasance without any specific finding against the individuals, who are actually responsible for the particular acts of misfeasance, as contemplated by that section—*Trevor* v. *Whiteworth*, (L. R, 12 A. C. 409); *In re National Funds Assurance Company, (*L. R, 10 Ch D. 118); *In re Denhan & Co.*, (L. R. 25 *Ch.* D. 752), referred to; *and In re British Guardian Life Assurance Company*, (L. R. 14 Ch. D. 335) commented upon. JADU NANDAN GOSWAMI *v.* ASHUTOSH GOSWAMI, **I. L. R. 29 C. 638.**

14 S. 128—*Order winding up a Company—Discretion of Court—"Just and equitable."*

To justify an order not some but all the conditions must be fulfilled.

If the Court finds that the main original object for which the Company was formed has substantially failed or that the substratum of the company is gone, it will consider that it would be just and equitable to wind up the company, and will make an order of compulsory winding up.

The court is not justified in making such order merely on the ground that the company has made losses and is likely to make further losses. *In re*, INDIAN COMPANIES ACT; *In re* SHA STEAM NAVIGATION COMPANY, **10 B. L. R. 107.**

15. s. 130.—See S. 182,130,165—9. B. L. R. 825 No. 33 *infra* .

16. S. 131, 169.—*Winding-up of a company—Depositor, application by, to wind up company—Parties—Creditors and Contributories, applications by—Withdrawal of the original petition, effect of—Verification.*

When a depositor in a company applies under s. 131 of the Companies Act (VI of 1882) for the winding up of the Company, and other creditors and contributories are allowed by the Court to join with him in prosecuting the case, the petition of the depositor should be considered as a joint petition of all the persons allowed to join; and his withdrawal from the case does not operate as a withdrawal of the whole case. If the original petition be duly signed and verified, the co-petitioners are not debarred from proceeding with the case for omission to verify their petitions—DACCA LOAN OFFICE COMPANY *v.* ANANDA CHANDRA ROY **31 C. 106.**

17. s. 136.—*A decree holder, attaching a decree against Company in liquidation:—*

It is not equitable for Courts to prevent a decree-holder who has attached a decree obtained by his judgment-debtor against a Company from executing the decree against the Company, without securing that his rights are respected in liquidation. 17 Times L. R. 344 ref. to. The attaching decree-holder can step into the shoes of his judgment-debtor in liquidation proceedings.—SESHA AYYAR *v.* V. TINNERELLY SARANGAPANI SUGAR MILL CO. **30 M. 533.**

18. s. 136, 177.—*Voluntary liquidation—Loan made by Company prior to liquidation upon the security of deposit standing to credit of borrower—Action by liquidators to recover amount of loan—Plea—Set off—Validity—Presidency—Small Cause Courts Act (XV of 1882), s. 69—Rules of Procedure of the Small Cause Court, Rule 428.*

The plaintiffs were liquidators of a company which went into voluntary liquidation in June 1901. The defendant, after he had ceased to be a share-holder in the company, deposited with the company a sum of money for a period of twelve months. Before the expiry of this period, the defendant applied to withdraw this amount. Being unable to get it, he applied to and obtained from the company a loan on the security of his deposit with interest at 12 per cent. on 14th December 1900. The company went into liquidation in June 1901. On 20th September 1901, an *ad interim* injunction was obtained restraining all creditors from suing the company. On the 9th October 1901, this injunction was made absolute. On 9th November 1903, the liquidators brought this action to recover the loan and interest. The defendant pleaded a set-off of the amount due to him from the company under his deposit made on 16th July 1900:

Held, that the defendant was entitled to set off the amount of his deposit against the sum claimed.—REFERENCE UNDER PRESIDENCY SMALL CAUSE COURT'S ACT, I. L. R, 28 Mad. 249; S. C., P. CHELLA PILLAI NAIDU *v.* SOOBRAMANI MUDALI, **15 M. L. J. 830.**

19. s. 136 —See s. 77,136,173,214—29. C. 638. No. 13 *supra.*

20 s. 147—See s. 58, 147 -27 A. 409 No 11 *supra.*

Sup: Govt. acts (VI of 1882) (*Contd.*)

21 149—Ex-parte *order when to be made—Pleadings Inconsistent pleas—Set off—Duty of appellate Court—Costs.*

Ordinarily he who seeks assistance from the Court cannot for the purpose of securing to himself a further measure of relief assert that, on the negation of which relief has already been awarded to him in relation to the same transaction.

The practice of passing *ex parte* orders involving the person affected in serious liablity is much to be deprecated.

It should not be laid down as a rule of procedure that *ex-parte* orders should ordinarily be passed where prodeedings are taken under s. 149 of the Indian Companies Act. They (*ex-parte* orders) should be granted with the greatest caution, and where rapid action is desired it is always possible under the rules of the Court to serve with leave short notice of any application to the Court.

A claim of set off was asserted by the defendant in his written statement but no issue on the point was raised and no pronouncement on it was made by the first Court. It was not made in appeal the subject of any cross objections, nor was it urged before the appellate Court in argument. The Court of appeal was of opinion that the claim of set off formed an integral part of the suit, and that it was essential to the right decision of the suit that appropriate issues be framed and tried with a view to determining the validity of the defendant's claim. The High Court framed issues on the point and referred them for trial to the first Court.

The party by the act of whose counsel a difficulty has arisen must ordinarily pay the costs. THE AHMEDABAD ADVANCE SPINNING AND WEAVING CO. *v.* LAKSHMISHANKAR DOESHANKAR. **6 B. L. R 790.**

22 s. 149—*Power of Court to deprive secured creditor of possession of his security.* See Contract Act IX of 1872 s. 221 No. 371 C. 368. **3 M. L. T. 247=31. M. 123.**

23 s. 156.—*Notice to creditors to prove Claims—Failure by creditor to prove within time limited—Claimant excluded from benefit of previous distribution.*

A creditor of a company in liquidation failed to bring in his claim by the date announced by the official liquidator for claims to be made. He subsequently applied that his claim might be admitted.

Held, that the creditor was not precluded from coming in at a latter stage. The only penalty for failure to come in within the time stated in the notice was that prescribed by the latter part of the section, namely, that the claimant would be excluded from the benefit of any distribution made before his debt was proved. ISACK JESUDASEN PILLAI *v.* DIWAN BAHADUR RAMASAMY CHETTY, **27 M. 496.**

Sup: Govt. acts (VI of 1882) (*Contd.*)

24. S. 165.—See Ss. 182, 130, 165—9 B. L. R. 825, No. 33 *infra.*

25. S. 169, 214.—*Appeal out of time—Notice.*

No appeal against an order made in the matter of the winding up of a Company under the Companies Act, 1882, shall be heard by an Appellate Court unless notice of the same is given within three weeks after any order complained of has been made. *In re Estates Investment Company* (L. R. 8 Eq. C. 227) not followed. PROSANNA KUMAR GUHA *v.* BANI KANTA BHATTACHARJEE. **30 C. 758.**

26. S. 169, 214.—*Appeal from order in winding up*—Ex parte *application for time—Service of notice within the extended time—Validity of extension made on* ex parte *application—Right of respondents to raise objections at hearing of appeal.*

By S. 169 of the Companies Act, 1882, appeals are provided for against orders and decisions made in the winding up of companies, subject to the restriction that no such appeal shall be heard "unless notice of the same is given within three weeks after any order complained of has been made in manner in which notices of appeal are ordinarily given under the Code of Civil Procedure, unless such time is extended by the Court of appeal. Certain applicants, under s. 214, for an order against delinquent directors and officers of a company, appealed to the High Court against the order of a District Judge dismissing their petitions. An *ex parte* application was made by them under s. 169, for an extension of time during which notice of the appeal might be given, an order for extension was made, and notice was in fact given to the respondents within the time so extended. Upon the appeal coming on for hearing, it was objected that the time should not have been extended without notice to the respondents, and that the extension, if granted, should be subject to objection being raised at the hearing.

Held, that notice of the application for extension of time was unnecessary; but, inasmuch as the order granting an extension had been made *ex parte*, the respondents were entitled to raise objection to it at the hearing. Such an appeal must, under s. 169, be filed within three weeks of the date of the order, at the latest

Per Bhashyam Ayyangar, J.—While refraining from expressing an opinion of the point, the terms of S. 169 of the Companies Act are probably complied with by lodging the memorandum of appeal. LAKSHMINARASAYYA SETTI *v.* VENKANNA SETTI. **25 M. 573.**

27. S. 169 —See Ss. 58, 147, 169—A. W. N, 1905, p. 75 = 27 A. 409, No. 11 *supra.*

28. S. 169.—See Ss. 131, 169—31 C. 106, No. 16 *supra.*

29. s. 169, 177, 185, 189, 201, 202—*Appeals from Court's orders regarding winding up of a Company—Position of liquidators—Delegation of powers by liquidators, validity of.*

Sup: Govt. acts (VI of 1882) *(Contd.)*

Any order or decision of the Court, as to the winding up of a Company, whether the winding up be compulsory, voluntary or under supervision is appealable. This is apparent from S. 169 of this Act and S. 124 of the Companie's Act 1862 from which this section has been made.

The liquidators duly appointed under S. 177 (*b*) cannot delegate their duties to arbitrators or others and they could not be removed by the company, but only by the Court under S. 185, on due cause shown. In discharging their duties, they are not under the control of the Company, except in so far as the sanction of an extraordinary resolution of the Company is required in the case of arrangements with the creditors or debtors of the Company made by the liquidators under the supervision of the Court in a voluntary winding up under Ss. 201 and 202.

The proceedings of the arbitrators, directors and the Company, contrary to the above rules, are *ultra vires* and illegal.

New liquidators appointed by the Court under S. 185, are bound to continue further the winding up. They are not bound to call any meeting of the company as no general meeting thereof can give to the liquidators any directions. KESAYALOO NAIDU *v.* MURUGAPPA MUDALI. **16 M. L. J. 537=30 M. 22.**

30. s. 173—See S. 77, 136, 173, 214—29 C. 688. No. 13 *supra.*

31. s. 177—See S. 136, 177—28. M. 249. No. 18 *supra.*

32. s. 177.—169, 177, etc:—30 M. 22. No. 29 *supra.*

33. s. 182, 130, 165—*Joint stock company—Suit by the liquidator to recover calls—Jurisdiction.*

A suit brought by the liquidator of a joint stock company against its share-holders to recover calls in liquidation can be entertained by the Court of Subordinate Judge. S. 182 of this Act is no bar to the Jurisdiction of the Civil Court. BAI CHANCHAL *v.* LAXMI CO. **9 B. L. R. 825.**

34. S. 185, 189, 201, 202—See S. 169, 177, 185 &c:—30 M. 522. No 29 *supra.*

35. S. 214.—See S. 77, 136, 173, 214—29 C. 688. No. 13 *supra.*

36. S. 214.—See S. 169, 214—30. C. 758, No 25 and 25 M. 576. No 26 *supra.*

37. s. 214.

S. 214 of the Indian Companies Act gives no new rights, but simply provides a summary mode of enforcing rights which must otherwise have been enforced by suit. It is not all rights that can be enforced under it, but only those specially indicated. It authorizes the recovery at the instance of the liquidator, creditor, or a contributory of the Company in liquidation, first of moneys for which the defendant has become accountable to the Company and secondly the pecuniary loss sustained by the company through the misfeasance or breach of duty of the defendant. KU-

Sup: Govt. acts (XIV of 1882) *(Contd.)*

MARPURAM SHESHADRI DORASWAMY *v.* PESTONJEE JAMASJEE PADSHAH. **5. B. L. R. 633.**

38. s. 214.—*Civil Procedure Code (Act (XIV of 1882), Section III—Set off—Equitable claim—Company in liquidation—Same character.*

The words "legally recoverable" in Section III of the Civil Procedure Code have no reference to the ability of the debtor to pay the demand in full, and a sum is legally recoverable, though in the result the creditor must be satisfied with a dividend.

A Director of a company cannot set off a debt due to him against a claim made by a liquidator under section 214 of the Companies Act.

To a suit for recovery of a certain sum filed by a company the defendant claimed certain sums by way of set off. It was pleaded for the Company that set off should not be allowed in respect of the item not mentioned in the written statement, that there could be no set off because the parties had not mutual dealings and that having regard to the fact that the plaintiff Company was in liquidation the defendant must discharge his indebtedness to the plaintiff Company in full and himself be limited to a proof in the plaintiff Company's winding up proceedings.

It was also objected that in the claim of the defendant against the plaintiff Company both parties did not fill the same character as the plaintiff Company had changed its character when it went into liquidation.

Held, that set off could not be allowed in respect of the item not mentioned in the written statement, but that other objections were not valid. It could not be said that in the defendant's claim and the plaintiff's suit both parties did not fill the same character, for each liability arose prior to the liquidation, though the amounts were ascertained after it. THE AHMIDABAD ADVANCE S. AND W. CO., LD. *v.* LUXMISHANKER DEWSHANKER. **7. B. L. R. 246**

39. S. 224—*See S. 6, 41, 224. 30 C. 103 No. 6 supra.*

40. S. 249.—*Agreement between Company and Director how far binding on Company—Scope of authority of officer of Campany*—See Contract Act IX of 1872 S. 64 No. 204—**C. 315. 317. 100 P. L. R. 1805=10 P. R. 1905.**

54—Act XIV of 1882—(Civil Procedure Code.)

See Act V of 1908 New Civil Procedure Code.

55—Act XV of 1882—(Presidency small cause Courts Act.)

1 S. 1—*References to High Court.* See S. 69, 79, 28 C. 260.

2 S. I, *35 Criminal Procedure Code (Act V of 1898) Section 195 (7)—Section by Registrar of*

Sup: Govt. acts (XV of 1882) *(Contd.)*

Presidency Small Cause Court—Revocation of sanction.

The Registrar of the Presidency Small Cause Court, as the public servant concerned, has authority to grant sanction under section 195 of the Criminal Procedure Code for the prosecution of an offence under section 182 I. P. C. Such sanction can be revoked by the Chief Judge of the Court as the public officer to whom the Registrar is subordinate. IN THE MATTER OF GOVERDHANDAS MEGJI. **4 B. L. R. 940=27 B. 130.**

3. S. 6—*Registrar's jurisdiction to set aside* ex parte *decree—Civil Proceedure Code S. 622—Revision by High Court of orders of the Calcutta Small Cause Court—Charter Act, S. 13, 14.*—I. L. R., 30 Cal. 588; 7 C. W. N. 547. See Review, p. 104 *ante.*

4. S. 9, *38—Decision by a single Judge on evidence—Reversal of decree by Full Court—Jurisdiction—Practice.*

One of the Judges of the Presidency Small Canse Court at Bombay having dismissed the plaintiff's suit on the evidence, the decree of the Judge was reversed by the Full Court (composed of two Judges) as being manifestly against the weight of the evidence on an application by the plaintiff under S. 38 of the Presidency Small Cause Courts Act (XV of 1882). A question arose as to whether the decision of the Full Court was *ultra vires* and void, there being nothing in the rules framed under S. 9 of the Act providing for the exercise by the Full Court composed of two or more Judges of any powers conferred on the Small Cause Court.

Held that though the rules of procedure and practice of the Presidency Small Cause Court at Bombay were silent as to the exercise by the Full Court consisting of more than one Judge of any powers under the Act, it did not follow that the sitting of the Full Court were therefore *ultra vires.* Though no rules were framed as to the procedure to be followed, still by long practice the procedure had become well-defined and fully known, the practice being that the Full Court should consist of two Judges—the Chief Judge, and in his absence the senior Judge, presiding. The Judge against whose decree any application is made is generally the second member, if he is present in Court. If he is absent, the Chief Judge and the second, or the Chief and any other Judge, hear and dispose of the application. Such being the unwritten rules of practice, they must be deemed to be "Rules treated as in force in the Court on 31st December, 1894," under cl. (2), S 9 of the Act, and to be validly in force. They fall within the principle that an inveterate practice amounts to a rule of law.

Held, further, that the power to alter, set aside or to reverse the decree under S. 33 of the Act includes the power of the Full Court to pass a decree in favour of the party in whose favour the application is granted. The practice of the Court of Small Causes at Bombay of reviewing the decree in cases in which the notes of evidence are sufficient to enable the Full Court to undertake that review and of setting aside a wrongful dismissal of the suit where the decision is manifestly against the weight of evidence is not contrary to law. BEHRAM *v.* ARDESHIE.—**5 B. L. R. 555=27 B. 563**

5. S. 19 (q).—*Madras City Civil Court Act (VIII of 1892), s. 3—Jurisdiction—Suit for "breach of promise of marriage"—Contract of marriage between intended bridegroom and parent of intended bride.*

The phrase "breach of promise of marriage" which occurs in art. (*q*) of s. 19 of the Presidency Small Cause Court's Act has reference to the action as understood in English law, that is, between the parties who contemplate contracting the marriage, and not between an intended bridegroom and the parent of the intended bride. By s. 3 of the Madras City Civil Court Act, 1892, jurisdiction is conferred upon the City Civil Court to try all suits of a civil nature except, *inter alia*, suits cognizable by the Small Cause Court. By s. 19 (*q*) of the Presidency Small Cause Courts Act, the Small Cause Court has no jurisdiction to entertain suits for compensation for breach of promise of marriage. A suit was filed in the City Civil Court for compensation for breach of promise of marriage; but the contract alleged to have been broken had been entered into between the parent of the intended bride and the intended bridegroom.

Held that the Court had no jurisdiction inasmuch as such a suit was not exempted from the jurisdiction of the Small Cause Court HAKIM MUHAMMAD ASHRUFF HUSSAIN *v.* SYED MUHAMMUD ALI. **24 M. 652.**

6. S. 20, 22, 29.—

The mere fact that the plaintiffs have claimed a sum in excess of the Small Cause Court's jurisdiction is not enough to take the case out of the operation of Section 20 of the Presidency Small Cause Courts Act, when the result of the suit shows that the true amount or value of the subject-matter was not above the Court's limit. SHRIDHAN GOPI NATH *v.* GORDHUNDAS GOCALDAS. **3 B. L. R., 893=26 B. 235.**

7. S. 35.—See Ss. 1, 35—27 B. 130, No. 2 *supra.*

8. S. 38.—*New trial of contested cases—Application to set aside order restoring suit dismissed for default of appearance.*

An application does not lie, under s. 38 of the Presidency Small Cause Courts Act, to set aside an order of a Judge of the Court setting aside his previous order dismissing a suit for defaut of the plaintiff's appearance. CHINNATHAMBI MUDALIAR *v.* VEERABADRIAH NAIDU. **26 M. 133.**

9 S 38.—*Power of Small Cause Court to allow suit to be withdrawn after granting a new trial.*—See C. P. C., S. 373. JADU MANI BOISTABEE *v.* RAM KUMAR CHAKRAVARTI. **29 C. 239.**

10 S. 38—*Small Cause Court—Ordering a new trial—Jurisdiction—Civil Procedure Code*

Sup: Govt. acts (XV of 1882) (*Contd.*)

(*Act XIV of 1882*), *Section 622—High Court —Revision.*

The jurisdiction exercised by a Presidency Small Cause Court under section 38 of the Presidency Small Cause Courts Act 1882, is in no way limited like the jurisdiction exercised by the High Court under section 622 of the Civil Procedure Code, 1882. Section 38 is in widest possible terms. BAPUJI DORABJI *v.* DASTUR KAI-KHUSHRU. **8. B. L. R. 678.**

11 s. 38—*New trial—Civil Procedure Code (Act XIV of 1882), Section 108—Rehearing of suit decreed* ex-parte—*Rules made by the High Court—Rule* 70.

When a suit has been decreed *ex-parte* and an application under section 108, Civil Procedure Code for setting aside such decree dismissed, an application cannot be made under section 38 of the Presidency Small Cause Court Act for a new trial. Section 38 only applies "where the case has been contested" Where there was no contest, there was no "trial" and consequently there canuot be a "new trial." *22 Cal. 784 and 10 B. L. R. 355, distinguished.*

In an application under section 38 for a new trial of the matters arising under Section 108, Civil Procedure Code or Rule 70 of the High Court's Rules, the Small Cause Court has no jurisdiction to go into the merits of the case. ANANTA COOMARI DASSI *v.* RADHARANI DASSI. **3. C. L. J. 199.**

12 S. 38—*Ch. VII—Suit—Proceeding—Power of the Presidency Small Cause Court to order new trial.*

The Presidency Small Cause Court cannot take action under S. 38 of the Presidency Small Cause Courts Act, 1882, regarding an order passed in a proceeding under Chapter VII of the Act. RAMKRISHNA SITARAM *v.* HAJIDAWOOD ISMAIL.—**9 B. L. R. 208 = 31 B. 259.**

13. S. 38—*See S. 9, 38—27 B. 563 4 supra.*

14. *Chapter VII—Civil Procedure Code (Act XIV of 1882), Section 108, 647*—Ex-parte *order —Power of the Small Cause Court to set aside the order.*

The Court of Small Causes at Bombay has inherent power to deal with an application to set aside an order made *ex-parte* and to set it aside upon a proper cause being substantiated. 32 C. 253, F. B.; 9 C. W. N. 81 *followed.* TYEB BEG MAHOMED *v.* ALLIBHAI MANGALJI. **8 B L. R. 803 = 31 B. 45.**

15. *Registrar's power to set aside* ex-parte *decree—See S. 6, 7. C. W. N. 547 No. 3 supra.*

16 S. 41.

If mortgaged estate, which is in the possession of the mortgagor, is sold under the power of sale contained in the mortgage deed, the mortgagor is in possession adverse to the purchaser from the time of the sale; consequently the mortgagor cannot be said to be the tenant of, or in possession by permission of, the purchaser, unless the purchasor has done some act to indicate his permission having been granted subsequent to the sale, and the purchaser does not claim through the mortgagee in the sense intended under s. 41 of the Presidency Small Cause Courts Act, because the effect of the sale is to convey to him a new and larger estate which the mortgagee did not possess; in fact it is the same as if a full owner had conveyed to the purchaser, in which case it would be impossible to suggest that the owner remaining in possession after the sale was converted into a tenant or anything of the kind without some act on the part of the purchaser. *6 Q. B. D. 361; 10 Bom., 49, referred to.* CHABILDAS LALLOO-BHOY *v.* MOWJI DAYAL. **3 B. L. R., 456 = 26 B. 82.**

17 S. 69—*Title suit.*

The Presidency Small Cause Court has jurisdiction to try questions of title which arise incidentally in a suit, and even if such question be the principal, though not the sole one, in the suit, the jurisdiction of the Small Cause Court is not ousted. To oust the jurisdiction of the Small Cause Court, the question of title must be the sole and only one in the suit. RAJENDRA MULLIC *v.* NANDA LALL GUPTA, **I. L. R., 31 C. 1001.**

18 S. 69—*Reference to High Court—C. P. C., s. 617.*

Section 69 of the Presidency Small Cause Courts means and contemplates that the opinion to be expressed by the High Court is an opinion governed by section 617 of the Code of Civil Procedure. Before the High Court can express an opinion upon a case referred under s. 69 of the Presidency Small Cause Courts Act, the conditions contained in s. 617 of the Civil Procedure Code must be complied with. When they are not so complied with the High Court may return the case for amendment. GARLING *v.* SECRETARY OF STATE FOR INDIA. **30. C. 458.**

19. S. 69—*Rule 428 of the Rules of Procedure of the Presidency Small Cause Court, Madras, is not ultra vires.*—MOHAMMAD KHUMAR ALI *v.* RANGA RAO. **24. M. 654.**

20. S. 69, 70.—*Practice and Procedure—Contingent judgment—Security for the amount of the judgment and the cost of reference—Time for furnishing such security—Power to extend time to furnish the security.*

In cases of reference from the Presidency Small Cause Court, the provisions of the statute which governs the matter, should be strictly complied with. In a suit for damages, the officiating Chief Judge of the Presidency Small Cause Court, on May 28th, 1900, gave judgment for the plaintiff contingent upon the opinion of the High Court, and a reference was made to the High Court under s. 69 of the Presidency Small Cause Courts' Act. The defendants, at whose request the contingent judgment was given, did not fully deposit the amount of the

Sup: Govt. acts (XX of 1882) (*Contd.*)

judgment and the costs of the reference until November 14, 1900. A preliminary objection having been taken to the hearing of the reference on the ground that it was not properly before the court

Held, that security for the amount of the judgment and the costs of the reference was not furnished "at once" as required by s. 70 of the Presidency Small Cause Courts' Act, the preliminary objection must prevail, and that the reference must be dismissed, the defendants paying the costs of the reference. *Fornaro* v. *Ramnarain Sookdeb*, (14 B. L. R, 180), discussed.

Quære.—Whether there is any power in the High Court to extend the time for furnishing such security. JUGAL KISSORE *v.* SEWMUK ROY. **28 C. 250**

21. Sch. II, *Art: 11 and 31—A joint Khata holder's suit to recover share of land revenue paid by him.*

A suit by a co-sharer Khata-holder against other joint holders for the land revenue of their share paid by him is a suit of small cause nature and therefore no second appeal lies in the case—See C. P. C. s. 586—SHIVRAO *v.* PUNDLIK. **4 B. L. R. 90 = 26 B. 437.** *For other cases also see s. 586 C. P. C.*

56.—Act XX of 1882 (Paper currency).

See Tender. JAGAT TARINI DASI v. *NABAGOPAL CHAKI. 5 C. L. J. 270=34 C. 305.*

57.—Act XV of 1883 (N. W. P. and Oudh Municipalities Act.)

See U. P. of Agra and Oudh Acts.

58.—Act XII of 1884 (Agriculturist's Loans Act).

1. S. 5. *Expropriietary tenant—Mortgage of trees to secure takavi advance—Relinquishment of ex-proprietory holding to zamindars.*

The defendants in this case who were expropriectory tenants, had taken *takkavi* advances from Government and as security hypothecated some trees standing on their holding. They next relinquished their holding to the plaintiffs who were their zamindars. The amount of the advance not having been repaid, the Government, in pursuance to the provisions of s. 5 of Act XII of 1884, realised the advance by the sale of the trees.

Held, that the zamindars were not entitled to recover possession of the trees from the purchaser. *Sham Das* v. *Batul Bibi.* (I. L. R., 24 All. 538) followed. BABU LAL *v.* RAM SAHAI. **1 A. L. J. 261 = A. W. N. 1904 P. 101 = 26 A. 540.**

59.—Act XVII of 1884 (Lower Burma Municipalities Act).

See Lower Burma Acts.

60.—Act XVIII of 1884 (The Punjab Courts Act.)

See Punjab Acts.

61.—Act VIII of 1885 (Bengal Tenancy Act.)

See Bengal Acts.

62.—Act XIII of 1885.

See Indian Telegraph Act.

63.—Act XVI of 1885 (Central Provinces Courts Act.)

See Central Provinces Acts.

64.—Act XVIII of 1885. (Land Acquisition Mines Act.)

See Act I of 1894.

65.—Act XXI of 1885. (Madras Civil Courts Act.)

See Madras Acts.

66.—Act II of 1886. (Income Tax Act).

1. S. 1, *30—Sale of property for arrears of income tax—Subsequent sale in execution of prior mortgage decree—Duty of purchaser at revenue sale to pay amount due under mortgage and prevent sale in execution—Civil Procedure Code (Act XIV of 1882), S 368.*

Plaintiff, as the assignee of a mortgage executed by the father of first defendant, sued the mortgagor in 1894, on the mortgage. During the pendency of the suit, and before the decree in it was passed, the mortgagor died. Plaintiff thereupon brought the first defendant on the record as legal representative under S. 368 of the Code of Civil Procedure. In December 1894, a decree for sale was passed, which was never impeached as being fraudulent or collusive. As a fact, first defendant was not the sole legal representative of the mortgagor, who left two other sons and three daughters. The second son was, at a date subsequent to the decree, assessed to pay income tax, for arrears of which the mortgaged property was sold (under the Revenue Recovery Act), and purchased by second defendant in 1896. In 1897, the mortgaged property was sold in execution of the decree in plaintiff's suit on the mortgage, and plaintiff became the purchaser, the sale being confirmed soon after, and plaintiff obtaining a sale certificate which purported to convey the whole of the mortgaged property to him, and obtaining delivery of the property under S. 318 of the Code of Civil Procedure in 1898. Plaintiff was subsequently dispossessed by defendants Nos. 2 to 5, and brought the present suit to recover possession of the property.

Held that the sale of the property for arrears of income tax affected only the share of the second son and not the shares of the other co-heirs and that in consequence, the whole of the mortgaged property had not passed to the second defendant, under that sale:

Held also, that the second defendant, by his purchase, had acquired only the equity or redemption in respect of the second son's share in the mortgaged proper-

Sup. Govt. acts (II of 1886) (*Contd.*)

ty. The effect of S. 30 of the Income Tax Act is not to convert income tax into an arrear of land revenue, due in respect of the land which may be brought to sale for the realization of the income-tax, but merely to extend the procedure prescribed by the Revenue Recovery Act to the recovery of arrears of income tax:

Held further, that the share of the second son was bound by the decree in the mortgage suit, notwithstanding that the second son was not joined in that suit as one of the legal representatives of the deceased mortgagor. Where a defendant in a suit dies and the plaintiff, under S. 368 of the Code of Civil Procedure, brings a person on the record, whom he alleges to be the representative of the deceased defendant, such person sufficiently represents the estate of the deceased for the purposes of the suit, and, in the absence of fraud or collusion, the decree passed in the suit, will bind the estate:

Held lastly, that the sale in execution of plaintiff's decree subsequently to the second defendant's purchase in the revenue-sale extinguished second defendant's equity of redemption.—KADIR MOHIDEEN MARAKKAYAR *v.* MUTHUKRISHNA AYYAR. **12. M. L. J. 368 = 26. M. 230.**

2. S. 4, *5—See Road Cess Act, Bengal Act IX of 1880 S. 66, 72 and 81—Manindra Chandra Nandi* v. *The Secretary of State for India in Council. 5. C. L. J. 148 = 34. C. 257.*

3. S. 5.—*Cess Act (Ben. Act IX. of 1880)—Mela, profits of—Liability to pay road cess tax—Board of Revenue, authority of, to frame rules under S. 106.*

The profits of a *mela* cannot be regarded as income driven from agriculture and are not exempt from income tax under S. 5 of the Income Tax Act (II. of 1886). Land, the profits of which are subject to income tax, should not be assessed with road cess tax, except when such land is also used for agricultural purposes. S. III, B, rule 33 (p. 74. Cess Manual 1900) is not such a rule as the Board of Revenue is authorized to make under the provisions of S. 106 of the Cess Act (Ben. Act IX. of 1880).—UMED RASUL SHAHA FAKIR *v.* ANATH BANDHU CHOWDHURI, **6. C. W. N. 128 = 28. C. 637.**

4. S. 5.—See S. 4, 5—34. C. 257. No 2 *supra.*

5. S. 14.—*See Contract Act IX. of 1872. S. 69, 70—No 241. Col: 326—3. M. L. T. 111.*

6. S. 30.—See S. 1 and 30—26. M. 230 No 1 *supra.*

7. S. 47.—*Place of business.*

Section 47 of the Income Tax Act 1886, so far as it empowers the Governor General in Council to declare which of several places of business should be deemed to be the principal place of business, only applies to a case of a company or a firm and not to the case of an individual carrying on business. HADJEE AJAM GOLAM HOSSEIN *v.* THE SECRETARY OF STATE FOR INDIA. **5. W. N. C. 257.**

67.—Act XXII of 1886. (The Oudh Rent Act). *See Oudh Acts.*

68.—Act I of 1887—(General Clauses Act.)

1. S. 7—A's property was sold in execution of a decree on 20th September, 1901. The period of 30 days within which he could apply under S. 310 A Civ. Provisional Code to set aside sale expired in vacation. The Court re-opened on 18th November 1901. On that day he applied to have the sale set aside, but as the lender was not returned to him on that day till the treasury was closed he could not deposit the money payable to the purchaser on that day. But he did so on the next day.

Held, that the deposit should be regarded as duly made on the principle that "an act of the Court should prejudice no man" S. 7 of the General Clauses Act or S. 310 A C. P. C. do not indicate that the aforesaid principle did not apply to the case. (4 O. C. 182 Refd. to.) RAM NATH *v.* MURLIDHAR. **6 O. C. 68.**

69.—Act VII of 1887. (Suits Valuation Act).

1. s. 3 (1)—*Appeal to Privy Council—Civil Procedure Code, s. 596—Value of subject matter in dispute.*

The words "value of subject matter in dispute" in s. 596 of the Civil Procedure Code, do not contemplate a value assessed under the Suits Valuation Act, 1887. They mean the selling or market value of the property in dispute. (23 A 94 18 C 190, 48 P. R. 1904 1. I. A. 317, and 15 M. 237 Refd. to). KARM SINGH *v.* KHEM SINGH.—**60 P. R. 1905,** *Civil.*

2 s 3, (1)—*Rule 1 (c)—Court-fee—Garden—Fruit Garden.*

Held, that, for purposes of Court-fee and jurisdiction, a fruit garden is a "garden" even though the garden land is assessed to revenue. SIRI DHAR *v.* AMAR NATH. **61 P. L. R. 1908.**

3. s. 3, 7, 8, 11—*See Court Fees Act VII of 1870. S. 7 cl: (4)—No 22 col: 105—8. B. L. R. 885 = 31. B. 73.*

4. *See Punjab Courts Act XVIII of 1884 S. 41—35. P. L. R. 1903 = 24 P. R. 1903.*

5 s. 4, (c), 8, 9—*See Court Fees Act VII of 1870—S. 7 (4) (c)—No 13 col: 102—14 M. L. J. 1904. P. 343 = 27. M. 480.*

6. s. 7—*See S. 3, 7, 8, 11—31. B. 73. No 3 supra.*

7. s. 8—*Jurisdiction of Court—Valuation of suit—Partnership—Accounts—Suit for dissolution of partnership and settlement of accounts.*

The plaintiff sued for dissolution of a partnership and a decree for such sum as he may be found entitled to against the defendant. He valued the claim approxim-

Sup: Govt. acts (VII of 1887) (*Contd.*)

ately at Rs. 130. The suit was tried by a Munsif who had pecuniary jurisdiction up to Rs. 1,000 and a decree was passed by him for Rs. 1,676-4-3. The defendant appealed to the Divisional Judge and consented to a decree for Rs. 1,000 to be passed against him and the decree was passed as prayed for by him. On further appeal by the plaintiff—

Held, that the Munsif had no jurisdiction to pass any decree in the case once he found that the amount due to the plaintiff exceeded the pecuniary limit of his jurisdiction and that the decree passed by the Munsif and the Divisional Judge must be set aside and the suit remanded to a Court competent to hear the case. *P. R., 169 of 1888, 58 of 1902, 31 Cal., 365 followed; 21 Cal., 550 referred to.* MANNA LAL *v.* SAMANDU. **94 P. L. R., 1906 = 46 P. R. 1906.**

7 (a) s. 8—*See Punjab Courts Act XVIII of 1884 S. 70 (1) (h) further appeal 43 P. L. R. 1903.*

7 (b) s. 8—*See Court Fees Act VII of 1870 S. 7 (IV) No 9 Cal 101—65 P. L. R. 1903 = 28 P. R. 1903.*

7 (c) s. 8—*Suit for settlement of account See Court Fees Act S 7 (V) (b) and 11—No. 41 Col 112—46 P. L. R. 1906 = 94, P. L. R. 1906.*

8. S. 8—*Valuation of suit—Amendment of Court fee—Jurisdiction appeal—Lower Burma Courts Act S. 2 (h), 28 (1) (c)*

A brought a suit for, *inter alia*, an account and valued the relief claimed at Rs. 600. Against the decree passed in the suit she appealed to the Chief Court valuing the appeal at Rs. 600 for computation of Court-fee and at 13,860 for purposes of jurisdiction. At the hearing she asked to be allowed to put on an extra stamp so that the stamps on the memorandum of appeal should cover a claim for Rs. 13,800.

Held, that amendment of the valuation could not be allowed. The appeal was returned for presentation to the Divisional Court, in accordance with the original valuation of the suit. THEIN YIN *v.* FOUCAR BROTHERS AND Co., LIMITED. **4. L. B. R. 1907 P. 120.**

9. S. 8—*See Ss. 3, 7, 8, 11—31 B. 73 No. 3 supra.*

10. S. 8 *See S. 4 (c), 8, 9, 27 M. 480 No. 5 supra.*

10 (a) S. 8 *and 9.—See Courts Fees Act S. 7 (iii) (d) No. 28 Col 107, 63 P. R. 1902.*

11. S. 8, *9, 21—Civil Courts (XII of 1887) S. 15, 18, 19,—Suits Valuation Act (VII. of 1887) S. 9. 21 Valuation of suit—Suit for restitution of conjugal rights—Jurisdiction.*

A suit for restitution of conjugal rights is not a suit which is of necessity excluded from the jurisdiction of a Munsif. The value of such a suit is as a rule the value which the plaintiff chooses to put upon it provided that the suit be not unwarrantably undervalued or overvalued from improper motives. ZAIR HUSAIN KHAN *v.* KHURSHED JAN. **3 A. L. J. 266 A. W. N. 1906. P. 99 = 28. A. 545. (F.B.)**

12. S. 9—*See S. 4 (c) 8, 9—27 M. 480 No. 5 supra.*

13. S. 9.—*See S. 8, 9, 21—28 A 545 No. 11 supra.*

14. S. 11.—See Bengal Civil Courts Act S. 21 Sub. S. 2. RAGHUNATH CHARANSINGH *v.* SHAMOKOERI. **31 C. 344.**

15. S. 11.—*Under-valuation of suit—Disposal of suit not prejudicially affected—Admissibility of objection on second appeal.*

The defendant in a suit raised the objection that its valuation was incorrect, and that if correctly valued it would exceed the jurisdiction of the Munsif's Court. The objection was overruled both in the Munsif's Court and in that of the District Judge, but was raised again on second appeal.

Held, that the objection was one that could be raised on second appeal.

Held, also, that even though the suit were under valued, as contended, the objection to it on that ground was not one that the Court would entertain having regard to S. 11 of the Suits Valuation Act (VII. of 1887) inasmuch as it had not been shown that the disposal of the suit had been thereby prejudicially affected.—GOVINDA MENON *v.* KARUNAKARA MENON, **24. 43.**

16 s. 11—*Improper valuation for jurisdictional purposes—Case not finally disposed of by lower Appellate Court but only remanded for findings—Validity of order of remand.*

S. 11 of the Suit Valuation Act VII, of 1887 has the effect of curing a want of jurisdiction caused by improper valuation not only in cases where there has been a final disposal by the lower Appellate Court, but also where a case has been remanded by the lower Appellate Court to the Court of First Instance for a finding. RAMAN *v.* SECRETARY OF STATE. **11 M. L. J. 315 = 24 M. 427.**

17 s. 11—*Appeal—Lower Court's decision to dispose of the case—Suit undervalued—Second appeal—Principal and Agent.*

When a Court in the exercise of its powers conferred on it by s. 11 of the Suits Valuation Act, disposes of an appeal on the merits, holding that the fact that the claim was undervalued, did not prejudicially affect the disposal of the suit.

Held that no appeal lay from the decision of Court to dispose of the appeal. Where the plantiff undervalues his suit and institutes it in a Court which had no jurisdiction to try it and which decided it in his favour,

Held that the plaintiff could not be allowed to contend, in second appeal that his own undervaluation of the claim prejudicially affected the disposal of the suit on the merits and that the entire proceedings should be set aside for want of jurisdiction in the original and appellate Courts.

Held also that where an agent acts with the knowledge and consent of his

Sup: Govt. acts (VII of 1887) *(Contd.)*

principal and the conduct of the latter shows that he ratifies the agent's action, the principal is bound by such actions of the agent notwithstanding the fact that they were outside the scope of the agency. RAMASAMY AIYANGAR *v.* OBAI GOUNDEN—**15 M. L. J. 487.**

18 S. 11—*Appeal—Jurisdiction—Value of suit for purposes of jurisdiction—Execution of decree Attachment. Objection against—Declaratory suit for release of property from attachment—Civil Procedure Code (Act XIV of 1882), sections 278-282.*

In a suit for release of property from attachment made in execution of a decree, where the decretal amount is less than the value of the property, the jurisdiction of Court depends on the decretal amount and not on the value of the property, 2 *All., 799 followed.* The fact that in the plaint the value of the property is entered as the value of the suit for purposes of jurisdiction does not affect the question of jurisdiction.

When undervaluation of an appeal has not prejudicially affected the disposal of the appeal, section 11 of the Suits Valuation Act bars any objection raised on the ground that the appellate Court had no jurisdiction to hear the appeal. BISHNU *v.* LAL SINGH. **71 P. L. R. 1906**=55 PRL

18 (a) S. 11—*Jurisdiction—Pre-emption suit—Appeal—Court-fee—Payment of deficiency after limitation period.*

The District Judge declined to hear an appeal in a pre-emption suit valued for purposes of jurisdiction at less than Rs. 100, decided by a Munsiff of the 3rd class, on the ground that the suit was under-valued, and the true value for purposes of jurisdiction was over Rs. 100. The District Judge also held that the plaintiff could not be allowed to make up the deficiency in the payment of Court-fee after the period of limitation prescribed for such suits had expired.

Held, (1) that the District Judge had overlooked the provisions of section 11 of Act VII of 1887 (Suits Valuation Act), and that he should have acted in accordance with them; (2) that as the case fell within those provisions, the proceedings of the Munsiff were not void for want of jurisdiction; (3) that the deficiency in the Courtfee could be levied after the period of limitation had expired. The Chief Court remanded the appeal to be determined by the Divisional Judge having jurisdiction to try the case. *15 All., 65; 20 All., 11; 23 All., 433; 24 All., 118, not followed. P. R. 3 of 1893; C. A. No. 635 of 1902; 19 Cal., 780; 20 Cal., 44 followed.* RAMA *v.* TAJA **173 P. L. R. 1903.**

19 S. 11. *Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), Section 18 and 19—Suit for restitution of conjugal rights whether triable by Munsiff—Jurisdiction*

A suit for restitution of conjugal rights is incapable of being valued, and consequently arbitrary valuation placed by a plaintiff in his plaint ought not to be a determining factor in fixing the forum.

A suit for restitution of conjugal rights is not triable by a Munsiff under section 19, sub-section 1 of Act XII of 1887, but is triable by a District Judge or a Subordinate Judge under section 18 of the Act.

A suit for ristitution of conjugal rights was valued at Rs. 49, and brought in the Munsiff's Court. No objection either as to valuation or jurisdiction was taken by the defendants.

Held, by the High Court in second appeal hat the suit ought not to be dismissed as not objection to jurisdiction was taken in the manner provided in section 11 of the Suits Valuation Act, which covered a case like the present in which the Court had exercised jurisdiction by reason of an arbitrary valuation when no valuation could or ought to be made. AKLEMANNESSA BIBI *v.* MAHOMED HATEM. **8 W. N. C. 705=31 C. 849.**

20. S. 11. *See Appellate Courts duty.* *WAHIDULLAH v. KANHAYALAL. A. W. N. 1902 P. 222=25 A. 174 at 178 (F. B.)*

21. S. 11. *Partition suit—Jurisdictional value.*

The jurisdictional value of a suit for partition is the value of the whole estate asked to be partitioned and not that of the plaintiff share. (3 C. L. J. 197 followed.) Where the suit had erroneously been valued according to plaintiff's share in the first court

Held, that S. 11 of this Act applied and unless under valuation was proved to have prejudicially affected the disposal of the suit the appellate court would not interfere. 1 C. W. N. 136 followed. EDWARD DALGLISH *v.* RAMDHARI SAHU. **4 C. L. J. 509.**

22. S. 11. *Pre-emption suit—Valuation for jurisdiction.*

A mortgaged his share to B for Rs. 3000, with a conditional sale. B's representatives got a foreclosure decree which was made absolute. The decree was for Rs. 5,000 and odd and possession was taken by them. C brought a pre-emption suit alleging that only Rs. 3,000 were due under the mortgage. The first court finding that plaintiff had waived his right dismissed the suit, but the D. J in appeal decreed C's claim on payment of Rs. 5,000 and odd the decretal amount. B's representatives filed an appeal and C took cross objections.

Held, regarding S. 11 of this Act that the plaintiff had not purposely or with gross negligence under valued his suit and even if he had done so the under valuation did not prejudicially affect the disposal of the suit or appeal on the merits. SAKINA BIBI *v.* ABDUL HAFIZ. **2. O. C. 103.**

23. S. 11. See S. 3, 7, 8, 11—31 B. 73 No. 3 *supra.*

24. S. 21. See S. 8, 9, 21—28 A. 545 No. 11 *supra.*

70.—Act IX of 1887 (Provincial Small Cause Courts Act).

1. S. 15. *Small Cause—Suit for possession for land purchased dismissed—Claim in the alternative for damages or possession. Futile prayer—C. P. C. S. 584—Second Appeal*

Where a vendee sued third parties to recover possession of land purchased by him and the suit being dismissed he sued the vendor for possession of land or in the alternative damages not exceeding Rs. 500 and the Munsiff passed a decree for damages but the suit was dismissed on appeal.

Held, that the suit was cognizable by a small cause courts that no second appeal lay in the case, the suit being really one for damages not exceeding Rs. 500; the prayer for possession of the land was a futile one that could not possibly be given effect to. VENKATARAMANUJA REDDIAR *v.* SUBBARAYA PILLAI. **13 M. L. J. 299.**

2. s. 15—*Evicted tenants assignee suing for the compensation for crops—Jurisdiction.* See U. P. Rent Act (XII of 188) S. 42, 95, 206. MATHURADAS *v.* MURLIDHAR. **A. W. N. 1902 P. 150 = 24 A. 517.**

3. s. 15—*Small Cause Court case—Procedure as to recording of Judgment.*—

Held, that even when exercising Small Cause Court jurisdiction a Court is bound to place on record something to show that it has considered the evidence adduced before it by the parties when its decision involves charging a party to a suit with forgery and making a false claim. JAI LAL *v.* BAKHTAWAR. **8 O. C., 44.**

4. s. 15, 32 and Art: 8 Sch II—*Courts of Small Causes—Suit for agricultural rent.*

In the absence of a notification by Government under Article 8 of the Second Schedule of the Provincial Small Cause Courts Act, 1887, a suit for rent of paddy land is not a suit of a nature cognizable by a Court of Small Causes. Consequently a second appeal is not barred by section 586 of the Code of Civil Procedure, nor by proviso *(a)* to section 30 of the Lower Burma Courts Act, 1900. *Maung Sit Le* v. *Maung Shwe Thin*, (1901) 1 L. B. R., 69, overruled

Ma Ka v. *Ma Win Byu*, (1902) 1, L. B. R., 335; *Soundaram Ayyar* v. *Sennia Naickan*, (1900) I. L. R, 23 Mad., 547; *Uma Churn Mandal* v. *Bijari Bewah*, (1887) I. L. R. 15 Cal. 174; referred to. SEIN THAUNG *v.* SHWE KUN. **3 L. B. R., 1905. P. 47.**

5. s. 15, sch. II. art 8—*Suit for rent with cross-demand for value of improvements.*

Plaintiff sued to recover arrears of rent due by defendants and also prayed that the value of improvements due to the defendants might be made liable for the claim.

Held that the suit was one for rent and triable by a Court of Small Causes.—KARUNAKARA KURUP *v.* MUNIPERANAN. **24 M. 356**

6. S. 15—*Sch. II Arts 11, 13, 31—Small Cause Court, suit—Profits of bazar—Suit for share of—Second Appeal—Civil Procedure Code (Act XIV of 1882) S. 586.*

Sup: Govt. acts (IX of 1887) *(Contd.)*

A sued to recover Rs. 30, mesne profits (*zar-i-wasilat*). He alleged that on the basis of a decree he had obtained possession of ⅔rds of Mouza, B remaining in possession of the remainder ⅓rd. The relief sought was a decree for Rs. 30 on account of the income (*munafa*) of *Bazar Jhanjia* for 3 years at the rate of Rs. 10 a year being ⅔rd share of the plaintiff out of the whole income of Rs. 15 a year r alised by the defendant.

Held, that the suit was one solely for the payment of money. It did not fall either in art. (11) or art. (13) or art. (31) of sch. II, Provincial Small Cause Courts Act (IX of 1887) and was, therefore, one of the nature cognizable by a Court of Small Causes and no second appeal lay under S. 586, Civil Procedure Code. ANRUDH SINGH *v.* AMARDAT SINGH. **4 O. C., 89.**

7. S. 15 *Sch. II, Art. 315 (j)—Rent—Recovery Act (Mad. Act VII of 1865)—S. 78—Provincial Small Cause Courts Act (IX of 1887), S. 15 sch. II, cl. 35 (j)—Compensation for illegal distress—Civil Procedure Code (Act XIV of 1882), S. 586—Second appeal—Limitation—Cause of action complete on date of illegal distress.*

A plaint alleged that plaintiffs had for long cultivated certain land as tenants under defendants, that they had raised a crop of paddy measuring above 6 garces and stored it in three heaps on the land, that one of the plaintiffs had paid all the *kist* that was due to defendant, but that defendant had taken unlawful possession of two of the heaps of paddy measuring about 5 garces under the pretext that he had distrained them. The prayer was for an order directing defendant to deliver to plaintiffs about 5 garces of grain worth Rs. 250 at Rs. 50 per garce in respect of the two heaps of paddy of which he had taken unlawful possession. The distraint was made on 25th January 1898, and the suit instituted on 26th July of the same year.

Held, that the suit was in substance one for compensation for illegal distress or attachment and for the recovery of specific property, and that, in consequence, it was not a suit of the nature cognizable by Court of Small Causes, and a second appeal lay.

Held also, that the suit was barred. The wrong was complete and the cause of action arose when the unlawful distress was made. *Yamuna Bai Rani Sahiba* v. *Solayya Kavundan*, (24 M. 339), distinguished. PAMU SANYASI *v.* ZAMINDAR OF JAYAPUR. **25 M. 540.**

8. s. 16.—*Suit of Small Cause nature tried as original suit—D. J. in appeal dismissed the suit on merits—Order as to costs if valid—Appeal.* See S. 646 (b), C. P. C. SRI RAJA SIMHADRI APPA RAO BAHADUR, Minor, by his guardian SRI RAJA RAM CHANDRA APPA RAO BAHADUR *v.* CHELASANE BHADRAYYA. **1 M. L. T, 414 = 30 M. 41.**

9 s. 16, 32 (2)—*Suit instituted before a Munsif exercising Small Cause Court powers*

Sup: Govt. acts (IX of 1887) (*Contd.*)

up to Rs. 50—Trial by his successor invested with higher powers.

A suit for recovery of Rs 70 was instituted before a Munsiff exercising Small Cause Court powers up to Rs 50 and during the pendency of the suit the Munsif was transferred and the Munsif who succeeded him had powers of a Small Cause Court up to Rs 100.

Held, that the suit should be tried as if the powers of the Court remained the same as they were when the suit was instituted.—MAHAMIA CHANDRA SIRDAR *v.* KALI MANDOL. **12 C. W. N 167.**

10 S. 16—*Small Cause suit wrongly tried on regular side—Regular appeal preferred against decree—No question of jurisdiction raised—Civil Revision petition raising question of jurisdiction—Discretion of High Court to interfere or not, according to the merits.*

Petitioner presented this Civil Revision petition to set aside a decree which had been passed against him by a District Munsif and upheld in the District Court, on the ground that the suit was one of a nature cognizable by a Small Cause Court, whereas it had been tried as a regular suit. Petitioner (who was defendant in the suit), had raised no objection before the Munsif to the ,mode of trial; nor had he done so in his grounds of appeal to the District Court.

Held with reference to S. 16 of the Provincial Small Cause Courts Act. that, even assuming that the case was one of a nature cognizable by a Small Cause Court, whereas it had been tried as a regular suit. Petitioner (who was defendant in the suit), had raised no objection before the Munsif to the mode of trial; nor had he done so in his grounds of appeal to the District Court:

Held with reference to S. 16 of the Provincial Small Cause Courts Act, that even assuming that the case was one of a nature cognizable by a Small Cause Court, the High Court was not bound to set aside the decrees of the lower Courts, but had a discretion to interfere or not, according to the merits of the case. *Suresh Chunder Maitra* v. *Kristo Rangini Dasi* (21 C. 249), approved and followed. *Ramasamy Chettiar* v. *Orr*, (26 M. 176), not followed. PARAMESHWARAN NAMBUDIRI *v.* VISHNU EMBRANDRI, **27 M. 478.**

11 S. 16 *Art. 31—Suit by land-holder for value of trees cut by the tenant contrary to the terms of the lease—Small Cause—Jurisdiction—Revision—Civil Procedure Code (Act XIV of 1882), section 622.*

The plaintiffs sued the defendants, their tenants, for the value of trees cut by them contrary to the terms of their lease. The suit was decreed by the Munsiff exercising ordinary powers and the appeal was also dismissed. The defendants applied under s. 622 of the Civil Procepure Code for revision contending for the first time that the suit was triable by a Court of Small Causes.

Sup: Govt. acts (IX of 1887) (*Contd.*)

Held, that the contention must be allowed. The objection as to jurisdiction cannot be given up by consent, nor can it be waived. *11 Mad., 26, followed.*

The High Court was bound to interfere on revision as the Courts had exercised a jurisdiction not vested in them by law. RAMASAMI CHETTIAR *v.* R. G. ORR AND OTHERS. **12 M. L. T. 264=26 M 176.** *(This was set aside on review).*

12. S 16, 32, (2). *Munsiff invested with Small Cause jurisdiction—Transfer of cases on file on regular side to small cause side.*

A District Munsiff, who had small cause jurisdiction up to Rs. 100, had, on his file on the regular side of his Court, suits of a small cause nature for amounts between Rs. 100 and 200, some of which were partly tried. His small cause jurisdiction was then extended to Rs. 200, whereupon he transferred the cases in question to his small cause file and tried and disposed of them as small causes:

Held that the transfer and trial were not in accordance with law.—HARI KAMAYYA *v.* HARI VENKAYYA. **26 M. 212; F. B.**

13. S. 16-33.—Where the same Judge presided over a Small Cause Court and District Court and tried by mistake as Judge of the District Court a case of a Small Cause nature—

Held that the mistake did not alter the character of the suit, and that no appeal lay from the decree 12. B. 486 and 25. referred to. B. 417 followed. NGA SHWE THA *v.* NGA PO. **U. B. R. 1907. P. 1.** *(Provincial Small Cause Court Act).*

14. S. 17.—*Application for review—Deposit in Court—Security.*

In S. 17 proviso the words "at the time of presenting his application" govern and refer to both "the deposit of the amount in Court" "and the giving of security, etc." Therefore "deposit" or "security" is a condition precedent to the granting of the review application. 18 C. 83; 28 A. 470 foll.; 13 M. 171; F. B. diss. from —SOMABHAI HIRACHA D. *v.* WADILAL PREMCHAND. **9 B. L. R. 883.**

15. S. 17.—*Application to set aside S. C. C. decree—Decretal money when to be deposited.*

A applied to have an *ex parte* decree passed against her in a small cause suit set aside. On presenting her application she applied also for permission to deposit the amount of the decree, but the record of the case being the record-room of the District Judge's Court, the Court refused to receive the money, and sent for the record. Sometime after the record was received, the applicant deposited the amount of the decree. Subsequently the Court dismissed the application, because the amount of the decree was not deposited with the application.

Held, that if an applicant makes the

Sup: Govt. acts (IX of 1882) (*Contd.*)

deposit or gives the security when permitted or directed to do so, although the deposit is not made or the security is not given at the time of making the application, the provisions of section 17, Act IX of 1887, are sufficiently complied with, and that the deposit made by the applicant should have been accepted. A Court having accepted an application should either permit the applicant to make the deposit or give security at once or allow a reasonable time for doing so.—RAGHUNANDAN *v.* BADAL, **3 O. C., 296.**

16. S. 17. *Application to set aside an* ex parte *decree.*

S. 17 of the Provincial Small Cause Courts Act, 1887, requires that at the time of presenting his application, the applicant must either deposit in Court the amount of the decree or give security as provided for by the section; so that the deposit of the decretal amount or the furnishing of security is a condition precedent to the entertaining of an application to set aside an *ex parte* decree. 18 C. 83, followed. 13 M. 178 dissented from. JAGAN NATH *v.* CHET RAM. **28 A. 470=3 A. L. J. 318.**

17. S. 17. *Application to set aside an* ex parte *decree—Condition of depositing decretal amount or furnishing security whether mandatory or directory only.*

A's application to set aside an *ex parte* decree was rejected on the ground that he had not complied with the provisions of S. 17 of this Act. To revise that order of rejection A made a petition on the ground that the provisions of the section should be regarded as directory and not mandatory.

Held, the provisions of this section form a condition precedent and are to be strictly construed. Enactments regulating the procedure in Courts are usually imperative and not merely directory. 5 Bom H. C R 79 and 14 W. R. 42 Ref. 13 M. 178 not approved and 18 C. 83 followed. UMRAO JIWAN PATEL *v.* MUNNUMIAN MUSALMAN. **2 N. L. R. 23.**

18. S. 17. (1) *Application to set aside a decree passed* ex parte *for a review of judgment—Decretal amount not deposited with application but within limitation time for application.*

A applied under S. 17 of this Act without depositing the decretal amount or giving security therefor. But before the application was rejected and within the time limited for making the application he deposited the money duly.

Held, the application substantially satisfied the requirements of the law and that the applicant has a right to have his application heard on the merits. 18 C 83 distinguished. JEUN MUCHI *v.* BUDHIRAM MUCHI. **1 C. L. J. 43=32 C. 339.** *But see S. 25—5 A. L. J. 295 No. 39 infra.*

19. S. 17—*Application to set aside decree*—Ex-parte *decree—Deposit—C. P. C. S. 108 and 310—Sale—Application to set aside sale.*

An *ex-parte* decree was passed by a Small Cause Court against the defendant and his property was sold by a Munsiff to whom decree was transferred for execution. The defendant made an application under section 310 A (C. P. C.) and deposited the amount of the decree and 5 per cent on the purchase money in the Court of the Munsiff. Subsequently he applied to the Small Cause Court to set aside the *ex-parte* decree. He also applied to the Munsiff praying that the money he had deposited under section 310 A might be retained in Court pending the hearing of the application under section 108 (C. P. C). The applications made under sections 108 and 310. A to the Small Cause Court and the Munsiff respectively were dismissed on the ground that the deposit made by the defendant did not satisfy the requirements of section 17 of the Provincial Small Cause Court and section 310 A. of the Civil Procedure Code.

Held, that the deposit was a sufficient compliance with the requirements of the sections and both the applications of the defendant must be granted. HANOOMAN SINGH *v.* LUCHMAN SAHOO. **8 C. W. N. 355.**

20. S. 17, (1)—*Order Dismissing suit for default—Decree—Application to set aside dismissal of suit—Deposit in Court or security= Civil Procedure Code, ss. 2, 102, 103.*

An order dismising a suit under section 102 of the Code of Civil Procedure does not involve the making of a "decree" within the meaning of section 2 of the Code. The proviso to sub section (*1*) of section 17 of the Provincial Small Cause Court Act, which requires an applicant for an order to set aside a decree *ex-parte* to deposit the amount due or to give security, does not apply to it.

Mansab Ali *v.* Nihal Chand, (1893) I. L. R., 15 All., 359; Chand Kour *v.* Partab Singh, (1888) I. L. R., 16 Cal., 98; Gilkinson *v.* S. Ayyar, (1898) I. L. R. 22 Mad. 221; followed.

Ramchandra Pandurang Naik *v.* Madhav Purushottam Naik, (1891) I. L. R. 1, Bom. 23; Radha Nath Singh *v.* Chandi Charan Singh 1903 7 C. W. N., 486; Bahadur Panday *v.* Phool Chand Gajaund, Civil Miscellaneous No. 189 of 1889; Radha Nath Singh *v.* Chandi Charan Singh, (1903) I. L. R., 30 Cal., 660; dissented from.

Maharaja Dhir j Maharana Shir Mansingji *v.* Mehta Hariharram Narharram, (189.) I. L. R., 19 Bom., 307; Auwar Ali *v.* Jaffer Ali, (1896) I. L. R. 23 Cal., 827; Jagarnath Singh *v.* Budhan, (1895) I. L. R. 23 Cal., 115; Williams *v.* Brown, (1886) I. L. R. 8 All., 108; Lekha *v.* Bhauna, (1895) I. L. R, 18 All., 101; Mussummat Jamina Bibi *v.* Seri Chand Bhagat, (1893) 2 C. W. N., 693; referred to. MANECK BAI *v.* P. L. S. A. MOOTHIA CHETTY. **4 L. B. R. 1907. P. 17.**

21. S. 18.—*See C. P. C. S. 586.* HANSRAJ *v.* RATNI. **A. W. N. 1904 P. 227= 27 A. 200.**

Sup: Govt. acts (IX of 1887) *(Contd.)*

22. S. 23.—*Suit for rent—Question of title—Return of plaint—Jurisdiction of Court to try question of title—Appeal.*

When in a suit for rent a Court of Small Causes returns a plaint under section 23 of the Provincial Small Cause Courts Act to be presented to a Court having jurisdiction to decide the question of title in respect of property for the rent of which claim is made the Court to whom the case is sent for disposal has simply to try the claim for rent and decide whether the plaintiff was entitled to the relief sought or not. If the nature of the defence renders it necessary to decide a question of title the Court has to draw issues of fact on that point as may be necessary and decide them incidentally. The jurisdiction of the Court is not barred because the defence set up makes it necessary incidentally to decide a question of title as to the property the value of which exceeds the pecuniary jurisdiction of the Court. The decree passed by the Court is subject to procedure and appeal as in an ordinary suit. I. L. R., XXIII, Cal., 425, referred to. MIRAJ-UD-DIN *v.* KARIM BAKSH. **43 P. R. 1902.**

22 (a). S. 23—*Question of title—Claim to possession of land when title to land disputed—Second appeal—Civil Procedure Code (Act XIV of 1882), S. 586.*

The plaintiff sued to recover Rs. 75 as the *utpan* (income) of certain lands. In his defence the defendant raised the question of the title to the land. The plaintiff obtained a decree, which was confirmed in appeal.

Held, that the suit, although raising the question of title, was a suit cognizable by a Small Cause Court, and that therefore under s. 586 of the Civil Procedure Code (XIV of 1882) no second appeal lay. VIANYAK *v.* KRISHNARAO. **25 B. 625.**

23. S. 23.—*Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), s. 23—Exercise of power under s. 23 gives Court jurisdiction to try suit as an original suit.*

Where a question of title, which a Court of Small Causes cannot finally determine, is involved in a Small Cause suit, the Court has discretionary power under s. 23 of Act IX of 1887 to return the plaint to be presented to a Court having such jurisdiction. The latter Court thereupon acquires jurisdiction to try the suit as an original suit and is bound to receive the plaint and try it as such. *Mahamaya Dosya* v. *Nitya Hari Das Bairagi* (I. L. R., 23 Cal. 425), followed.—SUBBAROYADU *v.* GANGAYYA, **29 M. 329**

24. S. 25.—*Revision—Civil Procedure Code (Act XIV of 1882), S. 622—Powers of High Court.*

Held that the High Court has greater powers of interference under S. 25 of the Provincial Small Cause Courts Act than it has under S 622 of the Civil Procedure Code as now interpreted.—MC-CARRON *v.* F. WALTI, **1. A. L. J. 637 = A. W. N. 1904. P. 227 = 27 A. 192.**

25. S. 25.—*Tort—Attack by vicious animal—Right of defence of person and property—Civil Procedure Code, s. 622.*

T. was driving home in a carriage driven by two mares when he was overtaken by a vicious stallion which attacked the mares and made his way into the compound of T and renewed his attacks upon the mares. All his attempts to drive away the stallion being fruitless, T inflicted a spear wound on the hind quarters of the animal from the effects of which it subsequently died.

Held, that the owner of the stallion was not entitled to damages for his loss, inasmuch as T. was perfectly justified in inflicting the spear wound in defence of his property and person.

Held also that the powers of interference conferred by S. 25 of the Provincial Small Cause Courts Act are wider than the powers conferred by S. 622 of the Civil Procedure Code.—J. G. TURNER *v.* JAGMOHAN SINGH, **A. W. N. 1905, p. 77. = 2. A. L. J. 297 = 27. A 531.**

26 S. 25—*High Court's power of revision.*

Where the decree or judgment of a Small Cause Court involves a substantial error of law which in the opinion of the High Court has occasioned a failure of justice, the High Court has power to interfere under this section NILMANI MAITHRA *v.* MATHURA NATH JOARDAR. **5 C. L. J. 413.**

27 S. 25—*High Court's power to exonerate defendant against whom decree has been passed and pass a fresh decree against another.* See C. P. Code s. 561 and 617. KRISHNA AIYANGAR *v.* APPANAIYANGAR **17 M. L. J. 62.**

28 S. 25—*Revision—Order of single Judge of High Court—Appeal against—Judgment.* See Letters Patent (Madras) Act. Art., 15. PUTHUKUDI ABDU *v.* PUVAKKA KUNHI KUTTI. **27 M 340**

29 S. 25—*Appellate Court's order directing Civil Court to receive plaint first returned by it for presentation to Rent Court. Revision.* See Rent Act (Oudh) s. 124 A. F. SHANKAR *v.* BHAWANI. **5 O. C. 332.**

29 (a) S. 25—*Section 25—Revision.*

The Chief Court declined to exercise its powers under section 25 of the Provincial Small Cause Courts Act, when there was no reason to think that injustice had been done.

Held, that it was contemplated to allow appeals on points of law under section 25. HARDIAL *v.* KANSHI RAM. **P. L. R. 113 of 1903.**

30 S. 25.—*Revision—Powers of High Court—Civ. Pro. Code (Act XIV of 1882), Ss. 108, 622—Setting aside* ex parte *decree—Condition precedent*

The High Court's powers of revision under S. 25 of this Act are more extensive than those exercised by that Court under S. 622, Civ. Pro. Code (A. W. N. 1907 P. 227 and 21 A. 89 refd to).

Where deposit is not made nor security is given the Court is bound to dismiss application to set aside *ex party* decree.

Sup: Govt. acts (IX of 1887) *(Contd.)*

By subsequently depositing the decretal amount the defect is not cured (3 A. L. J. 318 followed). NANHE MAL *v.* HAJAS. **5. A. L. J. 295.**

30. (a) S. 25.—*Revision—Mistake of Law.* In the exercise of its Revisional Jurisdiction, under Section 25 of the Provincial Small Cause Courts Act, the Chief Court is not bound to interfere when a Small Cause Court has erred on a point of Law, but it would interfere when a wrong decision on a question of law *e. g.* question of limitation, has resulted in a failure of justice.

The Chief Court cannot decline to decide a law-point raised merely because it is intricate and difficult, if the case itself is such that the Court's revisional action is necessary in the ends of justice. *P. R.* 19 *of* 1901, *S. C.*, 68 *P. L. R.* 1901 *considered.* 21 *Bom.*, 250 ; 16 *All* 476 ; 7 *Bom.*, 342, 21 *All.*, 89, *referred to.*

When a suit on a bond payable by instalments providing that the whole amount will become payable at once in case of default in payment of any instalment was dismissed by the Small Cause Court as barred by limitation under article 75 of the Limitation Act and the plaintiff applied under Section 25 of the Provincial Small Cause Courts Act for revision of the order of dismissal and contended that article 75 was not applicable to the case and there was waiver as regards the default of the first instalment.—

Held, that the Chief Court was competent to consider the legality or otherwise of the order.

Held, also, that the order of the Small Cause Court was not contrary to law. *P. R.* 188 *of* 1883 (*F. B.*) *followed.* 8 *Bom.*, 561, *referred to.*

Per Robertson, J.—The Chief Court should not interfere in the exercise of its revisional jurisdiction under section 25 of the Provincial Small Cause Courts Act except where a clear case of injustice resulting from a decree or order clearly not according to law has been made out.

Per Chatterji, J.—It is not allowable in construing an Act to refer to the report of the Select Committee and the debates in the Legislative Council on the Bill which subsequently is passed into the Act.

In an appeal it is the right of the appellant to obtain an adjudication, and one in his favour, if his grounds are made out, irrespective of the question whether substantial justice is or is not thereby dispensed in the case.

A point of law or procedure may, in a particular case, work a great hardship, but in an appeal the Court is bound to give effect to it, without regard to the consequences. In cases of revision, it is quite otherwise. No party has the right to obtain an adjudication, and it is entirely within the discretion of the Court to interfere or not, as it thinks fit. It will not interfere to perpetrate an injustice, but only to promote the ends of justice.

Section 622 of the Civil Procedure Code is not a safe guide for the exercise of the revisional powers under Section 25 of the Provincial Small Cause Courts Act. SAYAD MIR SHAH *v.* ATAR SINGH. **138 P. L. R. 1903.**

30. (B)—s. 25.—*Finding contravening s. 203 C. P. C.—High Court's interference.* Where the judgment of the Judge of S. C. C. does not give points for determination and his decision thereon as required by s. 203 C. P. C. the High Court will interfere with the decision. THAWAR DAS *v.* ROCHI RAM. **1 S. L. R. 118**

31 S. 27—*Civil Procedure Code (Act XIV of 1882), Section 223—Execution of decree—Decree passed by Munsiff exercising Jurisdiction as Small Cause Court—Transfer to regular side of Court for execution - Necessity of application for transfer—Appeal against orders made after transfer—*

A Munsiff exercising powers of a Small Cause Court cannot *suo motu* transfer an execution case to himself as Munsiff exercising jurisdiction on the regular side of his Court, for under section 223 of the Civil Procedure Code an application by the decree-holder is necessary to take action for transfer of execution proceedings.

When a case is transferred from the file of the Small Cause Court, an appeal lies in the ordinary course against the orders passed by the Court executing the decree. JIWAN *v.* MUNSHI RAM. **3. P. L. R. 1905.**

32 s. 27—*Appeal from Munsiff's decree in suit instituted as Small Cause Court suit and tried as regular suit—*

A suit, cognizable by a Court of Small Causes was instituted in a Munsiff's Court as a suit of that nature. The Munsiff, after taking evidence, thought that the suit was excluded from the jurisdiction of a Small Cause Court, and instead of returning the plaint for presentation to the proper Court, removed the case to the register of regular suits, tried it as such, and passed a decree.

Held, that the procedure, adopted by the Munsiff, was bad, that the case remained all along a case of the previous nature and that the decree was not appealable.—KANDHAI GIR *v.* BHAGWANT GIR, **7. O. C., 144.**

33 s. 27—*In execution of decree of Court of Small Causes, order was passed by Court not invested with such powers—Suit instituted in Court having jurisdiction of Small Cause Courts and continued when Court ceased to have that jurisdiction.*—

A sued B for money in the Court of a Munsiff invested with the powers of a Court of Small Causes. The Munsiff decreed the claim. B died, and A applied to the Munsiff for execution of the decree against C who was the legal representative of B. The application for execution was heard by Munsiff who had not the powers of a Small Cause Court. He passed an order that C was liable to be proceeded against. C appealed to the Court of Subordinate Judge who reversed the order.

Held, that the order of the Munsiff was

Sup: Govt. acts (IX of 1887) *(Contd.)*

not final under sec. 27 of this Act, and was appealable.

Held, further, that sec. 35 of the said Act does not confer the powers of a Small Cause Court upon an officer who does not possess those powers. 13 All., 324 *and* 2 O. C., 143, dissented from.—KAMTA PERSHAD *v.* MAHABAL SING, **6. O. C., 81.**

34. s. 32.—See Ss. 15, 32 and Art 8—3 L. B. R., 1905, P. 47—No. 4 *supra.*

35. s. 32 (2).—*Jurisdiction extended pending suit—Appeal.*

A suit to recover Rs. 81-4, was filed in the Court of a Subordinate Judge who was at the time invested with the jurisdiction of a Court of Small Causes to the extent of Rs. 50. Later the jurisdiction of the Subordinate Judge as a Court of Small Causes was raised to Rs. 100 and subsequently to this, the suit was decided by him as a regular suit and the claim was allowed. On appeal by the defendant, the District Judge held that no appeal lay on the ground that the suit was triable and must be taken to have been tried by the Subordinate Judge in the extended jurisdiction vested in him as a Judge of the Court of Small Causes.

Held, on an application by the defendant under s. 622 of the Civil Procedure Code (Act XIV of 1882) that the appeal lay to the District Judge. Under s. 32 (2) of the Provincial Small Cause Courts' Act (IX of 1887), it was necessary that the Judge should, before the institution of the suit, be invested with a Small Cause Court jurisdiction entitling him to hear the particular suit. 26 M. 212, followed. (5 Bom. L. R. 398, explained.) SAMBHU DHANJI *v.* RAM VITHU. **28 B. 244 = 5 B. L. R., 1008.**

36 s. 32 (2)—*Practice—Transfer of part-heard case from regular side to Small Cause side on extension of Small Cause jurisdiction.*

The effect of section 32 (2) of the Provincial Small Cause Courts Act is that none of the provisions of the Act apply to a suit which has been commenced in a court which has been invested with Small Cause jurisdiction before the date when the Court was so invested.

When a Munsiff was invested with Small Causes jurisdiction up to Rs 200, he having till then exercised such jurisdiction up to a limit of Rs 100, there were on his regular file 77 suits of a Small Cause nature between Rs 100 and 200, some of which had been partly tried. In accordance with the practice in vogue he transferred all these suits to his Small Cause file.

Held, that the practice was not in conformity with law. HARI KAMAYA *v.* HARI VENKAYYA. **26 M. 212.**

37 s. 32 (2)—See s. 16, 32 (2)—12 C. W. N. 167 No. 9 *supra.*

38 s. 32 (2)—See s. 16, 32 (2)—26 M. 212 No. 12 *supra.*

39 s. 33, 35—*Small Cause tried as a regular suit—Set-off exceeding small cause jurisdiction—Appeal.*

Sup: Govt. acts (IX of 1887) *(Contd.)*

The plaintiff filed a suit for recovery of Rs 49, cognizable by a Court of Small Causes, in the Court of the Subordinate Judge, who was invested, under section 28 of Act XIV of 1869, with the jurisdiction of a Judge of a Court of Small Causes, to try suits up to the value of Rs 50. The defendant claimed a set-off of Rs 120. The suit was heard by the successor in office of the Subordinate Judge, on whom similar powers were conferred up to the same pecuniary limit of Rs 50, which were subsequently enhanced to the limit of Rs 200. The claim was registered and numbered as a regular suit and dismissed and the Court awarded the defendant's counterclaim of Rs 120 made by way of set-off.

An appeal was preferred to the District Judge.

Held, that the Subordinate Judge must be taken to have dealt with the case under the Small Cause Court jurisdiction, even if he was not quite alive to it at the time. The suit did not cease to be a suit cognizable by the Court of Small Causes, or cease to be so tried, merely because the Subordinate Judge at a later stage dealt with it as if he were trying it under his ordinary jurisdiction.

Held, also, that the plaintiff's suit did not cease to be cognizable by a Small Cause Court by reason of the defendant having, by way of set-off, made a counter-claim for Rs 120, when the pecuniary limit of the jurisdiction of the Court, invested with the jurisdiction of a Court of Small Causes, was Rs 50 only. BALCHAND INDARSA *v.* BALARAM MERWADI, **5 B. L. R. 398.**

40 s. 33—See s. 16, 33—U. B. R. 1907 P. 1 No. 11 *supra.*

41 s. 35—*Application to be made in Court having jurisdiction at time of application.*

A Court of Small Causes was abolished after having passed a decree. Under section 35 of this Act proceedings regarding such decree ought to be taken in the Court in which the suit if instituted at the time of such application would have to be instituted. Where the jurisdiction in such a case is to be determined by considering the place of residence of the defendant, his residence at the time of the application is to be considered as his place of residence. KURELLA CHANCHAYYA *v.* POLISETTI SITARAMASWAMY. **30 M 217.**

42. s. 35.—*Munsifs, Jurisdiction of—Munsif exercising Small Cause Court powers—Civil Procedure Code (Act XIV of 1882), s. 25—Civil Courts Act (XII of 1887), s. 17—Appeal.*

When a Munsif vested with the powers of a Court of Small Causes is transferred and is succeeded in office by a Munsif not vested with such powers, and the Court of Small Causes is in consequence abolished, the successor has jurisdiction, under s. 35 of the Provincial Small Cause Courts Act and s. 17 of the Civil Courts Act (XII of

Sup: Govt. acts (IX of 1887) *(Contd.)*

1887), to try in his ordinary civil jurisdiction all the suits pending on the files, whether they be suits falling within the ordinary civil jurisdiction of the Court of his predecessor, or within its jurisdiction as the Court of Small Causes which has been abolished. No order of transfer under s. 25 of the Code of Civil Procedure is necessary to enable the successor to try the suits, and any order purporting to fall under that section, if made, has not the effect of giving to the successors jurisdiction to try as a Court of Small Causes the suits which had been pending in the abolished Court of Small Causes. The successor can try such suits only in his ordinary civil jurisdiction, and his decision in such case is open to appeal. *Mangal Sen* v. *Rup Chand*, (13 A. 324) dissented from. DULAL CHANDRA DEB *v.* RAM NARAIN DEB. **31 C. 1057.**

43. S. 35.—See S. 33, 35—5. B. L. R. 398 No. 39 *supra.*

44. *S h. II, Art. 2, 3, Section 586.—Tort—Tort committed by Government servant Government. Liability of—Second appeal—Government. Suit against—C. P. C. (1882) S. 586.*

In cases of torts committed by Government officials the person to be sued is the person who has actually done the alleged wrongful act, who may or may not have a statutory or other defence.

The plaintiff sued Government for recovery of money alleged to have been wrongfully made over by a Magistrate purporting to act under the provisions of section 577 of the Criminal Procedure Code.

Held that the Government was not liable, for the Magistrate was in such a position that, for all practical purposes, the Government had no control over him, it did not cause the act complained of, did not authorise or adopt it, and gained no profit from it. 4 *Mad.*, 344; 17 *Cal.*, 290 *referred to.*

That the suit was cognizable by a Small Cause Court; and its value being less than Rs. 500, second appeal did not lie. MOTI LAL GHOSE *v.* SECRETARY OF STATE FOR INDIA. **1 C. L. J. 355=9. C. W. N. 495.**

45. *Schadule II, Article 3—Official Act—Order by Commissariat Officer, confiscating security tendered by contractor.*

Held, that an order given by a Commissariat Officer forfeiting a contractor's earnest money is not an official act such as is contemplated by article 3 of Schedule II of the Provincial Small Cause Courts Act. A claim for recovery of earnest money against Government being in the nature of a Small cause, appeal in a case of value not exceeding five hundred rupees lies to the District Judge and not to the Divisional Judge. BABU GOPAL SAHAI *v.* THE SECRETARY OF STATE. **91 P. L. R., 1902.**

45 (a) *Sh. II, Art. 3.—Case of Contract or of Tort—Damages.*

Sup: Govt .acts (IX of 1887) *(Contd.)*

A sent a parcel containing jewelry in a value payable parcel through the Post Office to B. The postal clerk delivered the parcel to the addressee without collecting its value from him. A sued the Secretary of State for India in Council to recover the value of the parel, held that by its contract the Post Office is bound to collect the money of the value payable parcel. By its neglect to do so it commits a breach of contract for which it is liable in damages, the measure whereof is the value of the article. A Small Cause Court can entertain such a suit, it being a suit on contract and not on tort, and Art 3 of this Act does not apply thereto. MOHTI RANGAYA CHETTY *v.* SECRETARY OF STATE FOR INDIA. **15. M. L. J. 226-28. M. 213.**

46 *Sch. II, Art: 7—Suit for enhanced rent of house—Liability of Tenant to pay enhanced rent of house—Notice.*

B occupied A's house on rent. A issued a notice to B that he would be liable to pay enhanced rent if the house was not vacated by a certain date. A claimed rent at the enhanced rate.

Held, that the suit was not one for enhancement or assessment of rent under art. 7, and therefore was cognizable by a Court of Small Causes.

Held, also, that as the tenant failed to vacate the house after receipt of the notice, he must be held to have impliedly accepted the proposal that the rent would be enhanced.—BHAGWAN DAS *v.* MUSAMMAT MITTHANA **6 O. C., 190.**

47. *Sch. II, Arts. 7, 13—Claim for 'poruppu' and 'kulavettu :—*

A claim for *poruppu* does not fall within Art. 7 as a claim for apportionment of rent nor the claim for *kulavettu* does fall within Art. 13 of second Schedule of this Act. SEETHARAMA AIYAR *v.* FISCHER. **17 M. L. J. 487.**

48.—*Schedule II, Article 8—Compensation for rent wrongfully taken by a trespasser—Suit for mesne profits.*

Where a suit is for compensation for rent wrongfully taken by a trespassar, Article 8 of the Provincial Small Cause Courts Act does not apply.

23 *Cal.*, 885, *F. B.;* 12 *Mad.*, 196; 80 *P. R.*, 1896, *and* 94 *P. R.*, 1900, *S. C.*, 39 *P. L. R.*, 1901, *referred to.* GANGA RAM *v.* ABADAN **3 P. L. R. 1903.**

48. (A).—*Sch. II, cl. 8.—Judge of the Court of Small Causes, includes all Judicial Officers vested with Small Cause Court powers.*

The words, "the Judge of the Court of Small Causes," in cl. (8), Sch. II of this Act apply either to the Judge of the Court of Small Causes constituted under the Act or of a Court invested with the jurisdiction of a Court of Small Causes.

Where, the Local Government acting under cl. (8), Sch. II of the Act invested in general terms the Munsiffs of a certain place, with Small Cause Court Jurisdiction regarding suits of rent of homestead lands up to a

Sup: Govt. acts (IX of 1887) *(Contd.)*

certain value, such Munsiffs are competent to entertain and try such suits as a Court of Small Causes. AKSHAYA KUMAR SAHA *v.* HIRA LAL DOSADH, **7 C. L. J. 407 = 35. C. 677.**

49.—*Sch. II, Art 8.*—See s. 15, 32, Art 8—B. L. B. R. 1905 P. 47 No. 4 *Supra.*

50.—*Art 8*—See s. 15, Art 8—24 M. 356. No. 5 *Supra.*

51.—*Art 11, 31—Profits of land wrongly received by defendant's—Small Cause suit.*—See C. P. C. s. 586—VINAYAK *v.* IRISHNARAO. **3. L. B. R. 233 = 25. B. 625.**

51. (A).—*Sch. II Arts 11 and 31.—A suit to recover value of Jack fruits unlawfully taken away is a suit for damages* cognizable by a S. C. Court Articles 11 and 31 do not exempted 17 C. 707 23 C. 884. A. W. N. 1898 J. 10 *referred to* DILDAR KHAN *v.* GULAB, **Q. O. C. 256.**

52.—*Sh II Art 11, 13.*—See s. 15, Art—11, 13—4. O. C. 89. No. 6 *Supra.*

53.—*Schedule II, Articles 11 and 38.*

A suit brought by the junior members of a *tarwad* against the *karnavan* to enforce their right to participate in the joint enjoyment of the *tarwad* property in accordance with the terms of the family *karar* is not "a suit relating to maintenance" within the meaning of Article 38 of the second schedule of the Provincial Small Cause Courts Act but it is within the meaning of Article 11, "a suit for the enforcement of right to or interest in immoveable property." ACHUTAN NAIR *v.* KUNJUNNI NAIR.—**13. M. L. J. 499.**

54—*Sch. II, arts. 13, 31—Second Appeal—Civil Procedure Code (Act XIV of 1882), s. 586.*

The plaintiff sued the defendant in the Court of a Munsiff for the recovery of Rs. 150 which the defendant had collected in a certain market for the expenses of a temple alloted to the plaintiff under an award. It appeared that certain dispute between the parties about the partition of certain property was referred to arbitration and under the award made in accordance thereof and the decree thereon, the expenses of the temple alloted to the plaintiff were to be met from the duties and weighment charges collected in a market.

Held that the suit was conguizable by a Court of Small Causes and that being so, s. 586 of the Civil Procedure Code precluded a second appeal from the decree of the Court below, the value of the subject matter being below Rs. 500; it being immaterial that the suit was brought in the Munsiff's Court instead of in the Small Cause Court. *Kalian Dayal* v. *Kalian Nauer* (I. L. R. 9 Bom. 259) followed. *Dyebukee Nundan Sen* v. *Madhoo Mutty* (I. L. R., 1 Cal 123) dissented from.—MAHADEO *v.* BUDHAI RAM, **A. W. N., 1904, p 50; I. L. R. 26 A. 358.**

55—*Sch II, art. 13—Dues to which a person is entitled by reason of his interest in a religious institution—Suit for a share of presents made to a religious institution—Maintainability.*

A suit by a member of a religious association to recover his share of the "voluntary payment" made to the association is a suit, within the meaning of art. 13, sch. 2 of the Provincial Small Cause Courts Act, for "dues" to which a person is entitled "by reason of his interest in a religious institution," and as such it is excepted from the cognizance of a Court of Small Causes. (26 A 360 commented on)—BHAVADASON *v.* NARAYANA SOMAYAJIPAD, **28 M 202.**

56 *Art. 13.—Rent Recovery Act (VIII of 1865, Madras), Section 4—Land cess—Rent—Second appeal.*

Land-cess can be included in the rent under Section 4 of the Rent Recovery Act.

No second appeal lies in a suit for rent including landcess when the amount of the claim is under Rs. 500, the suit being cognizable by a Court of Small Causes. ZEMINDAR OF TARLA *v.* LATCHIAH. **13. M. L. J. 211.**

57 *Art. 13*—See s. 15, Art. 11, 13, 31—4. O. C. 89. No 6 *supra.*

58 *Art. 13*, 15, 18—See s. 18—27. A. 290. No 21, *supra.*

59 *Art. 13.*—See Art. 7, 13—17. M. L. J. 487—No. 47 *supra.*

60 *Schedule II, cls* 13, *31*—

The suit was one by a person claiming as landowner to be entitled to receive the rents or fees paid by shopkeepers for the temporary occupation during a fair of a piece of land which, the plaintiff alleged, belonged to his *mahal.* He further alleged that the defendant claiming that the land was his had wrongly received those dues or rents, or whatever they may be called.

Held, that Clause 31, Schedule II of the Provincial Small Cause Courts Act, excluded the suit from the coguizance of a Court of Small Causes. 17 *Bom*, 42, *referred to.* RAMESHAR SINGH *v.* DURGA DAS. **W. N., A., 1901, p 128 = 23 A. 437.**

61. *Art. 15, 18—See S. 18. 27 A. 290, No. 21 supra.*

62 *Sch. II, Art. 18—Suit for money borrowed by a trustee from his co-trustees out of the moneys belonging to the trust estate.*

One of several trustees of a charity personally borrowed from other trustees some moneys belonging to the estate of the charity and gave a promissory note therefor. The other trustees subsequently instituted a suit in the Small Cause Court to recover the amount.

Held, that the suit was not one "relating to a trust," within the meaning of art. 18 of sch. II to the Provincial Small Cause Courts Act, and that the Small Cause Court had jurisdiction to try it. SUNDARALINGAM CHETTI *v.* MARIAPPA CHETTI. **I. L. R., 26 M 200.**

63. *Schedule II, Article 19—Suit by dismissed guardian against minor for money spent by him for minor's use.*

When the plaintiff sued for the recovery of money spent in connection with the guardianship of the person and property of the minor defendant, over and above the

Sup: Govt. acts (IX of 1887) *(Contd.)*

income realized from the minor's estate, plaintiff having been appointed his guardian and subsequently removed.

Held, that the suit was one relating to a trust under article 18 of schedule II of the Provincial Small Cause Courts Act. 25 W. R., 25 *referred to.* JAGAN NATH *v.* NIRANJAN DAS. **141 P. L. R. 1903=58 P. R., 1903.**

63 (a). *Art. 18—Suit relating to a trust—Appointment of plaintiff under trust deed on a salary—Suit for unpaid salary.*

By a deed of trust, the settlor vested a press in trustees with the object of conducting a newspaper and appointed plaintiff as editor and manager on a fixed salary. Plaintiff acted but subsequently resigned. On a suit being brought by plaintiff, on the Small Cause side of the Subordinate Judge's Court, to recover the amount due to him by way of salary between the date of the trust deed and that of his resignation.

Held, that the Small Cause Court had no jurisdiction to try the suit. If the plaintiff had a cause of action, it was to enforce the performance of the trust in so far as it related to him, and the suit was barred, under art. 18 of sch. II to the Provincial Small Cause Courts Act. SUBRAMANIA AYYAR *v.* PANDI DORAISAMI TAVER. **13 M. L. J. 22=26 M. 368.**

64. *Sch. II, cl. 18—Jurisdiction—Suit relating to a trust—Suit to recover money paid to legal practitioner to institute suits, but not so expended.*

Held, that a suit in which the plaintiff claimed from the defendant the refund of certain moneys alleged by the plaintiff to have been paid to the defendant, a legal practitioner, for the purpose of instituting certain suits, but not to have been so expended, was a suit which was within the cognizance of a Court of Small Causes, and was not a suit relating to a trust within the meaning of cl. (18) of the second schedule to Act IX of 1887. NORTH-WESTERN COMMERCIAL BANKING CORPORATION *v.* MUHAMMAD ISMAIL KHAN. **A. W. N., 1902, P. 15=24 A. 208.**

65. S. 19. *—Small cause—Partnership—Suit for balance due on partnership account and for declaration of dissolution of partnership—Civil Procedure Code (Act XIV of 1882), Section 646 B.—Reference to High Court on question of jurisdiction*

When making a reference to the High Court under section 646 *B.* of the Civil Procedure Code, the District Court should submit with the record a statement of its reasons for considering the opinion of the Subordinate Court with respect to the nature of the suit to be erroneous.

Where the plaint alleged that there was a partnership between the parties, and a balance was struck and admitted by the defendant to be correct which he promised to pay.

Held, that the suit being really one for the balance of a partnership account in which a balance had been struck by the parties was not excluded from the cognizance of a Court of Small Causes, and the prayer in the plaint asking for a declaration that the partnership had been dissolved, being superfluous, did not effect the question of jurisdiction. CHHOTU *v.* JAWAHIR. **W. N. A., 1903, p. 29; 3 A. L. J., 23.=28. A. 293.**

66. *Sch. II, Art. 20. Objections to attachment, order disallowing—Suit to establish right—Civil Procedure Code (Act XIV of 1882), s. 281, 283,*

A obtained a decree for money against B in execution of which he attached certain animals as belonging to his judgment-debtor B. C unsuccessfully claimed the animals under s. 281, C. P. C., and they were sold. C then sued A for the amount which the latter had realised by sale of the animals.

Held, that the suit was instituted under sec. 283. Civil Procedure Code, and consequently under cl. 20, sch. II, Act IX of 1887, it was not cognizable by a Court of Small Causes. DILDAR ALI *v.* HIRU. **5 O. C., 190.**

67. s. 20. *Suit by unsuccessful objector to recover price of his property sold in execution of decree passed against third party—C. P. C. s. 278 and 283—Small Cause Court jurisdiction.*

A attached B's crops in the execution of his decree. C objected under S. 278 C. P. C. His objection being dismissed, he brought a regular suit to recover the price realized by sale of the attached property.

Held, that the suit fell under S. 283 C. P. C. was not triable by a court of small causes and not being tried as such, an appeal lay from the decision of the first court. RAM SARAN SINGH *v.* RAJA PARTAB BAHADUR SINGH. **8 O. C. 281.**

68. *Art. 21. Execution-sale—Setting aside sale—Saleable interest of the judgment-debtor—Small Cause Court, Jurisdiction of, in suits to set aside sale—Rights of a purchaser at an execution-sale.*

A suit to set aside a sale, either in whole or in part, is not a suit of a Small Cause Court nature, but is one excluded from the jurisdiction of the Small Cause Court by Art. 21 of Sch. II of Act IX of 1887, *Prasanna Kumar Khan* v. *Uma Churn Hazra* (1 C. W. N., 140) distinguished. When the judgment-debtor has a saleable interest, however small, the purchaser at an execution sale purchases at his own risk and there being no warranty that the property will answer to the description given of it, the purchaser is entitled to no relief, if the property does not correspond to the description. *Sundra Gopalan* v. *Venkatavaradar Ayyangar* (I. L. R., 17 Mad 228) followed. SONARAM DASS *v.* MOHIRAM DASS. **28 C. 235.**

69. *Sch II Art 28.—Small Cause Court—Suit to recover moveable property by right of inheritance.*

The suit was for recovery of certain ornaments or their value upon the allegation that they were given to the plaintiff's

Sup: Govt. acts (IX of 1887) *(Contd.)*

daughter-in-law at her marriage, that upon the death of the daughter-in-law, her father, the defendant, appropriated the ornaments, that the plaintiff's son, the husband of the defendant's daughter succeeded to the property by right of inheritance to his wife and that upon his death it passed to the plaintiff, his mother as his legal representative. The value of the suit was Rs. 100.

Held that the suit did not fall within the purview of sch. II art. 28 of the Provincial Small Cause Courts Act and was not cognizable by a Court of Small Cause. —CHHEDI *v.* GOLABO, **A. W. N. 1905, p. 134 = 2. A. L. J. 388 = 27. A. 622.**

70. *Sch. II., Art. 31—Civil Procedure Code (Act XIV. of 1882), S. 586.—Suit for mesne profits—Second appeal.*

A suit for mesne profits is not a suit for an account, but a suit for damages, and is not exempted from the jurisdiction of the Small Cause Courts under art. 31 of sch. II. to the Provincial Small Cause Courts Act. There is no second appeal from a decision in such a suit.—SUBBA RAO *v.* SITARAMAYYA, **11. M. L. J. 26 = 27. M. 118.**

71. *Sh. II Art. 31.*

Held, that a suit for the recovery of mesne profits is not cognizable by a Court of Small Causes.—*25 Mad., 103 followed.*—THOMASU PILLAI *v.* SAVUTHIA PILLAI **13. M. L. J. 1903. P. 136.**

72. *Sch. II Art. 31. Small Cause Court—Suits for account, what are.*

A suit for an account within article 31 of the Provincial Small Cause Courts Act does not mean every case in which accounts have to be looked into to ascertain the amount due to the plaintiff. A suit for an account is a special form of suit in which a special process is required to take an account.—KONDURU RUNGA REDDI *v.* SUBBIAH SETTY AND KUMBAHALA SUBBAMMA, **28 M. 394.**

73. *Sch. II, Art. 31.—Small Cause Court—Provincial Small Cause Courts Act, (IX of 1887), sch. II, art. 31—Suit for rent.*

A suit by a divided co-parcener to recover his share of rent from a tenant, and, if he would not be liable, from the other co-parcener in whose sole name the lease was executed by the tenant, is substantially a suit for rent and is not as against the co-parcener's suit for the profits of immoveable property belonging to plaintiff, which have been wrongfully received by defendant within the meaning of art. 31 of the second schedule of the Provincial Small Cause Courts Act.—SRINIVASA RAGHAVA AYYANGAR *v.* PICHAIKARAN, **29 M. 184.**

74. *Sch II, Art 31.—Suit to recover an ascertained sum as profits of land—Second appeal—High Court.*

The plaintiff sued to recover three specific sums of money amounting to Rs. 447-11-0, being her share of the revenues and profits of three sets of lands, alleging in her plaint that the money had been wrongly received by the defendant:

Held that the suit was one cognizable by a Court of Small Causes, and that, therefore, no second appeal lay.—GIRJABAI *v.* RAGHUNATH, **30 B. 147 = 7 B. L. R. 741.**

75.—*Sch II, Art 31—Jurisdiction—Dispossession of plaintiff from immovable property by defendant under decree—Receipt by defendant of profits—Decree reversed on appeal—Suit by plaintiff to recover profits wrongfully received by defendant while in possession—Suit not cognizable by Small Cause Court.*

Defendant obtained a decree against plaintiff for possession of certain immovable property; in execution of which defendant took possession of the property. Plaintiff appealed against the decree, which was reversed. While defendant was in possession, he received profits from the property amounting to a sum less than Rs. 500. Plaintiff now sued in the Court of Small Causes to recover this sum as profits which had been wrongfully received by defendant:

Held that the suit was not cognizable by a Court of Small Causes. *Subba Rao* v. *Sitaramayya*, (I. L. R. 24 Mad. 118), *Seshagiri-Ayyar* v. *Marakathammal*, (I. L. R., 22 Mad. 196) and *Kunjo Behary Singh* v *Madhub Chundra Ghose*, (I. L. R., 23 Cal. 884), considered. —SAVARIMUTHU *v.* AITHURUSU ROWTHAR,—**25 M. 103-11 M. L. J. 428 = 25 M. 103.**

76.—*Schedule II, Article 31—Small cause—Mesne-profits. Claim for—Appeal.*

Held, by the Full Bench, that a suit for mesne profits for the plaintiff being kept out of possession of property to which he was entitled is not a suit for accounts, and does not fall within the purview of Article 31, Schedule II of the Provincial Small Cause Courts Act.

The suit being in the nature of a small cause, the appeal against the decree passed in it lies to the District Court and not to the Divisional Court under Section 39 of the Punjab Courts Act, when the value of the suit does not exceed Rs. 500.—*I. L. R. XXIII Cal.*, 884 ; *XXII Mad.*, 196 ; 80 *P. R.*, 1896 ; 94 *P. R.*, 1900 ; *S. C.*, 39 *P. L. R.*, 1901, *followed* ; 119 *P. R.*, 1894, *disapproved.* MUSSAMMAT KISHEN KOUR *v.* SARDAR TULSA SINGH.—**84 P. L. R. 1902 35 P. R., 1902. (F. B.)**

76 (a)—*Sch. II Art 31.—Suit for profits of immovable property belonging to plaintiff and for profits wrongfully received by defendant.*

A, a co-sharer in a hamlet, sued B. for possession and got a decree. Now A sued B. for mesne profits for the period of three years during which B. was in possession.

Held this suit fell under the latter portion of Art 31 and the jurisdiction of the Small Cause Court was barred and section 586 did not apply.—MT. KUSAM KORE *v.* MAKHDUM KHAN.—**7 O. C. 202.**

77. *Sch. II, Art. 31.—Suit for share of profit is a suit for accounts and exempt under*

Sup: Govt. acts (IX of 1387) *(Contd)*

Art 31. A sued B. for a share of the profits of an estate of which they were co-sharers.

Held that the suit was for an account and therefore exempted from the Small Cause Court cognizance under Art 31 in which the words "for an account" include a suit in which accounts are expressly asked for and also a suit in which there must be an account taken, such as a suit in which a share of profits is claimed.—GOUINDE *v.* MATHURA.—**5 O. C. 130.**

78. Art: 31—See S. 15, Art 11, 13, 31—4. O. C. 89. No. 6 *supra.*

79. Art: 31—See S. 16, Art: 31—26. M. 176. No. 11 *supra.*

80. Art: 31—See S. 18—27 A. 200 No. 21 *supra.*

81. Art: 31—See Art: 13, 31—26 A. 358 No. 54 *supra.*

82. Art: 31—See Art: 13, 31—23 A. 437 No. 60 *supra.*

83. *Sch II, Arts 31 and 38—Hindu Law—Maintenance—Hindu widow—Forfeiture for unchastity—Suit by Hindu widow to recover income of property assigned by way of maintenance.*

In pursuance of a compromise between a Hindu widow and the brothers of her deceased husband, to whose estate the widow had laid claim, the brothers assigned to the widow certain property by way of maintenance, but themselves remained in possession as managers on behalf of the widow. It was not made a term of the agreement that the income of the property so assigned should be payable to the widow only so long as she remained chaste.

Held that a suit by the widow for recovery of the income of the property so assigned was not a suit cognizable by a Court of Small Causes.

Held also that the widow would not, even if unchastity were proved against her, forfeit her right to the income of the assigned property in the absence of an express stipulation to that effect. BHUP SINGH *v* LACHMAN KUNWAR. **A. W. N., 1904, p. 13 = 26. A. 321.**

84. *Sch. II, Art. 35, cl. (g)—Suit for damages for breach of betrothal contract—"Unclassed" suit, under S. 3 of the Punjab Courts Act—Appeal—Defect of jurisdiction—Interference of Chief Court.*

A suit for compensation for breach of betrothal contract falls under Art. 35, cl. (g) of this Act. 132 P. R. 1889 followed, 24 M. 652 refd. to.

It is an "unclassed" suit, as defined in S. 3 of the Punjab Courts Act, and, if the value exceeds Rs. 100, a District Judge can not hear its appeal.

Held where an inferior Court hears an appeal witout jurisdiction, the Chief Court will not interfere, unless the defect of jurisdiction has actually prejudiced the party who complains of the want of jurisdiction. (36 P. R. 1902 F. B. refd. to.) HAKIM *v.* RALYA. **80 P. L. R., 1907 = 125 P. R. 1907.**

Sup: Govt. acts (IX of 1887) *(Contd.)*

85 *Sch. II, Art. 35 (I)—Compensation for diverting a watercourse, whether cognizable by a Small Cause Court—Appeal from suit lies to Divisional Court and not District Judge—S. 39 (a), Punjab Courts Act 1884.*

A sued B for compensation for diversion of a water-course, which, if not forcibly obstructed by B would have flowed over to the A's land.

Held in revision that the claim was covered by art. 34 (i) of the Act and was, therefore, not cognizable by a Small Cause Court.

Held also, that, the suit was an unclassed suit of more than Rs 100 in value, and an appeal in the case would lie not to the District Judge but to the Divisional Court under s. 39 (*a*) of the Punjab Courts Act, 1884. (18 M. 28 followed and 71 P. R. 1896 referred to). LEHNA SINGH *v.* HIRA SINGH. **134 P. R. 1906 = 18 P. L R. 1907.**

86 *Sch. II, Art. 35 (j)—Suit for refund of money paid to avoid sale.*

Held that a suit by a tenant for recovery of money paid to avoid a sale of his tenancy in consequence of an improper distress, is one cognizable by the Small Cause Court, inasmuch as it is not properly a suit for compensation. Hence where in such suit, the amount sued for was below Rs 500, no second appeal lay. SENTHIVELU MUDALIAR *v.* VARADA CHARIAR. **16 M. L. J. 353.**

87 *Sch II, Art. 35 (j)*—See s. 15, Art. 35 (j)—25 M. 540 No. 7 *supra.*

88 *Sch II, Art. 35 (k)—Damages for attachment on insufficient grounds—Civil Procedure Code. s. 491.*

A Court of Small Causes has jurisdiction to award damages, under section 491 of the Civil Procedure Code, to a defendant whose property has been attached on insufficient grounds. IBRAHI ROWTHEN *v.* SANGARAM SHETTY. **26 M 504.**

89—*Sch. II, art. 38—Suit relating to maintenance.*

On the death of the widow of one R D., the daughter of R and mother of the plaintiff applied to the Revenue Court for the entry of her name as the owner of the zemindari left by R. This application having been resisted by the defendants, the reversioners, the matter was compromised with the result that the defendants agreed to pay Rs. 30 a year to D, but the compromise did not mention that the sum was by way of maintenance. After the death of D, the plaintiff, her son, instituted this suit to recover the arrears of the annuity upon the allegation that he was also entitled to it.

Held that the suit was cognizable by a Court of Small Causes.

Held also that sch. II, art. 38 of the Provincial Small Cause Courts Act refers to a suit which both in form and in substance is a suit for maintenance.—MAHADEV RAI *v.* DEO NARAIN RAI, **2. A. L. J. 697 = A. W. N. 1905. p. 137.**

Sup: Govt. acts (IX of 1887) *(Contd.)*

90. *Sch II, Art 38. Hindu Law—Widow—Maintenance—Agreement—Civil suit for maintenance based on agreement. C. P. C. (1882) s. 586.*

A Hindu widow sued her husband's brother for arrears of maintenance which she claimed under an agreement executed by the defendant providing for payment of maintenance to her "during her lifetime" but there was no provision that in case of her unchastity the maintenance would be forfeited. The suit was dismissed on the ground that the plaintiff had forfeited her right owing to her unchastity. On second appeal:

Held, that the suit not being a suit of the nature cognizable by a Court of Small Causes a second appeal lay in the case—23 *All.*, 495 *followed.*

Held, also, that in the absence of specific provision in the agreement the plaintiff's right to recover maintenance was not forfeited. *W. N. All., 1885 p. 164, 15 All., 382, 17 Mad., 392 referred to.* LACHMAN KUNWAR *v.* BHUP SINGH. **A. W. N. 1903 P. 226.**

91. *Art 38.* See Art 11, 38—13 M. L. J. 499 No. 58 *supra.*

92. *Art 38.* See Contract Act IX of 1872 S. 23 No. 96 Col. 280. **A. W. N. 1901 P. 155 = 23 A. 495.**

93. *Art. 38.*

B. executed a bond in A's favour agreeing that in default of payment B would be entitled to recover his money from the three boats pledged therein and other property of the defendant.

Held, no mortgage was created nor any lien effected on any property other than the boats (14 A. 162) and that the suit was cognizable by a court of Small Causes and no second appeal lay. DEBI *v.* KIDARNATH. **10 C. 1901.**

94. *Sch II, Art, 38, 41. Civil Procedure Code (Act XIV of 1882), Section 584—Second Appeal—Small Cause—Suit for contribution after payment made by plaintiff as joint-judgment-debtor against other judgment-debtors.*

When one of several judgment-debtors made jointly liable for a mere money-decree in a claim of maintenance sues the other judgment-debtors the suit is one cognizable by a Small Cause Court and second appeal does not lie to the High Court. The suit does not fall under article 38 or 41 or any other article of the Provincial Small Cause Courts Act. RAMASWAMY PANTULU *v.* NARAYANAMOORTHY PANTULU. **14 M. L. J. 489.**

95. *Sch. II, Art. 38.* A suit to recover arrears of maintenance payable under a written agreement is not cognizable by a Court of Small Causes (20 M. 29 refd. to.) SEWAK RAM *v.* Mt. SAISU SAI. **10 C. 93.**

96. *Sch. II, Art. 41—Joint decree—Payment by one judgment-debtor—Contribution.*

One of several judgment-debtors paid off a decree for costs passed jointly against him and other judgment-debtors, and then brought a suit for contribution.

Sup: Govt. acts (IX of 1887) *(Contd.)*

Held, that the suit was cognizable by the Court of Small Causes and Art. 41 did not exempt it. ROSHAN LAL *v.* RAM LAL. **4 A. L. J. 543 = A. W. N. 1907, P. 230.**

97. *Sch. II, Art 41.—When a contribution suit is of small cause nature—Test—S. 586, Civ. Pro. Code—Second appeal.*

Art. 41 applies only where a co-sharer sues his co-sharer for contribution in respect of payment made by him which was due from a co-sharer. But it does not apply to a suit for contribution claimed in respect of a debt, which becomes due only by virtue of such payment by the plaintiff, where there was no debt due from the defendant, the co-sharer, at the time the plaintiff, made the payment. The first is not and the second is a suit of the nature cognizable by a Court of Small Causes, and in the latter case, no second appeal will be under S. 586 of the Code, when the amount of the subject-matter of the suit does not exceed Rs. 500.

To see if a second appeal lies from an order in execution in a suit cognizable by a Court of Small Causes, it is not the amount claimed in the execution proceedings, but the amount of the subject-matter of the suit which is the test. (11 C. 169 followed). MAYULA AMMAL *v.* MAYULA MARACOIR. **17 M. L. J., 376 = 30 M. 212.**

98—*Sch. II., art. 41—Jurisdiction—Suit for contribution arising out of satisfaction of a joint decree for costs.*

Held that a suit by one of several joint judgment-debtors, who had satisfied a joint decree for costs, for contribution against the other joint judgment-debtors was not a suit exempted from the jurisdiction of a Court of Small Causes. *Bisva Nath Shah* v. *Naba Kumar Chowdhry* (I. L. R., 15. Cal. 713), followed—BHAIRON *v.* RAM BARAN, = **3 A. L. J. 6 = 28 A 292.**

99 *Art. 41*—See Arts 38, 41—14. M. L. J. 489. No. 94 *supra.*

71. Act XII of 1887 (Bengal, N. W. P., and Assam Civil Courts Act).

1. s. 8, 10, 11, 21, (3) and 22—*Appeal—Transfer of part-heard appeal to additional Judge, legality of—Assignment of "functions" to such Judge—Civil Procedure Code (Act XIV of 1882), s. 25.*

A District Judge has no jurisdiction under s. 8 of the Bengal, N. W. P. and Assam Civil Courts Act, to transfer a case partly heard before himself to an Additional Judge for disposal. Where, therefore, the District Judge admitted an appeal, heard the arguments and reserved judgment on a certain date, but on the next day, upon the application of the appellant, deputed an *amin* and a pleader to make a survey and identify some lands to prepare a map and to take certain evidence, and after the receipt of their report fixed a date for further hearing, but ultimately transferred the appeal to the Additional Judge for disposal:

Sup: Govt. acts (XII of 1887) (*Contd.*)

Held, that the order of transfer was without jurisdiction. *Kumarasami Reddiar* v. *Subbaraya Reddiar*, (I. L. R., 23 Mad. 314); *Sita Ram* v. *Naun Dulaiya*, (I. L. R. 21 All. 230); *Dumree Sahoo* v. *Jugdhori*, (13 W. R. 398); *Moulvi Abdool Hye* v. *Macrae* (23 W. R. 1); *Kishori Mohun Sett* v. *Gul Mahomed Shaha*, (I. L. R. 15 Cal. 177), referred to. A District Judge may under section 8 assign to the Additional Judge the function of hearing any purticular class of cases, but it is extremely doubtful whether he can transfer to such Judge any particular case pending before himself. BIDYA MOYEE DEBYA *v.* SURJA KANTA ACHARJI. **9 C. W. N. 705=32. C. 875.**

2. S. 9, *22—District Judge, power of, to transfer a case to the file of Additional Judge—Origin of tenancy unknown—Presumption—Monthly tenancy—Verification and signing of the plaint by the Collector.*

Under S. 9 and 22, sub-s. 2 of Act XII. of 1887, the District Judge has administrative control over the Court of an Additional District Judge and as such, he has jurisdiction to transfer to his file a case from his own file. *Bidyamoyee Debya Chowdhrani* v. *Surja Kant Acharya* (9 C. W. N. 705; I. L. R., 32 Cal. 875) relied upon. In this case, the date and origin of the tenancy being unknown and uncertain, it was *held* that the presumption was that the tenancies were monthly ones expiring with the last day of each month and a notice to quit served 8 months before was valid and sufficient. The collector is the representative of the Government and such notices on behalf of the Government, if signed by the Collector, would be sufficient. A plaint on behalf of the Government verified by the Collector and the Government Pleader of the District and signed by the Collector and a pleader who is not a Government Pleader, but who acts for the Government generally in the subdivision where the plaint was presented, was *held* to be properly signed and verified. The defects, if any, in such signing and verification of the plaint is cured by S. 576 of the Civil Procedure Code.—RAKHAL CHANDRA TEWARI *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL, **10 C. W. N. 841.**

3. s. 10.

An appeal was referred to the District Judge under section 189 of the N. W. P. Rent Act, 1881, against a decree passed by an Assistant Collector of the first class. On the date fixed for its hearing the District Judge was absent from the District and was engaged in hearing criminal cases in his capacity of a Sessions Judge, in another District. The appeal was heard by the Subordinate Judge in charge of the District Judge's office on a day when the District Judge had returned and resumed his office.

Without determining whether the Subordinate Judge had jurisdiction to entertain the appeal the High Court

Sup: Govt. acts (XII of 1887) (*Contd.*)

Held, that on the very clear wording of sub-section 1 of section 10 of Act No. XII of 1887 the Subordinate Judge had no power to try the appeal when the District Judge had returned and resumed his office. MALHI KUAR *v.* JWALA. **W. N. A, 1901, p. 111.**

4. s. 10.

A Subordinate Judge in charge of the office of the District Judge under section 10, Clause 2, of Act No. XII of 1887, may exercise all the powers of the District Judge without any limitations, only subject to the rules of the High Court. He may, subject to the rules, hear appeals filed under section 189 of Act No. XII of 1881. RAHMAT ALI KHAN *v.* ABDULLAH. **23 A. 455=W. N. A. 1901, P. 129.**

5. s. 10 and 11.—See S. 8, 10, 11, 21 and 22—32 C. 875, No. 1 *supra.*

6. S. 13 and 17.—*Jurisdiction—Transfer of District Judgeship pending an appeal.*

In a case an appeal from the decision of the Munsif of Kairana, in the district of Muzaffarnagar, was filed in the Court of the District Judge of Saharanpur, which then had jurisdiction there. But by a subsequent notification of the local Government, under S. 13 of this Act, the district of Muzaffarnagar was transferred, from the Saharanpur judgeship to the Meerut judgeship.

Held, that after the enforcement of the notification, the District Judge of Saharanpur had no jurisdiction to hear the appeal; also that the notification itself was sufficient authority for the District Judge of Saharanpur to transfer the record of the appeal to the District Judge of Meerut, (28 A. 93 refd.) JHANDU MAL *v.* PIRTHI. **A. L. J. 213=A. W. N., 1907, p. 53**

7. S. 13, 17.—*Redistribution of territory—Jurisdiction.*

A decree being passed by one court the subject matter became subject to the jurisdiction of another court by territorial redistribution.

Held, the decree may be executed either by the Court which passed it or by the Court which on redistribution acquired jurisdiction. JAHAR *v.* KAMINI. **5 C. W. N., 150=28 C. 238.**

8 s. 15, *18, 19—28 A. 545—See Act VII of 1887—(Suit Valuation Act No. 11 section 8, 9, 11).*

9 s. 17—*Appeal—Transfer of a locality to the jurisdiction of a different Judge.*

When any portion of a District is, by Goverment notification, transferred from the jurisdiction of one District Judge to that of another, any appeal, sought to be preferred from that locality, after the date of the notification, should be filed in the Court of the latter. An appeal is a 'case' under s. 17 (1) of the Act XII of 1887. ALLAH DEI BEGUM *v.* KESRIMALL, **A. W. N. 1905, P. 199=28 A. 93.**

10 s. 17—See S. 13, 17—A. W. N. 1907 P. 53 No. 6 and 28 C. 238 No. 7 *supra.*

Sup: Govt. acts (XII of 1887) *(Contd.)*

11 S. 18, 19, 21—*Restitution of Conjugal Rights—Jurisdiction of Munsif—Suits valuation Act (VII of 1877) s. 9, 11—Valuation of Suit—Jurisdiction—Mohamedan marriage, requirements of.*

A suit for restitution of conjugal rights is not triable by a Munsif under section 19, sub-s. (1) of Act XII of 1887, but is triable by a District Judge or a Subordinate Judge under s. 18 of that Act. *Matra Mondal* v. *Hari Mohun Mullick* (I. L. R., 17 Cal. 155), *Golam Rahman* v. *Fatma Bibi*, (I. L. R. 13 Cal. 232), *Mowla Newaz* v. *Sagiunniss Bibi*, I. L. R. 18 Cal. 378 *and Shire* v. *Shire*, (5 M. I. A., 81), referred to. Where a Court of first instance exercised jurisdiction with respect to a suit by reason of an arbitrary valuation, and no objection to jurisdiction was taken in that Court:

Held that the suit ought not to be dismissed by an Appellate Court on the ground of want of jurisdiction, regard being had to s. 11 of the Suit Valuation Act.

Semble: When a Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process. *Ledgard* v. *Bull* (I. L. R. 9 All. 191; L. R. 13 I. A. 134); *Meenakshi Naidoo* v. *Subramaniya Sastri*, (I. L. R. 11 Mad. 26; L. R. 14 I. A. 160); and *Raja Har Narain Singh* v. *Chaudhurain Bhagwant Kuar*, (I. L. R. 13 All. 300; L. R. 18 I. A. 55) referred to. The formal requirements of a valid Mahomedan marriage discussed. *Badal Aurat* v. *Queen-Empress*, (I. L. R. 19 Cal. 79) referred to.—AKLEMANNESSA BIBI *v.* MAHOMED HATUN. **8 C. W. N. 705 = 31 C. 849.**

12—S. 18, 19.—*See s. 15, 18, 19—28. A. 545 No. 8 and s. 18, 19, 21—31. C. 849 No. 11 supra.*

13—S. 20, 21—*Suits Valuation Act, S. 9—Restitution of conjugal rights—Jurisdiction—Appeal.*

From a decision of a Subordinate Judge in a suit for restitution of conjugal rights valued at less than one thousand rupees an appeal lies to the District Judge and not to the High Court. In the absence of rules under S. 9 of the Suits Valuation Act, the safest and the most convenient course to follow is to hold that for the purposes of S. 21 of this Act, the valuation made by a plaintiff in a suit for restitution of conjugal rights should be *prima facie* considered as the true value. 8 C. W. N. 725; 31 C. 849 dissented from. JAN MAHAMAD MANDAL *v.* MASHER BIBEE. **11 C. W. N. 458 = 5 C. L. J. 400 = 34 C. 352.**

13. S. 21—*Appeal—Forum—Value of suit—Acceptance of lesser sum by consent decree.*

In a case the original value of a suit was over Rs. 5,000 and by a consent decree the plaintiff accepted a sum of less than Rs. 5,000.

Held, that an appeal against an order passed in execution of such decree by the Subordinate Judge lies to the High Court.

Sup: Govt. acts (XII of 1887) *(Contd).*

JOGENDRA NATH ROY *v.* SARASWATI DEBI. **6 C. L. J. 38.**

13 a. S. 21.—*Valuation of suit—Appeal,*

In a suit before the Subordinate Judge, the valuation of which was above Rs. 10,000, the plaintiff withdrew a part of the claim.

Held that the valuation was not affected thereby and an appeal from a decree in such suit lay to the High Court and not to the District Judge.—JAGGI LAL *v.* GOPI NARAIN, **3 A. L. J. 136 = A. W. N. 1906. P. 57.**

14. S. 21, *Cl. (a)—Appellate Court—"Value of the original suit"—Mesne profits—Value as stated in plaint or as found by Court:*

Per Full Bench.—In a suit for possession of land and mesne profits which was originally valued at a sum below Rs. 5,000 but in which the whole amount actually found due by the Subordinate Judge inclusive of mesne profits payable by the defendant to the plaintiff is over Rs. 5,000 an appeal lies to the High Court.

Per Mookerjee, J.—Only if the amount is accepted by the plaintiff and additional Court fee be paid by him under S. 11 of the Court Fees Act.

Per Mookerjee, J:—The forum of appeal depends not upon the value as adjudged, but upon the value as accepted by the plaintiff after adjudication, *i.e.*, where the Court allows him a larger amount than what is tentatively claimed, he adopts the increased amount as the value of his claim, and in the other instance, that is where the Court allows him a less amount, he still adheres to his claim in respect of the large amount stated in the plaint and seeks to enforce the same.—IJJATULLA BHUIYAN *v.* CHANDRA MOHAN BANERJEE. **11 C. W. N. 1133 = 6 C. L. J. 255 = 34 C. 954.**

15. S. 21.—*Partition suit—Value of the original suit—Appeal. Forum of—*

In a suit for partition, the value of the entire estate sought to be partitioned, and not the value of the plaintiff's share in the property, is to be taken as the value of the original suit within the meaning of section 21 of Act XII of 1887.

Where, therefore, in a suit for partition, the value of the entire estate is above Rs. 5,000, but that of the plaintiff's share is below that amount, appeal shall lie, from the decree of the Subordinate Judge, direct to the High Court. BIRAJ MOHINI DASI *v.* CHINTAMANI DASI. **3 C. L. J. 197 = 10 C. W. N. 56.**

16. S. 21—*Jurisdiction—Accounts—Suit for—Valuation of suit—Appeal.*

In a suit for accounts the value of the suit which governs the course of appeal is the value originally fixed by the plaintiff in the plaint, and is not affected by the amount awarded by the decree. NAGENDRA NATH MOZAMDAR *v.* RUSSIK CHANDRA RAI. **6 C. W. N. 346.**

Sup: Govt. acts (XII of 1887) *(Contd.)*

17. S. 21.—See Suits Valuation Act VII of 1887 S. 11 RAGHUNATH CHARN SANG *v.* SHAMON KOERI **31 C. 344.**

18. S. 21.—*See S. 18, 19, 21—31. C. 849 No 11 supra.*

19. s. 21—See S. 20, 21—34. C. 352 No 13 *supra.*

20. s. 21—*Jurisdiction—Appeal.*

Where a plaintiff definitely fixes a certain sum as the amount of his claim this must be considered as the value of the original suit and the appeal will lie accordingly; but when he fixes a certain sum as the amount of his claim only approximately or tentatively and prays that the amount of his claim may be ascertained in the course of his suit, then the amount found by the Court to be due to him must be regarded as the value of the original suit for the purpose of determining the *forum* of appeal. 17 Cal., 704; 21 Cal., 550; 23 Cal., 536; 6 C. W. N., 346; A. O. D., 38 of 1901 *unreported, referred to.*—GULAB KHAN *v.* ABDUL WAHAB KHAN. **8 W. N. C. 233 = 31 C. 365.**

21. s. 21. (3)—*See S. 8,* 10, 11, 21 (3), 22—32. C. 875 No. 1 *supra.*

22 s. 22—See S. 8, 10, &c.—32. C. 875 No. 1 and 10. C. W. N. 841 No. 2 *supra.*

23. s 22, (3) and 23 (3)—*Transfer of a case by District Judge to his own file.*

A suit for partition was instituted in the Court of the Subordinate Judge. The District Judge transferred the case to his own file, and then after examining a few witnesses he re-transferred it to the file of the Subordinate Judge.

Held, that when once the District Court withdrew the suit to its own file for trial, it had exhausted all its powers under section 25 of the Code of Civil Procedure, and was not competent to re-transfer it again to the Subordinate Court. 24 *All.*, 301, 356 *followed.*

Held further, that section 22 cl. (3) of the Civil Courts Act authorizes a District Judge to withdraw an appeal previously transferred and to dispose of it himself; there is no similar provision either in that Act or in the Code of Civil Procedure authorizing him to treat original suit in the same way. Section 23 cl. (3) of the Civil Courts Act relates only to special proceedings as specified in that section.—RAMCHARITTAR RAY *v.* BIDHATA RAY.

24. s. 24—*Valuation of suit—General Clauses Act (I of 1887), s. 3 (13)—Suit for partition.*

In a suit for partition of the share of one only out of several co-sharers in immovable property, the proper valuation of the suit for purposes of jurisdiction is the value of the share sought to be separated from rest of the property, and not the value of the entire property out of which the share is to be taken. WAJIH-UD-DIN *v.* WALI ULLAH. **A. W. N. 1902 P. 88 = 24 A. 381.**

Sup: Govt. acts (XVI of 1887)

25. s. 37—*Mahomedan Law—Inheritance—Evidence of custom at variance with Mahomedan Law.*

Where the parties to a suit are Mahomedans governed, in regard to the matters mentioned in s. 37 of the Bengal Civil Courts Act 1887, by the ordinary rule Mahomedan law, evidence is inadmissible to prove a custom of succession at variance with that law. *Surmust Khan* v. *Kadir Dad Khan* (1 Agr. F. B., 38), referred to.—JAMMYA *v.* DIWAN. **I. L. R., 23 A. 20.**

26. S. 37.—*Beluchi Muhammadans governed by Mahomedan Law regarding succession.*—See Mohamedan Law Succession. ISMAIL KHAN *v.* IMTIAZ-UN-NISSA. **4 A. L. J., 792.**

27. S. 37.—*Hindus, Marriage—Law how controlled by S. 37.*

Where a dispute arose about the marital rights of Hindus in Bengal:

Held, Hindu Law applied to it and this section would not by any contract between the parties alter the rule of decision. TEKIT-MON MOHINI JEMADAI *v.* BASANTA KUMAR SINGH. **5 C. W. N., 673 = 28 C. 791, P. 756.**

72.—ACT XVI of 1887.—*(See Punjab Tenancy Act—Punjab Government Acts).*

73.—ACT XVII of 1887.—*(See Punjab Land Revenue Act—Punjab Government Acts).*

74.—ACT V of 1888.—*(Inventions and Designs Act).*

1. S. 4 (1), (9) and (10), and 29 (2), (3) and (4).—"*District Court," includes "High Court in its original jurisdiction—S. 29 (2), (3) and (4) bars certain defences to an action and Ss. 30 and 31 provide for application to High Court for a rule.*

The words "District Courts," as used in S. 29 (1) of this Act include a High Court in the exercise of its Ordinary Original Civil Jurisdiction, under S. 4. 1 of that Act.

The intention of the legislature is, that objections stated in S. 29 (2), (3) and (4) should not be allowed to be raised in defence to an action for the infringement of an exclusive privilege acquired under Part I of this Act, but must be raised under Ss. 30 and 31 of the Act, by applying to a High Court for a rule to show cause why the Courts should not declare that the exclusive privilege so acquired had not been so acquired, by reason of the objections stated in Ss. 30 and 31. KEDAR NATH MONDAL *v.* GONESH CHUNDRA ADAK. **12 C. W. N., 446.**

2.—s. 4, 8, 14, 29, 30 and 31.—*Suit for infringement of patent—Defence that patent wrongly granted:*

The licensee of the patentee of an invention can sue for damages for the infringement of the patent. Certified copies of the plan and specification in the register of inventions, issued from the Patent Branch of the Department of Commerce and Agricul-

Sup: Govt. acts (V of 1888) *(Contd.)*

ture of the Government of India, are good proof of the grant of the patent; and if the breach occurred within 14 years from the date of the grant, it lies upon the defendant to prove that the patent had determined before breach. In a suit for damages for infringement of patent a defendant can not plead that the so-called invention is so obvious that the exclusive privilege ought never to have been granted to the plaintiff.—SARNATH SANYAL *v.* BUTLER.—**1907 A. W. N. 23.**

3.—S. 29.—*Infringement of patent —Patent consisting of a combination of parts—Infringement as to one or more of such parts.*

Held that a valid patent for an entire combination for a process gives protection to each part thereof which is new and material for that process. *Parkes* v. *Stevens* (L. R., 8 Eq. 358) followed.—BUTLER *v.* ADAMJI BAHURA.—**A. W. N. 1903. P. 193=26. A. 96.**

4.—S. 29.—*See s. 4, 8, 14, 29, 30, 31—A. W. N. 1907. P. 23. No. 2 supra.*

4 (a).—S. 29 (2), (3), (4).—*See s. 4. (1) (g) and 10 &c. P. C. W. N. 446 No. 1 supra.*

5.—S. 30.—*Issue of Rule—Cause shown by affidavits—Onus of proof.*

G. obtained a rule against the respondents to show cause why under the provisions of s. 30 of the Inventions and Designs Act, he had not exclusive privilege in respect of an invention. The latter showed cause by means of affidavits and the Court, instead of discharging the rule, directed the issue to be tried.

Held that the *onus* of proof lay on the respondent—ALEXANDER GRAY, *In re*, **10 C. W. N. 985.**

6.—S. 30, 31. *See s. 4, 8, 14, 29, 30, 31—A. W. N. 1907. P. 23 No. 2 supra.*

7 S. 51—*"Proprietor" of a design—Publication of design in British India.*

In 189 the plaintiffs got a design for a curtain registered under the Inventions and Designs Act, 1888, as being the proprietors thereof. In 1901, they sued the defendants for damages for imitating the design. The defendants proved that they were making the curtains, which were alleged to be an imitation of the plaintiff's registered design, for a Bombay firm, and also that the design had been sent to the Bombay firm, from a firm in Lodon in 1897, that is, before the plaintiff's design was registered, in order that curtains of similar design might be manufactured in India and sent back to London for sale. The plantiffs failed to prove that they had either invented the design, or had purchased it from the inventor.

Held that the sending of the design by the London firm to the firm in Bombay, with which the former were in no specially confidential relations, amounted to a publication of the design in British India; and as the plaintiffs were not the "proprietors" of the design within the meaning of section 51 of the Inventions and Designs Act, they were not entitled to any protection. BAHAL RAI *v.* SUMER CHAND **A. W. N. 1903 P. 95=25 A. 493.**

Sup. Govt. acts (IV of 1889)

75—Act IV of 1889 *(Merchandise Marks Act).*

1. S. 4. and 19A.—*Slander of title—Cause of action—Malice not expressly pleaded—Amendment of plaint—Merchandise—Collector of Customs. Duty of, to detain goods.*

The plaintiff sued the defendants for damages on the following allegations:—

That the parties imported grey shirtings and the defendants were interested in putting stop to the sale of those imported by the plaintiff, that the defendants with intent to injure the plaintiff falsely alleged to the Collector of Customs, Calcutta, that the marks on the grey shirtings imported by the plaintiff which were then in the Calcutta Customs House in the ordinary course of business were in imitation of Messrs G & R. Dewhurst & Co.'s marks and applied to him to order the said grey shirtings to be detained pending such legal proceedings as they might take in the matter and that they induced the said Collector to make such an order. The suit was dismissed on the ground that it disclosed no cause of action.

Held, that the order of dismissal was wrong, for the allegations made in the plaint were sufficient to disclose a clause of action, for the case was in the nature of a slander of title, and though malice was not expressly pleaded yet it was to be implied from the allegations made by the plaintiff, and further, that in any case the plaint could be amended by allowing the plaintiff to specifically plead malice.

Per Sale, J.—That the plaintiff was not bound to get the Collector's order set aside by higher authorities before filing the suit in the Civil Court. NEMI CHAND *v.* C. W. WALLACE. **10 C. W. N., 1906, P. 107= 4 C. L. J., 268.**

2. S. 4 and 6.—*Trade-mark—Trade-description.*

The complaint stated that the present descendants of Shri Chandu used to prepare calendars bearing the name of Shri Chandu Panchang at Jodhpur, and send each year a copy of such calendar to the publishers in different parts of India, allowing them to use the name of Shri Chandu Panchang to denote calendars prepared in Jodhpur by the descendants of Chandu. It further stated that the defendant had recently used the words Shri Chandu Panchang on the outside of a calendar prepared and published by him.

Held, that the title Shri Chandu did not come within the definition of trade-mark or trade description, and the defendant was not liable to punishment under section 482 of the I. P. C., or Section 6 of the Merchandise Marks Act. RADHA KRISHNA *v.* KISSONLAL SHRIDHAR. **3 B. L. R., 883.**

Sup: Govt. acts (VII of 1889)

76—Act VII of 1889.—*Succession certificate Act*).

1.—*Assets left by a deceased woman—Marriage—Presumption.*

Held that the husband's brother has a better right to a succession certificate to the assets of a deceased woman than her sister's son. In the absence of evidence to the contrary, there is a presumption that a marriage was in one of the approved forms.—MUTHAN CHETTY *v.* RAMASWAMY CHETTY,—**16 M. L. J. 550**.

2.—*Impartible estate—Succession or Survivorship.*

One succeeding to an impartible estate on the death of the last holder succeeds to the "effects" of the deceased predecessor and is bound to produce a succession certificate before obtaining a decree for any of the debts due to the predecessor as owner of the estate.

Semble:—A member of the family succeeding to an impartible estate on the death of the last holder does not do so by survivorship.—RAJA OF KALAHASTI *v.* ACHIGADU.—**17 M. L. J. 367=30 M. 454**.

3.—*Heirship — Sister's daughter — Sister's daughter's son.*

A sister's daughter and sister's daughter's son of a deceased Hindu, governed by the Dayabagha law, are not heirs *prima facie* under the Dayabhaga law, and are not entitled to the certificate applied for.—KRISHNA PADA DUTT *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL.—**12 C. W. N. 453**.

4. S. 1, 7.—*Enquiry under the Act—Debts, existence of—Payment of money due into Court—Certificate in respect of the money so paid—Practice.*

The Succession Certificate Act (VII of 1889) is intended for the protectio of debtors, but this only means that where a debtor of a deceased person either voluntarily pays his debt to a person holding a certificate under the Act or is compelled by the decree of a Court to pay it to that person, he is lawfully discharged. There is nothing in the Act which either expressly or by necessary implication requires the Court granting a certificate to hold an inquiry into the existence of any debt alleged by the person applying to be due as a priliminary condition of the grant. The Court has merely to ascertain the representative title of the applicant for the certificate and not the existence or non-existence of the debt. The fact that the amount of the debt, to recover which a certificate is applied for, is paid into Court does not extinguish the debt or affect the necessity of taking out the certificate under the Succession Certificate Act (VII of 1889). BAI KASHI *v.* PARBHU KEVAL, **I. L. R., 28 B. 119; 5 B. L. R. 721**.

5. S. 1, cl. 4.—*Will—Probate, necessity to take out.*

S. 1, Cl. 4 of this Act bars an application for a succession certificate in respect of a debt to which a right can be established by probate or letters of administration under the Indian Succession Act or the Hindu Wills Act. The last portion of the clause refers to a will to which either of these two acts applies. Consequently, where a Hindu testator residing in the United Provinces has left a will, there is nothing to preclude the devisee from applying for a succession certificate to collect the debts of the deceased as none of those two Acts applies to him. JAMNA KUAR *v.* DAULAT RAI. **2 A. L. J., 126**.

6. s. 3, (2) 8, 9—*Order to file security.*

Where a Judge acting under s. 9 of the Succession Certificate Act requires security to be furnished by a person to whom a certificate of succession is granted, the amount of the security should be specified in the order and a time should be prescribed within which the security must be furnished.

Semble that s. 8 of the Act cannot be applied to the case of the fixed deposit in a bank, such not being a "security" within the meaning of s. 3 (2). GULRAJI KUNWARI *v.* JAGDEO PRASAD. **I. L. R. 28 A. 477**.

7 s. 3, 5, 8—*Appointing curator without taking evidence under s. 3 is illegal—C. P. C. S 622.*

Held, Subrahmanya Aiyar, J. dissenting:—An order by a District Judge appointing a curator without making an inquiry under s. 3 of Act XIX of 1891 should be set aside, as s. 3 is mandatory and not directory.

White C. J. The Judge acted without jurisdiction or with material irregularity.

Shephard J. The Judge acted within the jurisdiction, but with material irregularity KRISTNASAMI PUNNIKONDAR *v.* MUTHUKRSTNA PUNNIKONDAR. **M. L. J. 1901 P. 78=24 M. 364**.

8. S. 3, 19—*Appeal from the order of Agent to the Governor at Vizagapatam—General Clauses Act, 1868. S. 2 (12)—Madras Act XXIV of 1839.*

By S. 3 of Act XXIV of 1839 and Rule X, Cl. 4. framed under that Act, the Agent to the Governor at Vizagapatam is the Judge of the Principal Civil Court of Original Jurisdiction in the Agency of Vizagapatam. In S. 2 (12) of the General Clauses Act, 1868, which was in force when the Succession Certificate Act was passed, "District Judge" is defined as the Judge of the Principal Civil Court of Original Jurisdiction. S 3 of the Succession Certificate Act defines the District Court as a Court presided over by a District Judge. The Agent's Court is, therefore, a District Court, and an appeal lies, therefore, under S. 19, Succession Certificate Act, from his order as from an order of District Court. 18 M. 227 dist. GURUVARAJU *v.* GOPINATHA TRIPATHI, **18 M. L. J., 252**. *See also No. 43 infra.*

9. s. 4.—*"Debt"—Suit by son of deceased mortgagee for amount due on usufructuary*

Sup: Govt. acts (VII of 1889) (*Contd.*)

mortgage—Failure to produce certificate of heirship—Right to recover.

A Hindu, being the usufructuary mortgagee of certain lands, died, leaving an adopted son and two widows. The widows assigned the mortgage without consideration. The mortgagor sold the equity of redemption to a purchaser who paid off the mortgage to the assignee of the widows. The adopted son then sued the mortgagor, the widow, their assignee and the purchaser of the equity of redemption to recover the amount due under the mortgage, or for possession of the lands until the mortgage amount should be paid, but he did not produce a certificate of heirship:

Held that he was entitled to recover as against the mortgaged property. The money sued for was not due under a contract, but was in reality the value of the plaintiff's mortgage interest. In strictness, plaintiff was entitled to a decree for the land itself and it was only by his consent that money was awarded in lieu of the land. The amount could not, therefore, rightly be treated as a debt within the meaning of the Succession Certificate Act, and the failure of the plaintiff to produce a certificate was no bar to a decree being passed in his favour. ARUMUGAM PILLAI *v.* VALURA KOUNDAN. **24 M. 22.**

9 (a). S. 4.—*Necessity of Certificate by a member of joint Hindu family.*

A certificate under Section 4, Act VII of 1880, is not necessary in the case of the plaintiff suing in respect of debts to which he had become entitled as a member of a joint Hindu family by right of survivorship.

When a certificate of succession is not produced with the plaint proceedings may be stayed and the plaintiff directed to take measures to procure it. *P. R.*, 13 *of* 1883, *followed. P. R.*, 102 *of* 1889, *explained.* MAYA RAM *v.* SHIB DAS. **84 P. L. R., 1901= Punjab Record, 20 of 1901.**

10. S. 4.—*Certificate—Personal decree—Suit for sale on a mortgage.*

S. 4 of the Succession Certificate Act (VII of 1889) limits the necessity of a certificate under the Act to those suits in which the Court is called upon to pass a personal decree against a debtor of a deceased person for payment of his debt; and does not apply to a suit for a sale on a mortgage. *Kanchan Modi* v. *Baij Nath Singh* (I. L. R., 19 Cal., 336); *Baid Nath Das* v. *Shamanand Das* (I. L. R., 22 Cal., 143), and *Mohomed Yusuf* v. *Abdur Rahim* (I. L. R , 26 Cal., 139) followed. *Fateh Chand* v. *Mohamad Bakhsh* (I. L. R., 16 All., 259) not followed, *Santaji Khanderao* v. *Raoji* (I. L. R., 15 Bom., 105) distinguished. NANCHAND *v.* YENAWA. **6 B. L. R., 583 =28 B. 630.**

11. S. 4.—*Certificate not necessary in so far as the decree is made inforceable against mortgaged property, but necessary so far as the decree imposes personal liability.*

Sup: Govt. acts (VII of 1889) (*Contd.*)

A decree for the enforcement of a mortgagee's rights as against the mortgaged property is not a decree for a 'debt' within the meaning of s. 4 of Act VII of 1889; but it would be otherwise with reference to a personal decree for the debt, and a certificate will be a condition precedent to such a personal decree. *Fateh Chand* v. *Muhammad Bakhsh*, (I. L. R., 16 All., 259), not followed. PALANIYANDI *v.* VEERAMMAL. **I. L. R., 29 M. 77.**

12. S. 4.—*Heir of mortgagee applying for supplementary decree—Succession certificate—"Debt"—Transfer of Property Act, S. 90.*

A mortgagee died after a preliminary decree had been made in a mortgage suit, and his sons got themselves substituted on the record and an order absolute was made in their favour, but on the proceeds of the sale of the mortgaged property proving insufficient, they applied for a personal decree for the balance under s. 90, Transfer of Property Act.

Held, that until the applicants obtained a certificate under the Succession Certificate Act, no such decree could be made in their favour. SAHADEN SUKUL *v.* SHEIKH SAKHAWAT. **12 C. W. N., 145.** *(See col 693).*

13. S. 4.—*Whether Court can enquire if a debt is really due*

It is not competent to a Court granting the succession certificate to enquire before the grant of the certificate into the question whether the debt alleged by the petitioner is really due or not.—ANDALAMMAL *v.* VENKATACHARLU. **17 M. L. J. 257.**

14. S. 4.—*Joint decree-holders, right to execute a decree passed in favour of—Execution of decree by a survivor of two joint decree-holders—Heir of a decree holder, right of, to execute a decree.*

A and B were awarded certain sums under a decree jointly and certain other sums severally. A died and B claimed to execute the whole decree as the survivor of the joint decree-holders and as the heir of the other decree-holder, without producing Succession Certificate.

Held, that, so far as the sums awarded jointly were concerned, the surviving decree-holder could execute the decree, but she could not be allowed to execute it with respect to the sums awarded severally without the production of a Succession Certificate. 26 C 839,, 16 A 259 refd. RAI JAGATPAL SINGH *v.* THAKURAIN BILAS KUNWAR, **10 O. C. 378.**

15. S. 4—*In a suit to recover dower by an heir of a deceased wife against her husband, the plaintiff is not entitled to a decree without certificate required by Act.* See Mahomedan Law (Dower), ABDUL KARIM *v.* MAKBUL-UN-NISSA, **A. W. N. 1908 P. 113.**

16. S. 4.—*Certificate for part of a debt.*

Held, following 19 *All.*, 129 (Chamier, J., *dubitente*) that a Succession Certificate cannot be granted for collection of part

only of a debt. AKBAR KHAN *v.* BILKISARA BEGUM. **W. N., A. 1901, p. 125.**

17. S. 4.—Res Judicata—*Execution of decree—Principle of* res judicata *as applied to execution proceeding.*

The principle of *res judicata* applies to prevent parties raising a second time in the same suit, or in the same execution proceedings, an issue which in that suit, or in the execution proceedings in the suit, had been previously determined. The principle of *res judicata* does not depend for its application upon the question whether the decision which is to be used as an estoppel was a right decision or a wrong decision in law or on facts. A defendant-respondent cannot avoid the application of the principle of *res judicata* by saying that he did not appear at the trial of the suit, and a plaintiff who has got an *ex parte* decree on proof of his title or on failure of the defendant to prove a defence, the onus of proving which was on him, cannot be deprived of the full benefit of the decree which he has obtained by the fact that the defendant did not appear in Court to protect his own interest. *Ram Kirpal* v. *Rup Kuari*, (I. L. R., 6 All. 269) referred to. BEHARI LAL *v.* MAJID ALI. **24 A. 138.**

18 S. 4—*Debt. Meaning of.*

Held, that a suit for account is not a suit for a debt within the meaning of s. 4 of the Succession Certificate Act. BISSESWAR ROY *v.* DURGADAS MEHARA. **32 C. 418.**

19 S. 4—*T. P. A.—S. 90—Ex-parte decree—Court's inherent power set it aside—Certificate.*

An ex-parte decree was passed under section 90 of the Transfer of property Act in a suit, to enforce a mortgage.

Held, that the Court had an inherent power to set it aside (32 C. 253 followed.)

A decree can only be passed under s. 90 T. P. A. against a defendant, from whom the balance is legally recoverable. The Court cannot pass any decree under section 90, T. P. A. in favour of the representative of the mortgagee, where no certificate had been obtained by him under any of the Acts mentioned in section 4 of the Succession Certificate Act, and a certificate which is granted after the passing of the decree under section 90 is not sufficient to get rid of the difficulty put in his way by the clear language of section 4 of the Succession Certificate Act. ABDUL SATTAR *v.* SATYA BHUSHAN DAS, **35 C. 767.**

20 S. 4.—*Succession certificate—Execution of decree—Jurisdiction of execution—Court to question validity of decree.*

Where the Court refused execution of a decree on the ground that it should not have been passed since plaintiff had not obtained succession certificate before passing of the decree—

Held, that as the Court executing a decree is not competent to question the validity of a decree passed by a Court of competent jurisdiction, the execution Court had acted with material irregularity in refusing execution of the decree.—TIKA RAI *v.* GODHA RAM.—**P. W. R., 1906 p. 35 = 145. P. L. R. 1906.**

20 (a) S. 4.—*Decision of suit pending decision of application for certificate is improper—*

Held that the dismissal of a suit for non-production of a succession certificate within 15 days fixed by the court is improper where application for obtaining the certificate is pending in court.—AMIR SINGH *v.* RAM CHAND—**94 P. L. R. 1902.**

21 S. 4,—*Sub-S. I cl. A—Suit upon a usufructuary mortgage by the heirs of the deceased mortgagee whether maintainable without a succession certificate, in a case where the mortgagee becomes entitled to a personal decree against the mortgagor on the happening of certain events.*

In a suit by the heirs of a deceased mortgagee upon an usufructuary mortgage by the terms of which the mortgagee was precluded from suing for the money, the Court of First Instance gave a personal decree against the mortgagor by reason of the mortgage security having been impaired on the happening of subsequent events. The Lower Appellate Court reversed the decision of the First Court on the ground that having reference to s. 4 of the Succession Certificate Act (VII. of 1889), the suit was not maintainable without a certificate.

Held that in such a case it could not be said that the money, for which the suit was brought, was a debt due to the estate of the deceased mortgagee within the meaning of s. 4, sub-s. I, cl. (A) of the Succession Certificate Act, and that the suit was maintainable.—UMESH CHANDRA PRAMANIK *v.* MOTHURA MOHAN HALDAR, **5. C. W. N. 607 = 28. C. 256.**

22. S. 5.—*Power of Court to question the right of another Court granting certificate.*

The power of granting certificates of succession and of extending such certificates has been conferred upon District Courts by the Succession Certificate Act, 1889. When such a certificate has been granted by the Court before which such succession certificate is produced as authority to collect the debt entered therein to question the right of the Court which granted the certificate. DURGA DAS *v.* GULLU. **A. W. N., 1904, P. 172 = 27 A. 87.**

23. S. 5.—*See Ss. 3, 5, 8—24 M. 364 No. 7 supra.*

24. S. 6, 7, 9.—*Summary proceedings—Questions of disputed adoption not to be determined in such proceedings—Security—Guardian's right to certificate on behalf of the minor.*

Questions arising under the Succession Certificate Act (VII of 1889) are to be determined by a summary proceeding, *i. e.* by a short inquiry leading up to and resulting in a

Sup: Govt. acts (VII of 1889) (*Contd.*)

rapid decision in contrast with the lengthy investigation which may be required for the more tardy determination of a regular suit. The nature of the inquiry must depend on the circumstances of each case. An application by a guardian of a minor is not contemplated by s. 6, cl. *(d)*, of Act VII of 1889, which only permits the petitioner, who claims the right for himself, to apply. Where on an application for a certificate under the Succession Certificate Act (VII of 1889) s. 6, questions of adoption affecting the right to the certificate were raised, which could not be summarily disposed of.

Held, that the Judge ought to have decided the *prima facie* right of the applicant under cl. 3 or cl. 4 of S. 7 of the Act without waiting to decide the issue raised as to the adoption. GULABCHAND *v.* MOTI CHATRAJI. **3 B L R., 795 = 25 B. 523.**

25—S. 6, Cl. (d)—*Guardian and Wards Act (VIII of 1890), s. 27.*

A certificate under the Succession Certificate Act (VII of 1889) can be granted to the guardian of a minor.—*Ex parte* MAHADEV GANGADHAR, **I. L. R., 28 B. 344; 6 B. L. R., 281.**

26 S. 7—*Summary enquiry*

There must be an enquiry before a certificate under Act VII of 1889 can be granted, but the enquiry is to be a summary one. The order of the Judge granting such certificate was affirmed, although the enquiry made by him was not of a very protracted nature.—MUST. TIGRI BEGUM *v.* SYED ALI NAWAB—**5. C. W N. 434.**

27 S. 7.—*Certificate, right to—Title.*

In a proceeding under s. 7 of the Succession Certificate Act (VII of 1889), the Court is bound to decide, though in a summary manner, the question as to the right to the certificate, especially when there is a conflict between two parties. *Raghu Nath Miser* v. *Pate Koer* (6 C. W. N. 345) distinguished. *Hurri Krishna Panda* v. *Balabhadra Panda*, (I. L. R.. 23 Cal. 431) approved of.—BASANTA LAL *v.* PARBATI KOER—**I. L. R., 31 C. 133; 8 C. W. N. 51.**

28 S. 7.—*Object of.*

The object of this Act is to obtain the appointment of some one to give a legal discharge to debtors to the estate for the debts due, and not to have nice and intricate questions of law as to the rights of parties to the estate of the deceased decided on an application under it.—GUNINDRA PROSAD *v.* JUGMAIA BIBI—**I. L. R., 30 C. 581.**

29 S. 7.—*See s. 1, 7—5 B. L. R. 721=28. B. 119 No. 4 supra.*

30 S. 7.—*See s. 6. 7, 9—25. B. 523 No. 24 supra.*

30 (a) S. 7.—*Rival Claimant.*

Under this section a D. J. is bound to decide speedily which of the rival claimants is entitled to the certificate. He can not refuse to decide on the ground that difficult questions of law or fact are involved or the matter is in dispute in a suit regularly instituted—**137 P. R. 1907.**

Sup: Govt. acts (VII of 1889) (*Contd.*)

31 s. 7 *(3)—Succession certificate—Enquiry necessary.*

Though the proceedings under Act VII of 1889 are summary and the Court is not required to enter into and decide the rights of the parties as if he were trying a suit yet before passing a decision, it is bound at all events to enter into some enquiry and base its decision upon *prima facie* evidence with which it is sufficiently satisfied.

When on the application of a Hindu widow it was contended for the other side that as her deceased husband was member of a joint Hindu family she was not entitled to his estate and the Court passed order granting certificate to her without making any enquiry in the matter, the Hight Court set aside the order and directed the lower Court to make the enquiry. BALMAKUND *v.* KUNDAN KUNWAR. **A. W. N. 1905, P. 44=2. A. L. J. 144=27. A. 452.**

32 s. 8—See section 3, 8, 9—23 A. 477 No. 6 and section 3, 5, 8—24 M. 364 No. 7 *supra.*

32 (*a*) **s. 9**—*Cancellation of security bond.*

Held, that a person who has given security and executed a bond under the provisions of section 9 of the Succession Certificate Act, VII of 1889, cannot be relieved of his liability so long as the certificate of succession granted by Court holds good. KAMAL DIN *v.* MUSSAMMAT HAJRAN. **5 P. L. R., 1901.**

33 s. 9—*Security bond for the benefit of real heir and not reversionary heirs.*

By taking security under section 9 of the Sucession Certificate Act the contingent interests of reversionary heirs are not protected when the certificate granted in the same proceeding is given to the real heirs. BAI PARSON *v.* SOMNATH KAUSA. **5. B. L. R. 929.**

34 s. 9—See C. P. C. S. 43—ZAKI ALI KHAN *v.* JAFAR ALI KHAN. **2. O. C. 17.**

35—s. 9—*See s, 3, 8, 9—23. A. 477—No 6 supra.*

36. S. 9, *19—Order granting certificate conditionally on the giving of security by the applicant—Appeal.*

When, on an application for the grant of a certificate of succession under S. 7 of Act VII of 1889 the Court passes an order conditioned on the previous filing of security, such an order is not an order "granting, refusing or revoking a certificate within the meaning of S. 19 of the Act, and no appeal will lie therefrom. *Bhagwani* v. *Manni Lal*, (I. L. R., 13 All. 214) and *Bai Devkore* v. *Lalchand Jivandas*, (I. L. R., 19 Bom. 790), followed. *Venkataswami Naik* v. *Chinna Narayana Naik* (5 M. L. J. 28); *Ariya Pillai* v. *Thangammal* (I. L. R., 20 Mad. 412). and *Radha Rani Dassi* v. *Brindabun Chundra Basack*, (I. L. R., 25 Cal. 320), referred to.—NANNHU MAL *v.* GULBAO, **A. W. N. 1903. P. 225=26. A. 173.**

Sup: Govt. acts (VII of 1889) *(Contd.)*

37. S. 9.—*See S. 6, 7, 9—25. B. 523 No. 24. supra.*

38. S. 10, *19—Order extending certificate—"Order granting a certificate"—Appeal.*

The extension of a certificate under s. 10 of the Succession Certificate Act to additional debts is not the grant of a certificate so as to give a right of appeal under S. 19 of that Act against the extension —VENKATESWARULU *v.* BRAHMARAVUTU RAJA KRISTNAJI, **25. M. 634.**

39. S. 16.—*Suit pending in respect of the debt for which certificate is applied for and granted—Right of the certificate holder to prosecute the suit—Civil Procedure Code, s. 366 inapplicable.*

A widow, holding a succession certificate for the debt due to her husband can alone bring a suit for such debt and recover it. If her husband brought the suit and died, she as the holder of the succession certificate, will also be entitled as of right to prosecute the suit of her husband. Where at the date of the application for succession certificate, a suit is pending for the recovery of the debt in respect of which the certificate is applied for, the certificate holder alone is entitled as of right to prosecute the suit. S. 366, explanation, has no bearing on the question. MINATCHI ACHI *v.* ANANTHANARAYANA AIYAR. **12 M. L. J., 380 - 26 M. 224 at 229.**

40. S. 18, cl. (e).—*Hindu Law—Joint family—Death of one member—Certificate to widow—Suit by other member for declaration—Specific Relief Act, Section 42.*

The plaintiff who was member of an undivided Hindu family brought a suit after the death of another member of the same family for a declaration that the plaintiff was entitled to collect the debts set out in the plaint due to the deceased.

The defendant who was the widow of the deceased had obtained a succession certificate under Act VII of 1889 entitling her to collect the plaint debts of her deceased husband on giving security which she had done.

Held, that in spite of her having done so, the suit of the plaintiff was maintainable, and was one under section 42 of the Specific Relief Act, and was not barred under section 18, cl. (*e*) or any other provision of Act VII of 1889. CHINNAPPA CHETTIAR. *v.* THULASI AMMAL. **15 M. L. J., 399.**

41. s. 19. *Order granting certificate conditional on furnishing security not appealable.*

If a certificate is granted conditional on the applicant's furnishing security, no appeal lies under S. 19 from such order. 13 A. 214; 26 A. 214 : 173 foll.—

Per Richards, J. (doubting), Where the order of the District Court grants the applicant the right to obtain certificate on the furnishing of security, but no time is fixed within which it should be furnished nor the consequence that should follow upon failure to do so set forth the order falls within S. 19 of the Act. The order which the

Sup: Govt. acts (VII of 1889) *(Contd)*

Legislature intended to be appealable was the decision of the court as to who was or was not the proper person to be granted a certificate and not the question whether or not that person should within definite or indefinite period furnish security. GAURI DUTT *v.* MASAMMAT MAIKIA. **2 A. L. J. 606** *(See also No. 44 infra.)*

42 s. 19—*Succession certificate—Insurance-money—Hindu Law—Self-acquired property—Discretion in granting certificate.*

The widow of a deceased Hindu applied for a succession certificate to enable her to collect the monies due on policies of issurance standing in the name of the deceased. The brother of the deceased opposed the application on the ground that the policies were joint family property.

Held, that the widow was entitled to the certificate, for the money connected with insurance, the premia for which were paid out of the salary of the deceased, was *prima facie* his separate property. RAJAMMA *v.* RAMAKRISHNAYYA. **29 M. 121.**

43 s. 19—*Agent to the Governor at Vizagapatam—Appeal—District Court.*

Under section 19 of this Act, an appeal lies from the order of the Court of the Agent to the Governer at Vizagapatam as from an order of a District Court, (18 M. 227 dissented) BABUBALENDRANI GURUVARAJU *v.* BABUBALENDRANI CHANDRASAKRA RAJU, **3 M. L. T. 264.** *(See also No. 8 supra.*

44 s. 19—*Security, certificate granted on condition of giving—Appeal from order requiring security before granting certificate.*

An order under the Succession Certificate Act for the grant of a certificate conditional on the applicant furnishing security is not appealable. Such an order is not an order refusing a certificate. DELRAJ KUAR *v.* JAGDAT SINGH, **5 O. C., 213.** *See also No. 41 supra.*

45 s. 19—See section 3, 19—18 M. L. J. 252 No. 8 *supra.*

46 s. 19—See section 9, 19—26 A. 173 No. 36 and S. 10, 19—25 M. 634 No. 38 *supra.*

47 s. 180 and 212—*Application for Letters of Administration—Original will deposited and registered in Scotland—Copy certified under the hand and seal of Notary Public to be true copy of original granted by Assistant Keeper of Register of Deeds produced —Copy not admissible under S. 63, Evidence Act.*

An application was made under S. 180 and 212 of the Sucession Act, for Letters of Administration. A copy certified under the hand and seal of a Notary Public to be a true copy of the original granted by the Assistant Keeper of the Register of Deeds, of Scotland, neither purporting to be a copy made from the will itself nor bearing any certificate that it had been compared with the original, nor shown to be a copy admissible

in England to prove the original, was produced, along with the application.

Held that this was not a properly-authenticated copy of the will and was inadmissible as secondary evidence, under S. 63 of the Evidence Act, and that the applicant should produce a copy certified, by the Keeper or Assistant Keeper of the Register, to be a true copy of the original will to be acted upon. IN THE MATTER OF THE ESATE OF ADAM ROBERTSON WHYTE, **14 B. L. R. 33.**

77—Act VIII of 1890 ***(Guardian and Wards Act).***

1. S. 1 *and Chapter III.*

A District Judge, who is also a Deputy Commissioner in Santal Perganas, can appoint himself guardian of a minor. In his two offices as District Judge and Deputy Commissioner, he has in the eyes of law two district personæ, and in the latter capacity when he is appointed a guardian of a Minor, he is subject to the control of his own authority as a District Judge, which is different from his capacity of a Deputy Commissioner. The sections of Chapter III are applicable to persons other than the Collector appointed as guardian. KESHOBATI KUMARI *v.* SOTYA NARAIN SINGH. **34 C. 569.**

2. S. 7, *11, 13, 46—District Judge—Application for appointment of guardian—Reference to a Subordinate Judge to record evidence and submit report—Irregularity—Minor.*

A District Judge, upon receiving an application for the appointment of guardians to the persons and property of minors, fixed a day for hearing the same before the Subordinate Judge, and directed that Court to take evidence and report on the case. The Subordinate Judge recorded the whole evidence and submitted a report, upon the strength of which the District Judge dsiposed of the application.

Held that the procedure adopted by the District Judge was illegal and vitiated the whole inquiry. *Ganesh* v. *Kusabai,* (I. L. R., 23 Bom. 698) followed. NARAYAN SHRIDHAR *v.* RAMCHANDRA KOND DEVE BELHE. **26 B. 716=4. B. L. R., 1902. P. 511.**

3. S. 7 *and 17—And Act XL of 1858—A fit person to be appointed guardian.*

A was appointed guardian of a minor's property under S. 7, Act VIII of 1890. On appeal B. the appellant contended, (1) that Act VIII of 1890 confined the selection of a guardian to those of his relations who were entitled under the law to which the minor was subject to act as his guardian, that though b. S. 7 of Act XL of 1858 now repealed by Act VIII of 1890, a friend of the minor might have been appointed guardian of his property in preference to relatives, S. 17 of the latter Act had altered the law and now a friend of the minor could not be appointed in preference to

relatives entitled and willing to become guardians, and (2) that the appointment of some other person would be more agreeable to the appellant.

Held, that S. 17 of Act VIII of 1890, merely enacted plainly and distinctly what was apparently intended but not clearly expressed by Act XL of 1858, namely, that the Court should make a selection consistent with the law to which the minor is subject, provided that the selection was for the welfare of the minor and therefore the appointment made by the Court below was not one not authorised by Act VIII of 1890 merely because there happened to be in existence guardians indicated by the law to which the minor was subject who were willing to act.

Held, also that merely because it would be more agreeable to the appellant B if some person other than A were appointed guardian was no reason to reverse the appointment which appeared to be for the welfare of the minor. BASANTA *v.* CHEDI LAL. **4 O. C. 241.**

3 (a). S. 7 and 34.—*See No. 46 infra.*

4. S. 7, 47, 48.—*District Judge's order under S. 7 not open to review.*

A District Court's order under S. 7 of the Act refusing to appoint a guardian, is appealable under S. 47 (a), to the High Court: but S. 48 provides—"save as provided by S. 47 of the Act and by S. 622 of the Code of Civil Procedure, an order under the Act shall be *final* and shall not be liable to be contested by suit "*or otherwise.*"

Held, that the word "or otherwise" necessarily precluded review also under S. 622, C. P. C. FARID *v.* MITHO. **12 P. W. R., 1907=105 P. L. R., 1907=143 P. R, 1906.**

4(a). S. 7.—*See Ss. 34, 7—4 C. L. J. 112 No. 46 infra.*

5. S. 8.—*Father married again—Whether a fit guardian of a Hindu minor girl living with her maternal grandmother.*

In an application for appointment of a guardian for a minor, the Court has really to see what is for the benefit of the minor. A Hindu girl, aged 10 years, had been living with her grandmother for 5 years. The father had married again, on an application being made by the father to be appointed guardian of her person.

Held, that the father should not, under the circumstances, have been appointed guardian of the person of the girl, and having regard to her welfare, she should be restored to the custody of the grandmother. BINDO *v.* SHAMLAL. **4 A. L. J, 22=A. W. N., (1907), 24=29 A. 210.**

6 S. 8,—*39 Power of Court—Agreement entered into between parties.*

Having regard to the scheme of the Guardian and Wards Act and the protection intended to be thereby provided for minors the powers and jurisdiction of the Court, vested in it for the purpose of carrying the Act into effect cannot be ousted by any

Sup: Govt. acts (VIII of 1890) *(Contd.)*

agreement *inter partes*. *Bai* RUKSHMANI *v.* MOHANLAL RANCHODLAL **4. B. L. R. 963.**

7 s. 9—*Ordinarily resides—Temporary residence.*

Held, that the words 'ordinarily resides' in section 9 of the Guardians and Wards Act mean more than a temporary residence even though the period of such temporary residence may be considerable. MUBARIK SHAH KHAN *v.* MUSSAMAT WAJEH UL NISSA. **53 P. L. R. 1902.**

8 s. 9, 10—*Letters Patent, section 12—Jurisdiction of High Court—Natural guardians—Minor's wishes and interest test.*

Section 9 of this Act has not affected the jurisdiction of the U. P. High Court under its Letters Patent to entertain an application for appointing a minor's guardian. It has conferred a similar jurisdiction upon District Courts. (2 N. W. P. H. C. R. 79 referred to). The Court is not so much concerned with the feelings of the parents or natural guardians as with the welfare of the minor himself in his guardian. It must consider the benefit of the minor and what the wishes of the minor in the matter are. But the parents of the minor are entitled at all reasonable times to have an opportunity of visiting and seeing their child. ELLEN RAM *v.* CHARLES SPENCER. **2 A. L. J. 81.**

9 s. 10 —*Civil Procedure Code, section 562, 647—Record of evidence at the hearing of the application for appointment of guardian.*

At the hearing of an application for the appointment of a guardian under the Guardians and Wards Act, the Court, instead of taking down the evidence in the language of the Court, only took notes of it in English.

Held that the proceedings were not according to law and should be set aside. The cause should be remanded under s. 562 of the Civil Procedure Code. GANGA BAI *v.* NARAIN DAT, **9 C. W. N 104.**

10 s. 10—*Civil Procedure Code (Act XIV of 1882), sections 562, 647—Guardian and Ward—Evidence. Record of, in miscellaneous proceedings—Application for appointment of guardian.*

Where at the hearing of an application under the Guardian and Wards Act for the appointment of a guardian evidence of the witnesses examined by the parties was not recorded in the language of the Court and the only record of the evidence was in the Judge's notes of the statements made by the witnesses—

Held, that the case was not tried in accordance with law, that the proceeding must be set aside and the case remanded under section 562 of the Civil Procedure Code. GANGA BAI *v.* NARAIN DAT. **A. W. N. 1905 P. 104.**

11 s. 10—*Guardian and minor—Paternal uncle or mother—Mohammadan Law.*

The paternal uncle has no legal right under the Mohammadan Law to the guardianship of the property of his minor nephews and nieces in the lifetime of their mother. ALIMULLA KHAN *v.* ABADI BEGUM, **A. W. N. 1906 P. 256.**

12. s. 10—*Application by uncle to be appointed guardian of his nephew—Opposition by mother—Necessity of counter-application—Welfare of the minor.*

The uncle of the minor applied to be appointed guardian of his property. The minor's mother opposed the application and asked that she should be appointed. The Court granted her prayer.

Held, that in appointing a guardian the welfare of the minor should be the determining factor in the decision, and that though the next heir is peculiarly interested in the good management of the property, he ought not to be appointed when he is otherwise unfit—P. R., 54 of 1898 *referred to.*

Held, also, that it was not necessary for the counter-application made by the mother to be in the form prescribed in section 10 of the Guardians and Wards Act. AZIM ULLAH *v.* *Mussammat* ZAINAB.—**105 P. L. R., 1903.**

S 10—See S. 9, 10—2. A. L. J. 81—No. 8 *supra.*

13. S. 10, *25, 45—Suit by Hindu father for establishment of his right as guardian and for custody of his infant child.*

A suit was brought by a Hindu father alleging himself to be the guardian of his infant child for establishment of his right as such guardian and for the custody of the child, detained by the defendant, who was the maternal grandmother of the child.

Held that the Guardians and Wards Act (VIII of 1890) was intended by the Legislature to be a complete Code defining the rights and remedies of wards and guardians, and that no such suit as that brought would lie. *Ghasita* v. *Wazira*, (23 Punj. Rec. 41) approved. *Kishna* v. *Reade*, (I. L. R., 9 Mad. 31) and *Sharifa* v. *Munekhan*, (I. L R., 25 Bom. 574), distinguished. *In the matter of the petition of Kashi Chunder Sen*, (I. L. R., 8 Cal. 266), *The Collector of Pubna* v. *Romanath Tagore*, (B. L. R., F. B., 66—67, 630), and *Mussamat Hara Sundari Baistabi* v. *Mussammat Jayadurga Baistabi* (4 B. L. R., App. 36), referred to. SHAM LAL *v.* BINDO. **A. W. N., 1904. p. 135=1. A. L. J. 266=26 A. 594.**

14. s. 11.—See S. 7, 11, 13, 46—26. B. 716 No. 2 *supra.*

15. s. 11, *(1), 13, 17 and 46—Rival applicant, Power to refer to arbitration—C. P. C. S. 647.*

Per Curiam—Rival claimants for the guardianship of a minor are not in the position of ordinary litigants and cannot refer the matter in dispute to arbitration. Nor is any such power given to the Judge in the Guardians and Wards Act. The guiding principle, in appointing a guardian, is the consideration what is best for the welfare of a minor,

Sup: Govt. acts (VIII of 1890) *(Contd.)*

Per Karamat Husain, J.—S. 647 of the Code of Civil Procedure deals with procedure, and procedure alone, and does not touch the substantive law of arbitration. The consent of parties in a proceeding for the appointment of a guardian does not give the Judge any power to refer the matter to arbitration. MAHADEO PRASAD *v.* BINDESHARI PRASAD. **5 A. L. J. 101.**

16. s. 13, *and 46—Report of Collector—Evidence—Right of parties to tender evidence.*

Apart from section 46 of this Act a report called for by the District Court is no evidence. If the report is made on the initiation of the Collector, then it does not come within the provisions of section 46, and is no evidence on which Court can act. A District Court must base his conclusion on relevent evidence and is bound to admit evidence when tendered by a party opposing the appointment of a particular person as guardian. It is no ground to refer to take evidence as it would not carry conviction. GANGAWA *v.* SANNA IRAPPA. **4 B. L. R., 800.**

17. S. 13.—See S. 7, 11, 13, 46—26. B. 716 No. 2; S. 11, 13, 17, 46—5. A. L. J. 101. No. 15 *supra.*

18. S. 16, 29.—*Effect of appointment of guardian—Property of minor in different districts—Suit by ward on attaining majority to avoid sale by certificated guardian.*

When a certificated guardian of the property of a minor has been appointed under the provisions of the Guardians and Wards Act, he becomes certificated guardian in respect of all properties situated all over India. Section 16 of the Act is directory only and does not in any way affect or prejudice the status of a certificated guardian when appointed generally over the property of a minor. When a minor, for whose property a certificated guardian was appointed, sues on attaining majority to set aside a sale made by his guardian, he must make restitution of any benefits which he may have received from such sale. RAM CHANDAR *v.* CHHEDA LAL, **A. W. N., 1905, p. 123=2 A. L. J., 460.**

19. S. 17.—*Guardian and Ward—Application by mother to be appointed guardian of the person of her minor daughter—Evidence. Record of—Marriage of Muhammadan mother after the death of her first husband, C. P. C., (1882), S. 647.*

An application by mother to be appointed guardian of the person of her minor daughter was rejected. The Court did not record on what grounds the persons opposing the application were doing so, nor did it record the evidence of the witnesses in the manner required by law, but it simply made on the back of the application notes of the statements of certain persons examined by it.

Held, that the procedure adopted was wrong; under section 647 of the Civil Procedure Code, the Court was bound in a proceeding of this kind to follow the procedure prescribed in the Code in respect of suits.

Held, also, that the circumstance of the mother having married again did not disqualify her from being appointed guardian of the person of her daughter. GHAFURAN *v.* CHHANGA, **A. W. N., 1906, P. 64.**

20. s. 17.—*Appointment of guardian—Hindu Law.*

In appointing a guardian under S. 17 of this Act the legal right of guardianship, the minor's choice and relationship are very minor considerations as compared with the main question what order would be for the welfare and happiness of the minor, *i. e.*—

With whom will they be happy? Who is most likely to contribute to their well being and look after their health and comfort? Who is likely to bring up and educate the minors in the manner in which they would have been brought up by the parents if they have been alive? In short the interest, well-being and happiness of the minors ought to be the main and paramount consideration for the Court is selecting the guardian of the person of minor and not relationship, &c. *Re* GUARDIAN AND WARDS ACT: *Re* GOOLBAI AND LILBAI, **9 B. L. R. 923 =32 B. 50.**

20 a S. 17.—*Effect of change of religion on right of guardianship.*

One *Mussammat* Wazir Begam claimed to be appointed guardian to two minor children and of their property by right of her being their maternal grandmother as against their father who had embraced the Christian religion.

Held, that the claim should be dismissed. The law of India, while placing all religions on a level before the law and allowing to the fullest extent the right of aggregations to individuals to be governed by their own personal law, protects individuals, so far as may be, from the loss of either rights or property by reason of renunciation of, or exclusion from, any religion. The preservation of such rights must be consistent also with the preservation of the rights of others and when those clash, the Courts have to decide between rival interests according to justice, equity and good conscience.

Held, also that the fact that the father has had his children, who were not of age to profess Christianity of their own choice, baptized into the Christian Church, cannot have any legal effect on the rights of guardianship. GUL MUHAMMAD *v.* *Mussammat* WAZIR BEGAM. **167 P. L. R. 1901 = P. R., 60 of 1901.**

21 s. 17.—*Testamentary guardian—Interests adverse to the minor—Removal of Testamentary guardian.*

A person who is the presumptive heir to the property of a minor is one whose interests are adverse to that of the minor, and when he is not a blood relative of the minor, such a person, even though he had been appointed guardian by the will of the father of the

Sup: Govt acts (VIII of 1890) *(Contd.)*

minor, was removed from the guardianship, and the maternal grandfather of the minor appointed instead.—SAMI ROW JAGADAP *v.* ELIAYATHA ROW GAYABAYADU. **16 M. L. J. 357.**

22 s. 17. *—Joint family—Hindu Law.—*

Held, following (19 C., 301), that no guardian can be appointed under this Act of a minor's property, where the minor is a member of a *Mitakshara* joint Hindu family, holding no separate property.—SALIK RAM *v.* MUSAMMAT JANKA,—**4 O. C., 239.**

23 s. 17.—*As to Hindu Law See Nos. 20 & 22 supra.*

24 s. 17.—*See s. 7, 117—4 O. C. 241 No. 3 supra.*

25 S. 17.—*See s. 11, 13, 17, 46—5. A. L. J. 101. No. 15 supra.*

26 S. 17 *—Competition between outcasted mother and incaste paternal uncle*—(See Act XXI of 1850)—KAULESRA *v.* JORAI KASAUNDHAN.—**A. W. N. 1905 P. 205 = 2 A. L. J. 663 = 28 A. 233 C. 60.**

27 S. 17.—*Right of mother to the custody of his minor daughter whom she handed over to a mission to be taken care of to take her back when she was herself going to be converted to Mohammodanism*—See :Minor—MARIYUMMA *v.* REV. BOSHAID.—**1. M. L. T. 347.**

28. s. 19, 20. *Minor—Debt—Part-payment—Acknowledgement of liability—Extension of time.*

A guardian appointed under the Guardian and Wards Act (VIII of 1890) can sign an acknowledgment of liability in respect of, or pay part of the principal of, a debt, so as to extend the period of limitation against his ward in accordance with s. 19 and 20 of the Limitation Act (XV of 1887), provided it be shown in each case that the guardian's act was for the protection or benefit of the ward's property. ANNAPAGAUDA *v.* SANGADIGYAPA AND GOKUL DALSARAM *v.* KERU. **I. L. R., 26 B 221.**

29. s. 23. *Collector authorized by Board of Revenue to raise loan.*

Where the collector is authorized by the Board of Revenue as Court of Wards under S. 23 of this Act to raise a loan on the mortgage of a ward's properties, he can delegate his powers to the manager acting under him. JOGESHWAR NARAIN SINGH *v.* RAI RADHA RAWAN. **3 C. L. J. 165.**

30. s. 25. *Suit for custody—Abatement of suit—Torts—Death of defendant—Continuation of suit against heir—Findings of fact.*

A Muhammadan father sued the defendant to recover possession of his two daugters said to have been left with the defendant, who afterwards declined to restore them. During the pendency of the suit the defendant died and the suit was continued against one of his heirs.

Held, that the Guardians and Wards Act did not debar a Civil Court from entertaining a suit of this nature.

P. R., 10 *of* 1897, *not followed.*

Held, also, that the suit was of the nature of an *actio personalis* and the cause of action in such a suit does not survive when the defendant dies.

The High Court cannot accept a finding of fact arrived at without an application of sound principles to the consideration of evidence as binding upon it.—SHARIFA *v.* MUNEKHAN SHARLIKHAN.—**25 B. 574 = 3 B. L. R., 167.**

31. s. 25.—*See s. 10, 25, 45—26. A. 594. No. 13 supra.*

32. s. 28, 29 & 47.—*Order granting permission to transfer property to A. and not to B. is not appealable.*

Held, that an order of a District Judge sanctioning a mortgage in favour of a particular person in preference to another person is not appealable. Such an order cannot be treated as an order refusing sanction to mortgage.—MUST. SHIAM KUNWAR & ANOTHER *v.* SHIAM LAL, —**11 O. C. 29.**

33. s. 29.—*A certificated guardian can compromise a suit without obtaining D. T's sanction, as such an act is not contemplated in S. 29 of this Act.*—See C. P. C. S. 462.—BIKU HALWAI *v.* MAHESH HALWAI.—**8 C. L. J. 266.**

34. S. 29.—*See S. 16, 29—2. A. L. J. 460 No 18 supra.*

35. S. 29.—*See S. 28, 29, 47—11. O. C. 29. No 32 supra.*

36. S. 29. *30—Conditional permission to guardian to sell minor's property—Sale voidable when condition not fulfilled.*

Permission was given by the Court to the certificated guardian to sell certain property of the minor on condition "that the applicant files receipt for the amount paid over to the mortgagee in this court and invests the balance in the minor's name in a security approved by the Court within six weeks' time." The property was sold but the condition was not fulfilled, although the vendee had knowledge of it.

Held that the sale was voidable at the instance of the minor.—KUNJA LAL *v.* GAURI SHANKAR, **3 A. L. J. 30 = 1 M. L. T. 52 = A. W. N. 1905. P. 274.**

37. S. 29, *30—Minor—Pre-emption—Refusal of guardian on behalf of minor to claim pre-emption—Minor bound by such refusal.*

The guardian of a minor is competent to exercise on behalf of the minor, or to refuse to exercise a right of pre-emption accruing to the minor, and if he refuses in good faith and in the interests of the minor, the minor is bound by such refusal. *Lal Bahadur Singh* v. *Durga Singh* (I. L. R., 3 All, 437) referred to—UMRAO SINGH *v.* DALIP SINGH, **23 A. 129.**

38. S. 29, *30—Mortgage executed by a minor—Distinction between such mortgage and a mortgage executed by the certificated guardian on behalf of the minor—N. W. P. Land Revenue Act (XIX. of 1873), S. 203, 205 A.*

A mortgage executed by a minor is not void, but only voidable, even where the minor has a certificated guardian appoint-

Sup: Govt. acts (VIII of 1890) *(Contd.)*

ed by the Court. Where, therefore, a person during his minority, had mortgaged, with possession, certain immoveable property, and subsequently, after attaining his majority, had sold the same property, as unincumbered to a third party, without any notice to the mortgagee of his intention to avoid the mortgage, it was *held* that the purchaser could not turn the mortgagee out of possession.—MADAN MOHAN *v.* RANGI LAL. **A. W. N. 1901. P. 78=23 A. 288.**

39. S. 29, *30—Mortgage by guardian of minor's property—Court of Wards.*

A martgage, purporting to bind the estate of a minor was executed on behalf of the minor by his mother, who was not only the natural guardian of the minor, but a certificated guardian under the provisions of the Guardians and Wards Act 1890. The guardian, however, had not obtained the permission required by S. 29 of the abovementioned Act.

Held that the mortgage was not void, but if the minor had in fact benefited by the money borrowed, to that extent, the minor's estate ought to be held liable before he was entitled to be relieved against the mortgage. *Girraj Bakhsh Kazi* v. *Hamidally* (I. L. R., 9 All. 340) and *Sinaya Pillai* v. *Munisami Ayyan* (I. L. R., 22 Mad. 289) followed; *Nizam-udin Shah* v. *Anandi Prasad*, (I. L. R., 18 All. 373) distinguished. TEJPAL *v.* GANGA, **A. W. N. 1902 P. 193=24. A. 59.**

40. S. 29, 30.—*Conditional permission to Guardian to sell minor's property—Sale voidable when condition not fulfilled.*

Permission was given by the Court to the certificated guardian to sell certain property of the minor on condition "that the applicant files receipt for the amount paid over to the mortgagee in this Court and invests the balance in the minor's name in a security approved by the Court within six weeks time." The property was sold but the condition was not fulfilled although the vendee had knowledge of it.

Held, that the sale was voidable at the instance of the minor. KUNJA LAL *v.* GOURI SHANKAR, **3 A. L. J., 274.**

41. S. 29 and 31.—*Mortgage of minor's property to secure a loan sanctioned by the Court—Interest.*

In sanctioning the raising of loans on the security of the property of minors, it is the duty of the Judge granting sanction to specify in his order of sanction not only the amount to be raised and the property to be mortgaged, but also the rate of interest, or at least the maximum rate of interest, at which the loans are to be raised If the rate of interest is not specified the slender are entitled only to a reasonable rate of interest. (11 C. 379 followed). THAKUR PRASAD *v.* GAURIPAT RAI. **A. W. N., (1908), 75=30 A. 188.**

42. S. 30.—*See s. 29, 30—A. W. N. 1905. P. 274. No. 36. 23. A. 129. No. 37, 25. A. 59 No. 39*

Sup: Govt. acts (VIII of 1890) *(Contd.)*

3. A. L. J. 274. No. 40. supra.

43. S. 30.—*See s. 29, 30—23. A. 288. No. 38 supra.*

But see Act IX of 1872 s. 11, 19, 64, 65—No. 28 C. 255. 30. C. 539. P. C.

44. S. 30.—*Minor's Act (XL. of 1858), s. 18—Lease by guardian in excess of his powers—Sale of leased property by minor on attaining majority—Suit by purchaser for possession—Limitation Act (XV. of 1877) sch. II., art. 91.*

The certificated guardian of a minor granted, without previously obtaining the permission of the Court, a perpetual lease of certain immovable property forming part of the minor's estate on the 28th March 1890. The minor came of age on the 7th of December 1901, and on 21st October 1902, sold the property, the subject of the lease mentioned above. On the 22nd of July 1903, the purchaser sued for possession of the property purchased by him, asking for cancellation of the lease, if necessary.

Held that it was not necessary for the plaintiff to ask for cancellation of the lease as a condition precedent to his obtaining decree for possession and that the suit was not barred by limitation.—ABDUL RAHMAN *v.* SUKHDAYAL SINGH,—**2. A. L. J. 50=A. W. N. 1905. P. 176=28. A. 30.**

45. S. 31.—*See Ss. 29, 31—30 A. 188 No. 41 supra.*

46. S. 34 and 7.—*Indian Majority Act (IX of 1875), Section 3—Attainment of majority by infant of whose person and property a guardian has been appointed—Order appointing guardian on his furnishing security, if complete before security is given.*

So far as the infant is concerned, he is put in the position of a ward as soon as the Court has made up its mind as to the matters set out in clauses (*a*) and (*b*) of section 7 of the Guardians and Wards Act; and the proviso that the guardian should give security is merely an additional precaution to protect the interest of the infant.

The effect of the order requiring security is to suspend the acts of the guardian till he gives security. But as soon an order is made under section 7 the infant becomes a minor and remains a ward irrespective of any act of the guardian until he attains the age of 21 years. 17 Cal., 347 *referred to.* GOPAL CHANDER BOSE *v.* GONESH CHUNDER SRIMANI. **4 C. L. J., 112.**

47. S. 34, 38, 41 and 42.—*Liability of guardian to render account to Court.*

The object of section 34 Guardians and Wards Act is to give the Court, as representing the interest of the minor, certain summary powers for the protection of his property. As soon as the ward becomes *sui juris* the necessity for the power ceases.

The words in section 41 cannot be construed into giving the Court, by summary procedure, a power to order accounts to be rendered after the termination of the guardianship. NABU BEPARI *v.* SHEIKH MAHOMED, **5 W. N. C., 207.**

Sup: Govt. acts (VIII of 1890) *(Contd.)*

48 S. 34, 35, 36, 37—*Administration bond passed to Judge—Refusal of the Judge to assign—Appeal.*

No appeal lies from an order passed by the District Judge under s. 35 of the Guardians and Wards Act (VIII of 1890) declining to assign the bond. A bond under section 34 of the Guardians and Wards Act is to be given to the Judge of the Court to enure for the benefit of the Judge for the time being, with or without sureties, as may be prescribed, engaging duly to account for what the guardian may receive in respect of the property of the ward. There is nothing in the section or in the form, as given in the schedule of the High Court Circular Orders, which suggests that the bond ceases to operate either on the death of the guardian or of the ward or on the cesser or otherwise of the guardianship so that a right of suit would still continue notwithstanding the happening of these events. The District Judge can in his discretion under such circumstances assign such a bond to a proper person. GANPAT *v.* ANNA. **7 B. L. R. 803—30 B. 164.**

49 S. 35—*Guardian dealing with property not specified in the application for appointment of guardian.* See Guardian and Minor. SARAT CHANDRA ROY CHOWDHARI *v.* RAJONI MOHAN ROY. **12 C. W. N. 481.**

50. S. 35, 36, 37—See S. 34, 35, 36, 37 —30. B. 164, No. 48 *supra.*

51. S. 38.—See S. 34, 38, 41, 42—5. C. W. N., 207 No. 47 *supra.*

52. S. 39—*Removal of guardian appointed by Will—Incapacity. Proof of—Restoration of property to former guardian.*

To remove a guardian appointed by Will for incapacity without any evidence at all is illegal. Incapacity cannot be presumed from old age. It must be proved by evidence.

In cancelling the order of removal the High Court directed that if in pursuance of the order passed by the District Court, removing the old guardian, property of the minor had been made over to the newly appointed guardian, it should be restored to the former one. RINDABAI *v.* GIRDHARLAL PRAYAGDATTA. **4 B. L. R, 799.**

53. S. 39, 52. *Minor having proprietary interest with adults in joint family—Joint family comprising all minors—Guardianship liable to cease as soon as there is an adult person.*

A guardian of the property cannot be appointed for a minor whose only proprietary interest is as co-parcener with adults in a joint family property. This principle does not apply when all the co parceners are minors and a guardian of the property is appointed for the whole number. As soon as there is an adult co-parcener, any guardianship of the property previously constituted either ceases or is liable to cease. An order appointing a guardian of the property of minor co-parceners, who exclusively constitute the joint family, should reserve liberty to any minor on attaining majority to apply for the removal of the guardian of the property or restrictions of his power under s. 52 of the Guardians and Wards Act. BINDAJI *v.* MATHURABAI. **7 B. L. R. 809=30 B. 152.**

54. S. 39.—*See s. 8, 39—4. B. L. R. 963 No. 6 supra.*

55. S. 41, *C. 4.—Guardian to render accounts—Suit of accounts.*

Where the Court has made no order declaring the previous guardian to be discharged under S. 41, c. 4 of the Act, a suit lies for the purpose of calling upon the previous guardian to render accounts. The mere fact that the succeeding guardian has neglected to inspect those accounts, although they were lying in the Court for about a year, is no legal bar to the suit being maintained.

Although the question, whether certain properties, really belonged to the estate of the minor or to the previous guardian personally, being a question of right cannot properly be gone into in such a suit, still, for the purpose of taking an account, it must be seen what are the properties, which the previous guardian took possession of, as guardian of the minor under the orders of the Court; and he is bound to render an account, in respect of all the properties, of which he received charge as such guardian. KANIZ FATIMA *v.* SAJJAD HOSAIN, **34 C. 211.** *(See No. 65 infra).*

56. S. 41—*See S. 34, 38, 41, 42—5. C. W. N. 207 No. 47 supra.*

57. S. 42—*See S. 34, 38, 41, 42—5. C. W. N. 207 No. 47 supra.*

58. S. 45.—*See Ss. 10, 25, 45—26 A. 599 No. 13 supra.*

59. S. 45.—*Termination of guardianship.*

Where one of the minors attains majority, the Court has power to take action under s. 45 of Act VIII of 1890 and require the guardian to deliver up any property of the ward that might be in his possession or under his control. *Nabu Behari* v. *Sheikh Mohamed* (5 C. W. N. 207) dissented from. SYED ABDUL RAHIMAN SAHIB *v.* ABDULLA SAHIB, **16 M. L. J. 283.**

60. S. 46.—*Arbitrator—District Judge—Removal of guardian—Illegal delegation of power void though with consent—Nominal guardian—Court's power acting extra cursum curiae.*

A District Judge has no jurisdiction to remove a guardian under circumstances which would not enable him to remove them under the Guardians and Wards Act and to give him powers which no District Judge has under the law and which no person could by consent confer on an arbitrator. An arbitrator (who in the present case is the District Judge) could never have the power of taking the property out of the custody of the guardian appointed by the court under the Act and placing it in the charge of the Nazir, nor can any order, of any arbitrator, declaring the legally appointed guardian a nominal

Sup: Govt. acts (VIII of 1890) *(Contd.)*

guardian, have any effect. No consent of the parties could enable a District Judge to exercise a jurisdiction not vested in him by law and in no case can the court though acting *extra Cursum Curiae* do that which the parties could not have legally authorized an arbitrator to do. Therefore the order of the District Judge was *ultra vires*, was not as an arbitrator and was appealable. INDER NARAIN SINGH *v.* E. E. ADLAM, **8 C. W. N.** 87.

61. s. 46. *—Report of Collector—Evidence—Right of parties to tender evidence.*

Apart from section 46 of the Guardian and Wards Act a report called for by the District Court is no evidence. If the report is made on the initiation of the Collector, then it does not come within the provisions of section 46, and is not evidence on which Court can act. A District Court is bound to admit evidence when tendered by a party opposing the appointment of a particular person as guardian. GANGAWA *v.* SANNA IRAPPA. **4 B. L. R. 800.**

62. s. 46.—*See S. 7, 11, 13, 46—26 B. 716 No. 2 supra.*

63. s. 46.—*See Ss. 11, 13, 17, 46—5 A. L. J. 101, No. 15 supra.*

64. s. 46.—*See Ss. 13, 46—4 B. L. R. 800, No. 16 supra.*

65 S. 47.

A being removed by order of the Court from the guardianship of the property of a minor was ordered to deliver the accounts of the minor's property. A produced certain accounts, the correctness of which was objected to by the minor's mother. The District Judge declined to enquire into the correctness of the accounts.

Held on appeal that no appeal lies from the District Judge's order; section 47, cl. (i) was not applicable, as the order was not passed during the incumbency of the guardian; and cl. (j) of section 47, Act VIII of 1890 did not apply, as no penalty was imposed under section 41 or section 45 of the Act. MUSAMMAT CHAMBELLIA *v.* RAM DULARE. **1 O. C. 43.** *See No. 55 supra.*

66 S. 47—See sections 28, 29, 47—11 O. C. 29 No. 32 *supra.*

67. S. 47 *and 48—Indian Majority Act (IX of 1875), S. 3—Finality of orders—If order appointing guardian set aside minority does not extend to 21 years age.*

S. 48 of this Act gives finality to contested orders, and enacts that, once an order is made, it shall be final and shall not be contested by a substantive suit or by any from of litigation excepting as provided in S. 47 of this Act or C. P. C. S. 622.

Although the Guardians and Wards Act makes no provision for setting aside an order made under the Act, yet if such an order is made by the Judge sitting in Chambers, he can vary, alter, modify, rescind, recall, or set aside the order, if he finds that it is one that requires, in the interest of justice, to be dealt with in that way, or if he is satisfied that it is one that ought not to have been made.

If an order appointing a guardian is subsequently set aside, on any ground, the period of minority is not extended to 21 years under S. 3 of the Indian Majority Act, NAGARDAS VUTSRAJ *v.* ANANDRAO BHAI, **9 B. L. R. 495.**

Sup: Govt. acts (IX of 1890)

68. S. 47. 48—See S. 7, 47, 48—143 P. R. 1906=12 P. W. R. 1907. No 4 *supra.*

69 S. 48—See S. 7, 47, 48—143. P. R. 1906 No. 4 *supra*; and see S. 47, 48—9. B. L. R. 495 No 67 *supra.*

70 S. 52.—See S. 39, 52—30. B. 152. No 53 *supra.*

71. s. 52.—*Effect of appointment of guardian—Act IX of 1875 S. 3. C. P. C. S. 440.*

Were a guardian has been appointed under Act VIII of 1890 the attainment of majority of the ward is postponed till 21 years of his age, although the gaurdian so appointed may be discharged before that time—21. B. 281 followed.—SADULAL *v.* MURLIDHAR. **A. W. N. 1907. P. 213 =4 A. L. J. 597.**

78.—Act IX of 1890 *(Railways Act).*

1. s. 3 *(6), 77, 140—Notification of claim for refund as condition precedent to suit—To whom such notification must be given.*

Where the plaintiff sued a Railway Company for recovery of money alleged to have been taken by the defendant as freight upon certain goods in excess of what was legally due, and before filing the suit, gave notice of her claim for a refund to the General Traffic Manager, it was *held* that this was not a compliance with the provisions of the Indian Railways Act, 1890, and the suit could not be maintained.—*Periannan Chetti* v. *South Indian Railway Company* (I. L. R., 22 Mad 137) *The Secretary of State for India* v. *Dipchand Poddar* (I. L. R., 21 Cal. 306), *East Indian Railway* v. *Jeth Mal' Ramanand* (I L R, 26 Bom. 669), and *Bombay, Baroda and Central India Railway Company* v. *South Lal* (I. L. R, 26 All. 207), followed. GREAT INDIAN PENINSULA RAILWAY COMPANY *v.* CHANDRA BAI. **3 A. L. J. 329=28. A. 552.**

2. s. 3 *(6)—Suit against Traffic Superintendent of State Railway—Suit against Govt—Secretary of State for India in Council to be sued as defendant in suit against State Railway—Meaning of Railway administration—Notice to Secretary of State.* See C. P. C. S. 416, 424. TRAFFIC SUPERINTENDENT E. B. E. I. & O. & R. RAILWAYS *v.* HAFIZ ABDUL RAHMAN. **4 O. C. 133.**

3 s. 7, *10, 11—Compensation for damage caused by railway works—Suit to enforce construction of channel to irrigate—Maintainability.*

Plaintiff alleged that the execution of certain works by a Railway Company, under s. 7 of the Railway Act had interfered

Sup: Govt. acts (IX of 1890) (*Contd.*)

with his right to the flow of water to his land. He did not suggest that the Company had exceeded the powers conferred on them by that section, but claimed that they had failed to discharge the obligation, imposed by s. 11 (*b*) of the Act, to make the necessary accommodation works, and sought a decision of the Courts that such works should be executed.

Held that he had no right of action. The effect of s. 11 of the Railway Act is that the opinion of the executive, with reference to the sufficiency of accommodation works, is final. SEETAMRAJU KONDAL ROW *v.* THE COLLECTOR OF GODAVARI. **25 M. 632.**

4 s. 7-12—*Railway—Negligence in construction of railway—Suit for damage to land by causing water to flood—Acting in excess of statutory powers in construction of railway—Suit for damages.*

The defendants, by the negligent construction of a railway made in the exercise of their powers under the Indian Railways Act (IX of 1890), caused the plaintiff's land to be flooded in the rainy season and consequently damaged. That Act provides that a suit shall not lie to recover compensation for damage caused by the exercise of the powers thereby conferred, but that the amount of such compensation shall be determined in accordance with the Land Acquisition Act, 1870.

Held it being shown that the defendants had exceeded or abused their statutory powers, that the plaintiff's remedy was by suit for damages, and not for compensation under the Act. Statutory powers under such an Act are to be exercised with ordinary care and skill and with some regard to the property and rights of others; they are granted on the condition, sometimes expressed and sometimes understood —expressed in the Railways Act of 1890, but if not expressed always understood—that the undertakers "shall do as little damage as possible in the exercise of their statutory powers."—GAEKWAR SARKAR OF BARODA *v.* NANDHI KACHRABHAI, **27 B. 344=7. C. W. N. 393.**

5 s. 10, 11—*See s. 7, 10, 11—25. M. 632. No 3 supra.*

6 s. 12—*See s. 7, 12—7. C. W. N, 393 No 4 supra.*

7 s. 47.—*Rules thereunder—Criminal offences.*

Neither S. 47 of the Act nor the rules made by a Railway Company thereunder create any criminal offences. The section merely gives to the Company power to frame rules and to enforce them by imposing fines on its own officers. BASANTA KUMAR BANERJI. **11 C. W. N. 583.**

8. s. 47 (b).—*Responsibility of Railway Company for goods left on its premises without a receipt being taken for them—Rules framed by the Company under the Act.*

Held, that a rule, by which a Railway Company disclaimed all responsibility for goods left on Company's premises unless certain conditions were fulfilled, the principal of which was that the goods should have been accepted and a receipt given for them by a duly authorized employe of the company, was a rule properly made under the provisions of the Railways Act 1890, and that no suit in respect of the loss of goods merely deposited upon the Company's premises, without such a receipt being taken for them, could be maintained. *Shea* v. *The Great Northern Railway Company* (14 C. B., 647), referred to. BANNA MAL *v.* THE SECRETARY OF STATE. **A. W. N., 1901, P. 107=23 A. 367.**

9. S. 47 (b).—*Railways—Carriage of goods —Contract—Formation of contract—Rules of Company for consignment of goods—Re-booking of goods after arrival at original destination.*

The rules of a Railway Company prescribed certain procedure for the booking of goods. In accordance with those rules certain goods were booked from Trichinopoly to Bagalkot. The plaintiff requested A, the goods clerk and station master at Hotgi (on defendants' Railway), to have the goods re-booked from Bagalkot to Hotgi, and for this purpose handed him the railway receipt with a written application, which, however, was not in the form of consignment used by the Company. A, accordingly sent a service telegram to the station master at Bagalkot asking him to re-book the goods. The station master there did not re-book the goods and they were delivered at Bagalkot. The plaintiff sued the Railway Company for damages for non-delivery at Hotgi.

Held, that the defendant Company had not contracted with the plaintiff to carry the goods from Bagalkot to Hotgi. The mere fact that the plaintiff got A, the station master at Hotgi, to send a service telegram to Bagalkot did not constitute a contract to bind the Company. MALKARJUN SHIDAPA *v.* SOUTHERN MAHRATHA RAILWAY COMPANY. **27 B. 126.**

10. S. 47 (b).—*Railway Company—Liability for acts of servants—Scope of authority—Railways Act (IX of 1890), Section 77—Objection for the first time on second appeal.*

The plaintiff entrusted the defendants, Railway Company, with goods to be sent to Kamti to be delivered to the consignee. Subsequently whilst the consignment was *en route* to Kamti, the plaintiff requested the Station Master at the despatching station to direct delivery of the goods to be made to him and not to the consignee. The Station Master at Kamti, however, delivered the goods to the consignee. The plaintiff sued the defendants for compensation. It was pleaded for the defendants that the suit did not lie, as they were not liable for the acts of their servants beyond the scope of their authority. It was also pleaded in the High Court on second appeal that the suit did not lie as no notice had been given to them, as required by section 77 of the Railways Act. No mention of this plea was made at any early stage of the case.

Sup: Govt. acts (IX of 1890) *(Contd.)*

Held, that the defendants were liable to pay compensation and were not entitled to raise the plea for the first time on second appeal. CHHAGANLAL SHALIGRAM SETH *v.* EAST INDIAN RAILWAY COMPANY. **5 B. L. R. 531 = 27 B. 597.**

11 S. 47, 54—See s. 72, 47, 54—31 C. 951 No. 26 *infra*.

12 S. 47, 51, 72, 77 and 140—*Non-delivery of goods—Bye-laws requiring notice of description and contents of missing article to be given to the District Traffic Superintendent invalid.*

A claim for damages for non-delivery of goods brought against a Railway Company falls under this Act (6 P. R. 1897 and 108 P. R. 1906 distinguished).

A railway receipt provided that all claims against the railway for loss or damage to goods must be made to the clerk in charge of the station to which they have been booked before delivery is taken, and that a written statement of the description and contents of the article missed or of the damage sustained must be sent forthwith to the Traffic Superintendent of the District in which the forwarding or receiving station is situated, and in default thereof the railway company will not be responsible.

Held that this bye-law which is duly sanctioned by the Governor-General in Council, and published in the Gazette is *ultra vires*, and under section 54, cl. 1 and 77, is inconsistent with the Act. The Act only requires a written notice of claim to be given to the Railway within 6 months of the delivery of goods. The aforesaid condition imposed by the bye-law, amounts to a repeal of section 77 and substitutes an incosistent provision in its place. By sec. 54 (1), a bye-law can impose conditions with respect to the "receiving, forwarding or delivering" of articles and can not prescribe what the consignor or consignee is to do after the goods are lost. (3 O. C. followed 26 B. 669 distinguished, 24 C. 306 and 22 M. 137 referred to.) AZIZUL RAHMAN *v.* THE BOMBAY-BARODA AND CENTRAL INDIA RAILWAY COMPANY. **76 P. R. 1908.**

13. S. 54. *See S. 47, 54, 72, 77, 140—76 P. R. 1908 No. 12 supra.*

14. S. 54. *See S. 72, 47, 54—31 C. 951 No. 26 supra.*

15. S. 59. *Responsibility of a Railway Company in the care of passengers—Injury to the latter by the illegal act of a fellow passenger—Negligence.*

The legal obligation upon a Railway Company to exercise due care and skill in carrying passengers does not extend so far that the Company can be held responsible, under all circumstances, for not carrying them safely. Negligence alleged against them must be proved affirmatively, where denied. It was not the duty of the railway servants to search every parcel that passed the ticket barrier, carried by a passenger. Words in the judgment of the Chief Justice, Q. B., in *Collett v. The London and North-Western Railway Company*, (16 Q. B., 984) as to the duty to "carry safely," explained. As no act, or omission, of neglect had been proved against the Company or their servants, the decrees below were recommended for reversal, and the suit for dismissal. THE EAST INDIAN RAILWAY COMPANY *v.* KALIDAS MUKERJI. **28 C. 401.**

16. S. 67. *Waiver by Railway Company —Reserved accommodations.*

The benefit of S. 67 *i. e.* "Fares shall be deemed to be accepted and tickets to be issued subject to the condition of their being room available in the train" may be waived by the Railway Company, but this benefit cannot said to have been waived by the mere fact that the plaintiffs had reserved a carriage as according to the rule of the Company "reserved carriages in mail trains can only be provided when the load of the train permits." Plaintiffs had reserved a carriage from Cocanada to Madras. At Samalkot the Company refused to attach this carriage to the mail train as it was already fully loaded.

Held, that plaintiffs were only entitled to the statutory relief given by S. 67 of the Railways Act. KOMMI REDDY SURYANARANA MURTY *v.* MADRAS RAILWAY Co. **30 M. 417.**

17 S. 68, and 112—*Travelling without ticket—Cheating—I. P. C. s. 417 and 511—Separate sentences—General Clauses Act s. 26.* KULADU PRASAD MAJUMDAR *v.* THE EMPEROR. **5 C. L. J. 47 (cr.)**

18 S. 72—*Risk Note, Form B—Contract Act (IX of 1872), s. 151, 152, 161—Goods, loss of—Bailee—Suit for compensation.*

A special agreement, known as "Risk Note, Form B," sanctioned by the Governor-General in Council under s. 72 cl. (2) of the Railways Act absolves a Railway Company from all liability for loss of goods from any cause whatsoever. The Company in such a case is not a bailee under the Contract Act.—TOONYA RAM *v.* EAST INDIAN RAILWAY COMPANY, **7. C. W. N. 370 = 30. C. 257.**

19. S. 72.—*Risk note by consignor—Liability of Railway Administration as regards goods lost in transit.*

A Cawnpore firm consigned 20 bundles of cotton to a firm at Gonda and signed a risk note in a form approved by the Governor-General in Council under sec. 72 (*b*) of the Indian Railways Act. 1890, at the time of delivery of the goods to the Railway. The risk note provided that whereas the consignment of cotton was charged for at a special reduced rate chargeable for such consignment the consignors in consideration of such lower charge undertook to hold the Railway Administration........, harmless and free from all responsibility for any loss, destruction or deterioration of or damage to the consignment from any cause whatever.........Out of the whole cotton one maund and twenty-nine seers were

Sup: Govt. acts (IX of 1890) *(Contd.)*

short delivered to the plaintiff, as a part of the consignment was lost in transit. The plaintiffs sued the Railway Administration for damages and called upon it to prove the cause of the loss.

Held, that there could be no question as to the validity of the risk note 17, Bom., 417 and 18 All., 42 followed, and that part of the consignment was 'lost' within the meaning of the risk note and though the cause of the loss was not proved the Railway Administration was protected by the risk note.—GOPAL DASS *v.* THE AGENT OF B. W. N. RAILWAY, **5 O. C., 153.**

20. s. 72—*Duty of Railway Company as carriers—Burden of proof—S. 151, Contract Act.*

A's horse carried by B, the Railway Company, was injured on the way and died a few days after. The horse was neither carried at the owner's risk, nor was it insured.

A sued B for damages. alleging that the accident was due to a defect in the horse box, but failed to prove it.

Held, on appeal by A that the burden of proof lay upon B under S. 72 of the Railways Act, to prove that B discharged the duty of a bailee, under S. 151 of the Contract Act.

The burden would only be discharged by proof that the horse box was in all respects sufficiently fitted, and adequately secured, and that, on the journey, such precautions as ordinary prudence dictates were taken by the Company's servants. 9 B. H. C. 1, 41 L. T. C. P. 268 and 22 A. 361 refd.

The burden of proof cannot be affected by the fact that the plaintiff had put forward, and failed to make good, a theory of his own to account for the accident.—(I. N. L. R. 4 foll.). BABU HARIDAS *v.* THE AGENT OR MANAGER OF THE B. B. AND C. I. RAILWAY. **3 N. L. R. 94.**

21. s. 72. *Railway Company—Liability for the acts of servants of the Company—Booking of goods.*

Plaintiff got his goods booked to Bagalkot Station. He got the Station Master, Hotgi, to send a service telegram to Bagalkot to re-book the goods to Hotgi, but this was not done. He sued the Railway Company for damages.

Held, that the mere fact that the plaintiff got the Hotgi Station Master to send a service telegam to Bagalkot to re-book the goods from Bagalkot to Hotgi could not possibly constitute a valid contract which bound the Railway Company, and the plaintiff's suit was not maintainable. MALKURJUN SHIDDAPPA *v.* THE SOUTHERN MARATHA RY. COMPANY. **4 B. L. R. 890 = 27 B. 126.**

22. s. 72 *Railway—Consignor agent of consignee—Modification of terms of contract by consignor—Cause of action against Railway.*

The plaintiffs' agent consigned certain goods to the plaintiffs who refused to take delivery owing to a *bona fide* mistake as to the identity of the goods, the agent having sent them loose in a waggon while the invoices described them as sent in bags. It was not alleged that the agent had no authority to transfer the goods from bags into a waggon or that the Railway dealt with the plaintiffs' agent with notice of the agency. On the plaintiffs' suit for damages—

Held, that on the pleadings the plaintiffs' claim was not maintainable for the plaintiffs' agent was the person who caused the mistake and the railway could not be held responsible for what the agent did in the course of authority.

Held, also, that assuming that it was a term of the contract that the goods should be carried in bags and delivered to the plaintiffs the agent himself by his action modified that term and as between him and the railway he could not hold the latter liable for a breach of it. The plaintiffs could not sue the railway whatever cause of action they might have against their agent. G. I. P. RAILWAY Co. LD. *v.* SAHEB RAM. **5 B. L. R. 953.**

23. s. 72. *Railway Company—Duty in carrying passengers and luggage—Negligence—Burden of proof.*

There is no obligation on the part of a Railway Company to carry a passenger safely. To sustain a claim for damages against a railway Company the plaintiff must prove that the officers of the railway did not show due care and diligence. 16 Q. B. 935 *explained*. THE EAST INDIA RAILWAY Co. *v.* KALIDAS MUKERJEE. **5 W. N. C., p 449, = 11 M. L. J. 156 = 3 B. L. R. 293 = 28 I. A. 144 = 28 C. 401.**

24. s. 72—*Railway Company—Negligence—Trains overshooting the platform—Injury to passengers—Damages.*

In determining the question as to whether there has been negligence or not on the part of the Railway Company the Court must have regard to all the circumstances of the case. No general hard and fast rule can be laid down. All the facts of the case have to be taken into consideration. The mere overshooting of the train beyond the platform is not in itself negligence. The mere fact that the station is not sufficiently lighted is not in itself negligence. There must be something more in order to entitle the plaintiff to claim damages on the ground of the negligence of the Railway Company. KESSOWJEE ISSUR *v.* THE GREAT INDIAN PENINSULA RAILWAY Co. **6 B. L. R. 673.**

See also 17 M. L. J. 347, 9 B. L. R. 671; 11 C. W. N. 721 P. C.

25. s. 72 (2)—*Suit for damages against a Railway Company for their servant's gross negligence—"Risknote," effect of.*

A sued B, a Railway Company, for damages for loss and deterioration of a consignment of wool. B pleaded a special contract, which A's consignor entered into with B., and which was embodied in a Risknote, by which the consignor, in consi-

Sup: Govt. acts (IX of 1890) (*Contd*).

deration of having the wool carried at a rate below the ordinery tariff rate agreed to hold B 'harmless and free from all responsibility for any loss or damage to the consigument'.

Held, that the risk-note constituted an agreement, conforming in every respect to the requirements of section 72 (2) of the Act and as its effect in no case was the Railway Company liable to account to the consiguee for any loss from any cause whatever. (18 A 42, 17 B. 417, 19 B. 159 and 30 C. 257 followed). HIRALAL *v.* BENGAL-NAGPUR RAILWAY COMPANY. **2 N. L. R. 125.**

26. S 47, 54, 72.—*Rules under Sections 47 and 54. Reasonableness of—Liability of Railway as bailee.*

The term " delivery " in section 72 of the Railways Act refers to a physical event an important element of which is that whatever is delivered passes from the physical custody of one man to the physical custody of another. It is used as a purely lay word, devoid of any legal significance at all.

When goods are delivered to the Railway to be carried, they become liable like any other bailee.

Rules under sections 47 and 54 of the Act may cut down the liability of the Railway but such rules must be reasonable.

The rule that goods tendered for despatch will remain at the owner's risk while in the custody of the Railway officers before a receipt is granted for them is not wholly reasonable. It is not unreasonable that as long as the consignor's servant is seeing the goods through the process of booking, marking and weighing, the Railway Company should not be responsible, but it would be unreasonable not to hold the Railway responsible if the booking process is interrupted for any substantial time and the goods are left in their possession. JALIM SINGH KATARY *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **8 C. W. N., 725= 31 C. 951.**

27. S. 72, 74 and 75 (1).—*Company's liability for passenger's luggage lost.*

A railway passenger, who entrusted his box, containing cloths, gold and silver ornaments and currency notes of over Rs. 100 in value to the Railway Company's servants, for conveyance in the luggage van, which was lost or stolen, cannot recover the value of the box or of any part of its contents from the Company, unless he had made the declaration prescribed by S. 75 (1) of the Act. The words "any parcel or package" in s. 75 (1) includes passenger's "luggage" dealt with by S. 74 of the Act. Cl. (*b*) of the second schedule of the Act covers currency notes. (56 P. R. 1897 refd. to). ALWAZ *v.* SIMLA-KALKA RAILWAY COMPANY. **15 P. L. R., 1908=73 P. R., 1907.**

28. S. 72, 76.—*Railway. Liability of—Goods carried under Risk Note—Release of liability for loss—Goods delivered to wrong person—Burden of proof.*

Sup: Govt. acts (IX of 1890) (*Contd.*)

The plaintiff's goods were carried by the defendants, Railway companies, under a Risk Note which protected them from liability for loss, destruction or deterioration of consignment of failure to make delivery of the goods.

Held, that the defendant companies were exempted from liability.

The plaintiff objected that the goods were not lost but delivered to a wrong person.

Held, that the burden of proving this was on the plaintiff.

It was for the plaintiff to show that the circumstances in which the goods disappeared were not such as to amount to loss within the meaning of the Risk Note.

It was not for the defendants to show by affirmative evidence that they had lost the goods. 10 *Cal.*, 210, 17 *Bom.*, 417, 19 *Bom.*, 159 and 18 *All.*, 52 *followed*. MULJI DHANJI SEIT *v.* SOUTHERN MAHARATTA RAILWAY Co. LD. & MADRAS RAILWAY Co. **14 M. L. J. 396.**

30. S. 72.—*See S. 47, 54, 72, 77 and 140—76. P. R. 1908 No 12 supra.*

31. S. 74.—*See S. 72, 74, 75 (1)—15. P. L. R. 1908 No 27 supra.*

32. S. 75.—*Through booking partly by steamer and partly by Railway consigner's omission to declare value and description of goods as required by Railways Act and Carriers Act—Liability for damages when goods are lost while in transit*—See Carriers—NARANG RAI AGARWALA *v.* RIVER STEAM NAVIGATION CO: LD: **11. C. W. N. 1071= 34. C. 419.**

33. S. 75.—*Contract to carry goods partly by Steamer and partly by Railway—Steamer Company's liability for loss of goods during railway transmission—Railways Act S. 75 and Carriers Act III of 1865 S. 3, 8, 9*—See Carriers—GOKAL CHANDERA DASS *v.* INDIAN GENERAL STEAM NAVIGATION AND RAILWAY CO. LD:—**11. C. W. N. 1076.**

34. s. 75 (1)—*See S. 72, 74, 75 (1)—15. P. L. R. 1908 No 27 supra.*

35. s. 76—*See S. 72, 76—14. M. L. J. 396 No 28 supra.*

36. s. 77—*See S. 3 (6), 77, 140—28. A. 552. No. 1 supra.*

37. s. 77—*See S. 47, 54, 72, 77, 140—76, P. R. 1908 No. 12 supra.*

38. s. 77—*See S. 72, 77—27 B. 597 No. 29 supra.*

39. s. 77 and 80.—*Railway—Liability for loss of goods—Notice of claim.*

Under section 80 of the Railways Act, when goods are booked through over the railways of two or more railway administrations, it is at the option of the plaintiff to sue either the railway administration to which the goods were delivered by the consignor or the railway administration on whose line the loss was occurred.

Under section 77 notice of claim must be given within the period therein fixed to the railway administration which the plaintiff seeks to render liable. BOMBAY, BARO-

Sup: Govt. acts (IX of 1890) *(Contd.)*

DA AND CENTRAL INDIA RAILWAY CO. *v.* SAUTE LAL. **A. W. N., 1903, P. 235.**

40. S. 77, 140.—*Overcharge—Notice of claim—Statement in a letter.*

A sued B the Railway Company to recover the excess amount claimed and received by B as carrier after the delivery of the goods to the consignee.

Held, that the notice prescribed by S. 77 of this Act was necessary and that the overcharge referred to in the section, is not confined in its meaning to an overcharge recovered before the delivery of the goods to the consignee at their destination.

Held, also, that a letter under S. 140 of the Act must be in exact compliance with the terms of the section. It must, therefore, be delivered to the agent at his office. The statement of a fact in a letter is not proof of the fact itself. GREAT INDIAN PENINSULAR RAILWAY *v.* DEVASI VERSEE. **9 B. L. R., 942 = 31 B. 534.**

41. S. 77, 140.—*Goods lost in transit—Notice of claim.*

Notice of claim for goods lost in transit given to Railway Company A, with whom they were originally booked is not sufficient notice within Ss. 77 and 140 of the Railways Act to Railway Company B on whose line the goods were subsequently lost. Notice should have been given to the Company, B also to make them liable for the loss. 26 B. 669 followed. TILAK CHAND LAHUTHY *v.* THE EAST INDIA RAILWAY COMPANY. **12 C. W. N., 165.**

42. S. 77, 140–*Claim against Railway Company—Notice of claim.*

The plaintiff sued the B. B. and C. I. Railway Co. and the East Indian Railway Co. for damages for non-delivery of goods alleged to have been delivered at Ghaziabad for conveyance to Bombay on the 16th May 1898. From Ghaziabad to Delhi, the railway line belongs to the East Indian Railway Co., and from Delhi to Bombay, the line is that of the B. B. & C. I Railway Co. Both Companies were, therefore, made defendants in the suit. On the merits, the suit was dismissed as against the B. B. & C. I. Railway Co., but a decree was passed against the East Indian Railway Co. for Rs. 4,617. It appeared that no notice of plaintiff's claim under s. 140 of the Railways Act (IX of 1890) had ever been directly addressed to the East Indian Railway Co. The plaintiff relied on a notice dated the 28th July 1898, which he had addressed to the B. B. & C. I. Railway Co., making a claim against that Company. The latter Company had at once informed the East Indian Railway Co. of the plaintiff's claim and had given notice that, in case the plaintiff sued them, they would expect the East Indian Railway Co. to bear all the expenses. Further correspondence took place between the two Companies with reference to the plaintiff's claim, and on the 31st October 1898, the Solicitors of the East Indian Railway Co. wrote to the plaintiff's Solicitors as follows:

Sup: Govt. acts (IX of 1890) *(Contd.)*

"DEAR SIRS, Your letter of the 21st instant to the address of the General Traffic Manager, B. B. & C. I. Railway, Bombay, has been handed to us by our clients, the East Indian Railway, Calcutta, claiming on behalf of your clients sum of Rs. 7,437, being the amount of loss alleged to have been sustained in respect of short delivery of 500 and 125 bags of wheat. The file of papers has just been handed to us and we will write to you further as soon as we have had an opportunity of going through same. Yours faithfully, (Signed) MORGAN & Co."

The lower Court held that in this letter the Solicitors of the East Indian Railway Co. treated the communication sent to them by the B. B. and C. I. Railway Company as communication affecting themselves, and that they could not afterwards say that the notice of claim given by the plaintiffs as to the B. B. & C. I. Railway Co. and forwarded to them (East Indian Railway Co.) was no notice to them: that the plaintiffs must be held to have given the notice through the B. B. & C. I. Railway Co. and that such notice was good. On appeal

Held, (reversing the decree and dismissing the suit), that no sufficient notice had been given to the East Indian Railway Co. under s. 77 and 140 of Act IX of 1890. EAST INDIAN RAILWAY Co. *v.* JETHMUL. **I. L. R., 26 B. 669 = 4 B. L. R. 495 = 26 B. 669.**

43. In a suit against the E. I. and B. B. and C. I. Railway Companies for non-delivery of goods consigned from Ghaziabad to Bombay the plaintiffs claimed sums advanced by them against receipts given at Ghaziabad by the E. I. Railway.

Held, that the receipts not having been granted by the B. B. and C. I. Railway, and the goods not having been shown to have been lost on their line, they were not liable under Section 80 of the Railways Act, unless it was proved that the E. I. Railway acted either as their partners or their agents in giving the receipts.

Held, also, that so far as the E. I. Railway was concerned the Railway receipts were binding and operated as estoppels, either as instruments of title or otherwise, and that the plaintiffs having made advances on the faith of those receipts were entitled to recover the same. JETH MAL RAMANAND *v.* B. B. & C. I. RAILWAY. **3 B. L. R., 260.**

44. S. 80 —*See Ss. 77, 80—A. W. N. 1903, p. 235, No. 39 supra.*

44 (a) S. 101. *Endangering safty—Starting train without taking line clear.* FAZAL DIN *v.* EMPEROR. **59 P. L. R., 1907.**

45. S. 101.—*Rashly and negligently causing death—Breach of general rules and dangering passenger's safty.—Line clear and caution message system—Collision.*—See SHANKER BALKIRISHNA *v.* EMPEROR. **32 C. 78.**

46. S. 107.—*False declaration of goods—* Fireworks declared as locks, I. P. C., S. 304 (a) and 328, **24 P. L. R., 1905.**

Sup: Govt. acts (IX of 1890) *(Contd.)*

47. s. 121.—*As to summary trial for offences under this section.*—See Cr. P. Code, S. 260. **A. W. N., 1902, P. 24.**

48 s. 112—*See S. 68, 112—5. C. L. J. 47 No. 17 supra.*

48 (a) S. 112—*Fraudulently entering Railway carriage without ticket.* CROWN *v.* ATA ULLAH. **124 P. L. R. 1905.**

48 (b) S. 118 *(2)—Travelling on foot board of Railway Carriage—Passenger.*—CROWN *v.* NUR MOHAMMAD. **146 P. L. R. 1905.**

48 s. 140, *77—"May" Explained—Notice served on Traffic Manager insufficient.*

The word "may" used in S. 140 of the Act means "must," and a notice of claim under S. 77 of the Act for short delivery of goods must be served, in the case of a railway administered by a Railway Company on the Agent, in India, of the Railway Company (26 B 669, 24 C 306, 28 A 552 followed and 22 M. 137 dissented).

Therefore the Service of notice on the Traffic Manager was insufficient. NADIR CHAND SHAHA *v.* Mr. WOOD. **12 C. W. N. 450.**

50. s. 140—*See S. 3 (6) 77, 140—28 A. 552 No. 1 supra.*

51. s. 140—*See S. 47, 54, 72, 77, 140—76 P. R. 1908 No. 12 supra.*

52. s. 140—*See S. 77, 140—31 B. 534 No. 40, 12. C. W. N. 165. No. 41, 26 B. 669. No. 42 supra.*

79. Act XIV of 1891. *The Oudh Courts Act.*

See Oudh Acts.

80. Act XVIII of 1891. *Bankers Book Evidence Act.*

S. 1.—*Evidence Act (I of 1872), S. 74, 76—Public Document—Inspection of document, right to—Certified copies—Loan Register of the Public Debt Office—Bankers Books Evidence Act (XVIII of 1891).*

The Loan Register of the Public-Debt Office in the Bank of Bengal is a "public document" within the meaning of S. 74 of the Evidence Act; and under S. 76 of the Act, any person having an interest in the document is entitled to inspect the same and obtain certified copies thereof. *Queen-Empress* v. *Arumugam*, (I. L. R. 20 Mad. 189), followed. *Mutter* v. *Eastern and Midlands Railway Co.*, (L. R. 38 Ch. D. 92); *Rex* v. *Justices of Staffordshire*, (6 Ad. and E. 34), referred to.—CHANDI CHARAN DHAR *v.* BOISTAB CHARAN DHAR, **8 C. W. N. 125.=31. C. 234.**

2. s. 6.—*Procedure.*

When a party desires an order under section 6 of the Bankers' Books Evidence Act, 1891, in his own behalf the court ought to grant it *ex-parte*.

When he applies against the other party the Court ought not to make the order without notice to that other party.

Sup: Govt. acts (XVIII of 1891) *(Contd.)*

When the Court is not satisfied that the application is not for the purpose of obtaining inspection beyond what is allowed under the ordinary procedure, the Court ought to refuse the application under this section. TRICUMLAL SAKARCHAND *v.* LAKHMIDAS NARONJI. **5. B. L. R. 865.**

81. Act XX of 1891. *The Punjab Municipal Act.*

See Punjab Acts.

82.—Act IV of 1893 *(Partition Act).*

s. 2.—*Partition of house latrine—Common user—Compensation for the sale of latrine and for passage thereto.*

A and B, real brothers, partitioned their dwelling house in 1893 and by mutual arrangement each of them agreed to enjoy the use of the house latrine and its passage. Now A sued B for partition of the latrine. The first Court held that the arrangement for common use was equivalent to a partition and could not be disturbed. The Lower Appellate Court applying the provisions of the Partition Act of 1893 to the case sanctioned the sale of the latrine and passage to the plaintiff and awarded the sale proceeds as compensation to the defendant.

Held, that the Partition Act did not apply, that the latrine had in effect been already partitioned and that the plaintiff was not entitled to the relief claimed for. SETH SADIA SUNAR *v.* BALDEO PRASAD SUNAR. **17 C. P. L. R., 1904, P. 45.**

1. S. 2. *Preliminary order—Commissioner's report—Order for sale—C. P. C. S. 396.*

In a suit for partition after the preliminary decree for partition was passed a commissioner appointed under S. 369, C. P. C., to make a partition, submitted a report and the court on consideration of the report was of opinion that the property could not be conveniently partitioned, and then passed an order for sale of the property under S. 2 of the Act.

Held, that the Court could pass an order under S. 2 of the Act for sale of the property and the fact that a preliminary decree had been passed was no bar to its proceeding under that section. HIRAMONI DASSI *v.* RADHA CHURN KUAR. **5 C. W. N. 128.**

2. S. 2. *Partition decree—Power of Court to order sale.*

S. 2 of the Act applies equally, where the Court has to pass a decree in a suit for partition, as also, where the Court has already passed a decree directing partition in a particular mode, and the mode becomes impracticable or inexpedient. The court can in both cases order sale instead of partition. (5 C. W. N. 128 and 24 M. 639 followed). BAI HIRAKORI *v.* TRIKAMDAS HIRACHAND. **10 B. L. R. 23=3 M. L. T. 141.**

3. S. 4.—"*Undivided family*"—*Mahomedans.*

Sup. Govt. acts (IV of 1893) *(Contd.)*

Held, that the expression "a dwelling house belonging to an undivided family" as used in S. 4 of the Act, is not applicable to a hou e belonging to a Mahomedan family. 13 A. 282 ref. to. HASHMAT ALI *v.* MUHAMMAD UMAR. **A. W. N., 1907, P. 52=4 A. L. J. 203=29 A. 308.** *This case was over-ruled by 30 A. 324 see next number.*

4. S. 4 and P. P. A., s. 44.—"*Undivided family*"—*Mahomedans.*

Held, that Mahomadans are not excluded from the benefit of S. 4 of the Partition Act, (9 O. C. 156, 13 A. 282 refd. and 29 A. 308 overruled). SULTAN BEGAM AND OTHERS *v.* DEBI PRASAD, **A. W. N. (1908) 126=5 A. L. J. 552=4 M. L. T. 38=28 A. 324.**

5. S. 4—*Partition suit—Extension of time for payment of price.*

A Court which has fixed a time within which the price of a share of the property which is to be partitioned, is to be paid, can afterwards extend that time.—MUHAMMAD HUSAIN KHAN *v.* KULLU. **1 A. L. J. 474.**

6. S. 4.—"*Undivided family*"—*Muhamadans.*

Held, that in S. 4 of the Act, the words "undivided family" include every family, whether it be a Hindu or otherwise, and one which is undivided *qua* the particular dwelling house; and the words, "dwelling house' mean not only the house in which the members of an undivided family actually live, but also which belongs to the familly and in which other members of that family have a right to live, if they feel so inclined to do. KALKA PRASAD *v.* BANKEY LALL. **9 O. C. 156.**

S. 4.—*The right of a member of joint family to buy off the decree holder in whose favour a decree for possession is given.* See C. P. C. S. 331—Resistance or obstruction —KALI KUMAR MUKERJI *v.* BRAHMANAND MUKERJI.—**7. C. L. J. 98.**

S. 12.—*Amicable Settlement among cosharers and distribution of their interest—Partition, its binding effect on tenants.* See Bengal Land Registration Act VII of 1876. S. 42, 78—PORESHMONI DASSI *v.* NABOKISHORE LAHIRI. **30. C. 773.**

83 Act I of 1894. *(The Land Acquisition Act).*

1 s. 1 and 18—*Jurisdiction of Court to decide objections of parties to reference.*

A Court has jurisdiction to deal with objections, made only by persons who were parties to the proceedings before the collector and who brought about the reference and of no one else. MOHAMMAD SAFI *v.* HARAN CHANDRA MUKERJEE, **12 C. W. N. 985.**

2 s. 1 and 18—*See to the same effect and just in the same terms,* PRABEL CHANDRA MUKHERJI *v.* RAJA PEARY MOHUN MUKHERJEE, **12 C. W. N. 987.**

3 s. 1, 23, 24—*Land acquired by Government—Compensation—Principle to be applied in awarding compensation.*

Sup: Govt. acts (IV of 1893) *(Contd.)*

When land is acquired by Government under the Land Acquisition Act, the principle to be applied in awarding compensation under the Act is:—That an owner is entitled to have the price of his land fixed in reference to the probable use which will give him the best return. *2 Cal., 103, 10 Bom., 585, 15 Bom., 279, 16 Mad., 369, (P. C.), 44 P. R. 1904 referred to.* HIRA NAND *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **21 P. R. 1905=132 P. L. R. 1905.** *(For other cases of this nature see s. 23 infra.)*

4. S. 1 & 23.—*Compensation—Mode of ascertaining market value of land acquired.*

In ascertaining the market value of land to be acquired by Government for the purpose of assessing the amount of compensation, the Court should not take the amount which the claimant had expended in purchase and improvement of the land, as if it was invested on loan since the date of expenditure at the prevailing rate of interest and treat the total amount so arrived a the market value of the land.—SECRETARY OF STATE FOR INDIA *v.* KARTIK CHANDRA GHOSE,—**9 C. W. N. 655.**

5. S. 1.—*Land acquired by Government—Award—Compensation*—Res-judicata.

An adjudication as to the right of persons claiming compensation under the Land Acquisition Act, 1894, concludes the question between the same parties in subsequent proceedings.—20 *Mad.*, 269, *distinguished.*—CHOWAKARAN MAKKI *v.* VAYYAPRATH KUNHI KUTTI ALI.—**29. M. 173.**

6 s. 1—*Forest Act (VII of 1871)*—*Distinction between the two Acts.*

The most important distinction between the Land Acquisition Act (I of 1894) and the Forest Act (VII of 1871) lies in this:—That whereas in the Land Acquisition Act, the Legislatere has expressly constituted the Local Government the sole arbiter as to what land shall be acquired for a public purpose, the Forest Act gives the power to afforest subject to conditions as to the fulfilment of which the Local Government is given no express power to decide.—BALVANT RAMCHANDRA *v.* SECRETARY OF STATE, **I. L. R., 29 B. 480.**

7. *Decision of Civil Court of question of appointment of compensation money on reference, no* res judicata *on question of title to other properties—High Court affirming decision—Leave to appeal to the Privy Council.*

A court's decision regarding appointment of compensation money, upon a reference under the Act, is no *res judicata* affecting other parts of the claimants' property held under the same title (7 C. 406 followed, 12 C. 484 dist., 20 M. 269 refd.)

A land acquisition Judge awarded compensation less than ten thousand rupees and his decision was confirmed by the High Court on appeal.

Held, on an application for a certificate for leave to appeal to the Privy Council, that the case could not be regarded as indirectly

Sup: Govt. acts (IV of 1893) *(Contd.)*

involving a larger amount, because other properties not acquired were held under the same title and the value of them all exceeded rupees ten thousand. RAI BHAIA DIGGAJ DEO BAHADUR *v.* KALI CHARAN SINGH. **11 C. W. N., 525 = 34 C. 466.**

8. *Land acquisition—Apportionment of compensation between land-lord and tenant.*—See landlord and tenant. BHUPATI ROY CHOWDHURY *v.* THE SECRETARY OF STATE. **5 C. L. J., 662.** (*See Nos. 12, 13 and 102 infra*).

9. *Land acquisition proceedings—Property mortgaged converted into compensation money—Rights of mortgagee decree-holder.*—See T. P. A. IV of 1882, Ss. 88, 90, No. 512, cols. 678, 679. **6 C. L. J., 745 = 30 M. 464.**

10. *Land actually acquired not mentioned in declaration—Reference to Civil Court invalid.*

The land actually taken up by Government was different from that mentioned in the declaration issued under the Act.

Held, that the proceedings of the Collector were void, and there could be no valid reference to the Civil Court under the circumstances. GAJENDRA SHAU *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **8 C. L. J., 39.**

11. *How to ascertain compensation—Surveyor's opinion and his evidence—Value of frontage land, its depth—Hypothetical value in determining compensation—Value of the whole, from value of a part—Disturbance of Collector's award.*

Where the valuation of property cannot be based on what it is producing at the time of the notice nor any recent sales of the land exist to serve as a guide to the court the market value must be determined by sale of similar land in the neighbourhood.

The owner of the land can prove either what the plot would fetch if sold in one block or in lots.

The Court can, in addition to the evidence of sales, be guided by the opinions of surveyors, though it is necessary to distinguish opinion from argument.

The practice of surveyors making long reports and furnishing copies to the opposite side beforehand is open to grave objection. A surveyor's evidence tested by cross examination would be more valuable but it does not justify him to provide himself the material for cross-examination. The Court's time will be saved if a surveyor prepares a concise description of the property to be valued and gives only his opinion of the value, and if he does give his reasons they must be based on facts and not on hypothesis.

While determining the value of frontage land the depth should also be considered.

The value of a building frontage must depend on the higher rents that can be obtained for the shops or rooms facing the street and as the proportion of these rents to the lower rents of the back rooms decreases

Sup: Govt. acts (IV of 1893) *(Contd.)*

so does the value of the frontage land decrease.

Ordinarily the value of an income producing property depends on its income irrespective of its costs, but no general rule can be given.

It cannot be taken as a hard and fast rule that back land must be worth half the frontage land.

The belief that an hypothetical scheme can be a guide to market values which are ascertained by other means is fallacious.

In ascertaining value of the land as a whole it is incorrect to add up the retail values of the parts derived from the instances of sales of small plots without making some deduction on general principles.

The Collector's offer should not be disturbed for the difference of a few rupees except for very strong reasons such as an error or a question of principle. GOVERNMENT OF BOMBAY *v.* KARIN TAR MAHOMED. **10 B. L. R. 660.**

12—*Land acquisition proceedings—Apportionment of compensation between land-lord and tenant—Presumption of permanency of holding from uniform payment of rent*—See Bengal Tenancy Act VIII of 1885 Section 50—NUNDALAL GOSSAMI *v.* ATARMANI DASSI. **12 C. W. N. 432.**

13—*Principal of apportionment of compensation between land-lord and tenant.* See Compensation—SATIS CHUNDRA CHATTOPADHYA *v.* RAI JOTINDRA NATH CHOWDURY. **7 C. L. J. 284.**

14 S. 3 (a)—*Fishery rights not Land—Reference invalid.*

Fishery rights are not land within the meaning of the Land Acquisition Act and the Government can not acquire under this Act only those incorporeal rights apart from the land as in this case it sought to acquire them alone.

It is the land, and not merely some subsidiary right as fishery right, that can be acquired under the Act.

The Civil Court must of its own motion set aside proceedings of, and a reference by, the Collector, which are bad, being contrary to this Act. (4 C. L. J. 256 at 258 and 13 B. 650) referred to. RAJA SHYAM CHANDRA MARDARAJ HARICHANDAN RAJ NARAIN DAS *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **7 C. L. J. 445 = 12 C. W. N. 569.**

15—*Potential value in fixing compensation.*

The Land, situated in the neighbourhood of a town always has a potential value. If placed in the market, purchasers would be willing to pay for it not according to its existing, but future use.

Future utility is a thing that people have an eye to in buying land, and the market price of the land is affected by it. Such future utility must be estimated by prudent business calculations and not by mere speculation and impractical imagination. (32 C. 348 followed).

Sup: Govt. acts (IV of 1893) (*Contd.*)

The value of the land according to the expected user should only be adopted when the expected user is immediately available and is so obvious that its present value can be ascertained such as in the case of a piece of vacant land in the midst of a building area.

The value of the potentialities attaching to the land in question must be fixed in the light of the sales in the neighbourhood and expert opinion as to the value of the land as it stands.

Different kinds of land must be differently valued, and the valuation must also vary according to advantage or disadvantage as regards communications, but such questions must be dealt with in relation to future utility. The claimant is entitled to have included in the market price of his land such speculative advance therein as has already taken place in consequence of the improved prospects of the locality 28. I. A. 121. followed,

The probability of a person purchasing the land for a similar purpose is an element for consideration, if the probability is not so remote that it ought to be held to be purely speculative, so that other things being equal, of two blocks of land, the block under acquisition should be taken to be of equal market value with the other block 34. C. 704 followed.

There are two guides in assessing the value of potentialities :—(1) the opinion of experts, (2) evidence of the value the purchasing public has put upon them within a reasonable period prior to the date of acquisition.

An owner of land is entitled to the benefit of a good bargain he has been able to make before the land was notified provided he can prove its present value with a reasonable degree of accuracy, but this cannot be done by merely suggesting that within ten or twenty years the land will increase in value. That is a question of chance only and not therefore reliable.—DOROBJI CURSETJI SHROFF,—*In re*, **10 B. L. R. 675.**

16.—*Values realised by sales of neighbouring lands—Assessment on the principle of small building plots.*

The Court should not interfere with the award of the Tribunal of Appeal, unless it is clearly satisfied that it is substantially erroneous.

Although the method of hypothetical development pre-supposes the intermediation of a third person—a speculator or exploiter, that is to say, a person who purchases the land wholesale from the claimant in order afterwards to sell it retail for building purposes, yet it can not be objected to on this ground. The owner is entitled to the price which it will fetch if disposed of on the most profitable terms.

In the method of ascertaining the present value of land by reference to the prices realised by the sale of neighbouring lands, it is plain that no evidence of former sales can be

Sup: Govt. acts (IV of 1893) (*Contd.*)

obtained which shall be precisely parallel in all its circumstances to the sale of the particular land in question. Differences, small or great, exist in various conditions, and what precise allowance shall be made for these differences is not a matter which can be reduced to any hard and fast rule. It will depend on the merits of each case. TRUSTEES FOR THE IMPROVEMENT OF THE CITY OF BOMBAY *v.* KARSONDAS NATHU, **10 B. L. R. 688.**

17. *Allowance for means of access, in valuation—Value of possibilities.*

Land may possess certain potentialities, but it does not follow that they have any present value.

In valuing land too great a stress must not be laid on its existing position and means of access as they may be entirely altered when the opportunity comes to bring the land into use afterwards. SORABJI JAMSETJI TATA, *In re*, **10 B. L. R. 696.**

18. *Hypothetical method of fixing valuation—Questions to be considered in valuation.*

The hypothetical valuation when analysed shows that it is a mere delusion. It imagines that the value of the land can be arrived at by making certain deductions from the gross rent of the buildings to be erected thereon.

There are only two ways of valuation of land : (1) by determining its value as a whole as it existed at the date of the notification ; (2) by ascertaining its then value on the basis of its being laid out for sale in building plots. The latter, however, is open to the objection that it may be too artificial, but there is no doubt that it is a well established method of valuation.

Although the owner is entitled to rely on the most advantageous way of realising the value of his lands yet his calculations must be based on the market value and conditions existing at the date of the notification ; and the scheme must be capable of being carried out immediately ; (3) it must be adapted to the locality.

There are six questions to be considered in determining value of land :—

(*a*) the building area ;

(*b*) the cost of development ;

(*c*) the value of the building area when laid out for sale;

(*d*) the time required for development and disposal ;

(*e*) The present value of the sale proceeds;

(*f*) The deduction to be made for the advantage to the owner of getting cash payment and so being saved the trouble and risk of development.

Valuation by fixing the proportion the general rent should bear to the rack rent must necessarily fail in Bombay. The use of capital in building and the results to be obtained therefrom vary so enormously according to the land built upon and the capacities and opportunities of individuals, that they cannot be standardized and cannot lend

Sup: Govt. acts (IV of 1893) *(Contd.)*

to definite conclusion. DHANJIBHOY BOMANJI, *In re*, **10 B. L. R. 701.**

19. *Piecemal acquisitions discouraged*—See 34 C. 599 No. 32 *infra*.

20. s. 1, 31 (2).—*Jurisdiction of special Judge is exclusive—Jurisdiction of Civil Courts ousted—Revival of proceedings.*—See 2 C. L. J., 359. See No. 123 *infra*.

21. *See s. 49—9 O. C. 311, No. 147 (a) infra.*

21 (a) s. 3—*(a)—Fishery Rights—"Land" —Jurisdiction.*

The Land Acquisition Deputy Collector of Balasore, on the 3rd March 1903, gave notice of the intention of Government to acquire certain fishery right over land at Chandipur, which land had previously been acquired by Government under a declaration dated 10th Februray 1896; and the Land Acquisition Judge, on a reference by the Deputy Collector, awarded a certain sum, as compensation for the acquired fisheries. The claimant appealed from the decision of the Land Acquisition Judge, contending that the fishery rights being neither 'land' nor 'profit arising out of land' could not be acquired under the Land Acquisition Act.

Held, allowing the oppeal, that incorporeal rights cannot be acquired without the land, over which they are exercised; that what is to be acquired under the Land Acquisition Act is the aggregate of rights in the land and not merely some subsidiary right, such as fishery rights. SHYAM CHUNDER MARDRAJ *v.* SECRETARY OF STATE. **35 C. 525.**

22. s. 3 (a).—6, 17, 18 and 23.—*Land with trees on.*

Where the greater part of the land acquired was grown with cocoanut trees.

Held that the value of the trees formed properly a part of the market value of the land and need not be separately assessed, and that the allowance of 15 per cent. prescribed by section 23 (2) of the Land Acquisition Act should be calculated on such marked value of the land (which should include the value of the trees). The word "Land" as defined in section 3 *(a)* of the Land Acquisition Act includes "things attached to the earth" and therefore *trees*, and this definition has to be applied to section 23 unless there is something repugnant in the subject or context. S. 23 (1) cl. 2 cannot be applied to a case of purchase of land with trees upon it, but may be applicable to the case provided for in section 17 where the Collector takes possession before award, and the owner of the land declines to accept the sum therein offered as payment for the crops or trees taken or possibly to the case of crops or trees grown after the date of declaration, under section 6. SUB-COLLECTOR OF GODAVARI *v.* SIRAGAM SUBBARAYUDU, **16 M. L. J. 551=30 M. 151.**

Sup: ovt. acts (IV of 1893) *(Contd.)*

23 s. 3 *(b)*—"*Person interested.*"

Held, that a lessee of lands acquired by Government with five years to run is a "person interested" within the meaning of section 3 (b) of the Land Acquisition Act. MEHAR BASSA *v.* THE COLLECTOR OF LAHORE. **184 P. L. R., 1901=18 P. R. 1902.**

24. s. 3, 9 and 11—*Collector can not delegate his powers to Deputy Collector—Legality of award.*

In this Act the expression, 'Collector,' means the Collector of a District, including a Deputy Commissioner appointed by the Local Government, to perform the functions of a Collector under S. 3 (c). It does not include any officer, to whom the Deputy Commissioner thinks fit to delegate these duties. Under S. 9 of the Act, notice must be issued by the Collector and must call on persons having claims to appear before him personally and put forward their claims on a date fixed; and, on that date, the Collector or the Deputy Commissioner, as the case may be, ought to enquire into the value of the land and the interests of the claims and make an award under his hand. The Collector ought to give his persoual consideration to the claims and make his award after giving them an opportunity of being heard by himself.

A Deputy Commissioner referred a claim to a Deputy Collector and the latter officer made an enquiry and reported to the Deputy Commissioner, who wrote on the report the word 'approved,' without giving any opportunity to the claimaut to be heard.

Held there was no legal award such as could be referred to the Civil Court.—MOHD. SIDDIQUE *v.* THE SECRETARY OF STATE FOR INDIA,—**8 O. C. 118.**

25 s 3, 18.—*Rival claimants—reference to Civil Court.*

In a case the Collector apportioned the amount of compensation between the landlord and the tenants. Afterwards, another person appeared and claimed the amount apportioned to the landlord as the real landlord, alleging that the person to whom the Collector had apportioned the money was not the real landlord of the land acquired. The Collector thereupon referred the matter to the Civil Court.

Held, the reference was valid and the Civil Court had jurisdiction to decide the dispute. 17 A. 573 app.—RANI HEMANTA KUMARI DEBI *v.* HARI CHARAN GUHA.—**5 C. L. J. 301.**

26. s. 3, *and 23—Person interested—Lessee of a tank with right of fishery whether entitled to compensation.*

For the purpose of the Land Acquisition Act a lessee of a tank is in the same position as a yearly tenant of agricultural land. He is a "person interested" within the meaning of s. 23 of that Act, and is entitled to conpensation. NARAIN CHANDRA BORAL *v.* THE SECRETARY OF STATE. **5. C. W. N. 349=28. C. 152.**

Sup: Govt. acts (IV of 1893) *(Contd.)*

27. s. 6, *7, 8, 9, (2), 11, 39, 40, 41, 48 and 50 (2)—Owner—Land—Notice of enquiry—Government, power of, to acquire property for a Company—Land Acquisition proceedings by Collector—Jurisdiction—Collector holding enquiry, whether a judicial officer—High Court, power of, to question validity of Land Acquisition proceedings—Civil Procedure Code (XIV of 1882), s. 424—Plaint, amendment of.*

S. 424 of the Civil Procedure Code relates to the institution of a suit against the Secretary of State. There is nothing in the law to show that in case of any amendment necessitated by alleged discovery of facts previously unknown to the plaintiff, the Secretary of State should have a further notice of two months. No notice of action is required against the Sub-Collector, who is joined in the action with the Secretary of State, inasmuch as he is not sued for any act done by him independently of the Government. The jurisdiction of the Land Acquisition Collector extends under the Act over several districts, as he has power to hold his sittings at the office to which he was posted. When provisions of law are clear, it is not competent to Courts of Justice to enter into question of natural justice. and, having regard to the economy and social conditions of the country, the provision that the Government should be the sole judge of what is likely to prove useful to the public is both expedient and useful. In making an acquisition, the wishes of the owner of the land are wholly irrelevent under the Act. There is no definition of a "public purpose" in the Land Acquisition Act, nor any limitation regarding what is likely to prove useful to the public; both matters are left to the absolute discretion of the Local Government, and it is not competent for this Court to assume to itself the jurisdiction to impose restrictions in this discretion by holding that at an enquiry under s. 40 of the Act, the person whose land is intended to be acquired should have an opportunity to appear and object. This is a course wholly contrary to the policy of the Act. S. 40 of the Act constitutes the Government custodian of the public interests and sole judge as to whether the land is required for the construction of work, and whether that work will prove useful to the public. This Court is not competent to question the validity of the proceedings under s. 40 of the Act. It is not open to this Court to discuss the sufficiency of the enquiry made by the Collector or his qualifications. The Local Government is the sole judge. S. 41 of the Land Acquisition Act makes the Government sole judge of the manner in which the public are to have the use of the land taken up. A Collector holding an enquiry under the Land Acquisition Act is not a judicial officer, nor is the proceeding before him a judicial proceeding. He acts as the agent of the Government for the purpose of acquisition, clothed with certain powers to require the attendance of person to make statements relevant to the matters which he has to enquire into. *Durga Das Rekhit* v. *Queen Empress* (I. L. R., 27 Cal. 820) followed. Neither the enquiry nor the proceedings held by the Land Acquisition Collector are invalid. There is no provisions under s. 39 of the Act that the consent of the Government should be given after the agreement is executed, and that such consent should be notified by a resolution in the Gazette.—EZRA *v.* THE SECRETARY OF STATE, **7 C. W. N. 249=30 C. 36.**

28 s. 6, 7, 11, 23, 24—*Proceedings prior to award—Calculation of market-value—Collector's award when final.*

An officer specially appointed, under the Act, for the purpose of acquiring land, made merely a calculation, and left the question of compensation to be given to a portion of land undecided, and referred the case to the Deputy Commissioner, asking permission to allow the rates he had proposed. The reference of that officer was not an award at all. The award in such a case is the modified award of the Deputy Commissioner who has been also appointed, under section 7. to make order for the acquisition, although such officer was not so empowered at the time of reference by the special officer.

Up to the Collector's award the proceedings are merely administrative, and any deviation from the procedure prescribed in section 11 of the Act will not render them *ultra vires.* 30 C. 36, 32 C. 605 P. C. followed, 115 P. R. 1906 referred to.

There are three methods of obtaining market value of agricultural land in this country, *viz.*, comparisons with recent sales of neighbouring lands, capitalisation of net profits, and valuation on the basis of land revenue. 15 B. 279 referred to.

The publication of notification under section 6 of the Act was delayed by the Government for more than one year, and, the market value of the land increased during that period, as the people knew of the intention of the Government to establish a civil station at that locality.

Held that, under section 24 of the Act, the rise in price was merely speculative and the Court was not bound to take into consideration such increase of price notwithstanding section 23 cl. (1), under which the Court was to take into account the market value of the land at the date of notification. 90 P. R. 1905 followed, 21 P. R. 1905 referred to. FARMAN SHAH *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **83 P. W. R. 1907=63 P. R. 1907.**

29. s.6. 11, 12, 40.—*Enquiry under S. 40—Owner of land not entitled to notice of enquiry as to compensation—Judicial proceeding—Evidence on which award as to compensation may be based.*

Sup: Govt. acts (IV of 1893) (*Contd.*)

The owner of land, which it is proposed to acquire under the Land Acquisition Act (I of 1894), is not entitled to notice of the enquiry provided for by s. 40 of the Act, which is in no sense a litigious proceeding. The subsequent enquiry, by the Land Acquisition Collector, as to the value of the land and the amount of compensation to be paid for its acquisition, resulting in the award is an administrative, and not a judicial, proceeding; if the owner of the land desires a judicial ascertainment of the value of the land, he can require the matter to be referred by the Collector to the Court for determination. In making his award, the Collector is not limited to the evidence taken before him, but is entitled to avail himself of information supplied him without the knowledge of the owner of the land, and not disclosed at the enquiry.—EZRA *v.* SECRETARY OF STATE FOR INDIA,—**9 C. W. N. 454; 1. C. L. J. 227. 2 A. L. J. 771 = 32. I. A. 93. P. C, = 32. C. 605. P. C.**

30 S. 6, 11, 26 and 50—*Calcutta Municipal Act (III of 1899), Bengal, Sections 163 (1) and 557—Land acquisition for municipality —Compensation. Assessment of—"District"—"Re-assessment"—Presumption.*

The Government appealed against an award made under section 557 of the Calcutta Municipal Act, 1899, Bengal, on acquisition of *bustee* land for the Calcutta municipality, on two grounds: (1) that section 557 (*d*) of the Act had no application to this case, and the claimant was not entitled to any sum beyond what might be determined to be the market-value without any reference to the presumption mentioned therein; and (2) that the determination of the market-value was vitiated by two errors, inasmuch as (*a*) only 40 per cent. had been deducted from the gross annual income for taxes and repairs, whereas the allowance ought to have been 50 per cent., and (*b*) the property had been valued as a whole, and the value of the land had been ascertained by taking the difference between the value of the entire property and the value of the huts, whereas the land ought to have been valued independently of the huts.

Held, that the first contention was valid, but the second had no force.

That section 557 (*d*) is not limited in its application to cases where the Calcutta Municipal authorities acquire land or buildings for themselves, and it applies to cases of acquisition made through Government. And a performance by the Chairman of the Corporation of the duties of a Collector, under clause (*a*) of the section, is not a condition precedent to the applicability of the provisions of the other clauses of the section.

That the term 'land,' as used in section 557 (*d*), includes *bustee* land.

That the words "re-assessment" and "district," as used in the proviso to clause (*d*) of section 557, signify re-valuation and not re-imposition of rate and tax and "ward" respectively.

That when a substantial part of the act of assessment or valuation is completed before the commencement of the Act, it cannot reasonably be maintained that there was a re-assessment after the commencement of the Act, merely because some objections to the re-assessment or re-valuation might have been prepared or disposed of after that date.

That as there was no re-assessment made after the commencement of the Act for the ward in which the land acquired was situate, the presumption laid down in clause (d) was not applicable to the case.

That the deduction of 40 per cent. was fair.

That the property could not be divided into fragments, and the huts could not be valued separately. SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* BELCHAMBERS. **10 W. N., C., 239 = 3 C. L. J., 169 = 33 C. 396.**

31 S. 6, 9, 12, 16 *and 18—Question relating to title acquistion for a Municipality.*

A question of title arising between rival claimants must be decided in the case under this Act, and cannot be made the subject of a separate suit.

Under this Act, it is the aggregate of rights in the land, and not merely some subsidiary right, such as that of a tenant that can be acquired. 7. A. 817, 19. A. 339 D.

Where the Government or a Municipality or other local authority, for whose ultimate benefit the land is being acquired, professes to be the full owner, and no other person has any sort of right in the land, there is nothing to be acquired.

Where such authority claims a restricted right, the Government can acquire the land and then deal with it in any manner it chooses. The Government obtains the title by acquisition, and neither the tenant under the Municipality nor the Court has any concern with the arrangements between the Government and the Municipality, after the acquisition of the land under this Act. The Act applies all the same to cases in which a Municipality or other local authority, for whose ultimate benefit the Government may wish to take action, happens to have some interest in the land to be acquired under this Act. BABUJAN *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL *and* THE CHAIRMAN, GAYA MUNICIPALITY, **4. C. L. J. 256.**

32 S. 6, 11, 14, 18, 21 and 23—*Issue of different declaration discouraged—Consolidation of claims recommended—Inquiry by the Judge—Onus—market value how determined.*

It is not desirable that the local Government should avoid issuing different declarations, under section 6 of this Act, for the acquisitions of portions of the same track

Sup: Govt. acts (IV of 1893) (*Contd.*)

of land, when the declarations follow each other in rapid succession and put parties to unnecessary costs and inconvenience. The Collector and Judge should also try to consolidate claims for compensation as far as possible. The encouragement of piecemeal acquisition results in loss to all the parties concerned, including the Government itsolf.

Although on a reference under sec. 18 of the Act, the claimant must show that the Collector's award should not be accepted, yet the onus varies according to the value of the enquiry made by the Collector under section 11 of the Act. S. 14 empowers the Collector to summon witnesses and to make an enquiry just like a Civil Court. He must in his reference to the Judge state the grounds on which his award of compensation was based. In default of the enquiry or giving grounds for his valuation, the burden of proof on the claimant is only nominal. The Judge must decide on the weight of evidence irrespective of the questions of burden of proof and must not throw on the claimant an undue share of it.

Section 21 authorizing the Judge to confine his enquiry into the value of the interests of the persons affected by the reference under section 18. necessarily means the admitted interests. If there is dispute as to the relative value of such interests, the total amount of compensation paid may be the subject of a case for apportionment, and the Judge should determine the total amount payable for the land, leaving the question of apportionment to be decided in a separate proceeding to be asked for by any of the parties concerned

The homestead lands are generally more valuable than agricultural lands. The different kinds of land must be differently valued, and the advantages or disadvantages as regards the river, the proximity of roads and railway communications must also be considered.

Held following 20 C. 103 that the profit which might arise from the most advantageous disposition of land is one test for determining the market value of the land.

Held further following 28 J. A. 21 that the probable use of land in the most advantageous way, in accordance with, or following, the use already made of neighbouring lands, leads to speculative advances in prices, and regard should be had to such advances.

Moreover in estimating the value of land its utility, which may be calculated by a prudent business man, must be considered (32 C. 343 referred to.)

Purchases by others of a neighbouring land similarly situated and possessing similar advantages, made with a view to some profitable disposition should also be considered, and recent purchases in neighbourhood must be resorted to as guides in valuation.

Sup: Govt. acts (IV of 1893) (*Contd.*)

In sales of permanent subordinate interests, the compitalised value of the landlord's interest should be added. The profit realised by the person in actual occupation should also be considered.

Sales of land for ordinary homestead purposes fetch lower prices than those for factory purposes, but the general demand for land and the consequent reflex action on the prices of all classes of land should also be considered. FINK *v.* SECRETARY OF STATE FOR INDIA. **34 C. 599.**

33. s. 6, 23.—*Land Acquisition—Public Works Department entering upon land and cutting down trees before publication of notice of intended acquisition.*

Under section 23 of the Act the Collector in assessing his award can consider only the market value of the land at the time of the declaration of intended acquisition under section 6 of the Act, and the value of such trees and crops as are on the land at the time when possession of it is taken by the Collector. When therefore the Public Works Department enter upon and damage land before publication of the notice under section 6, or remove trees or crops before possession is taken by the Collector, the Collector and the Court can consider only the market value of the land as damaged, and in the case of trees or crops only the value of such as remain when the Collector takes possession.

Compensation for severance is distinct from other compensation, and must be assessed separately. *MacIntyre* v. *Secretary of State*, (1903) 2 L. B. R., 208, followed. MA GYI *v.* THE SECRETARY OF STATE. **3 L. B. R., 1905. P. 117.**

34 s. 6—*See S. 3 (a), 6, 17, 18, 23—30. M. 151 No. 22 supra*

34 (a). s. 6—*See S. 23, 24, 6, 9, 18—26. B. L. P. C. No 101 supra.*

35. s. 7. *See S. 6, 7, 8, 9 &c.—30 C. 36 No. 27 supra.*

36. s. 7. *See S. 6, 7, 11, 23, 24—63 P. R. 1907—No. 28 supra.*

37 s. 8, 18, 30, 39, 53, 54—*See Court Fees Act VII of 1870 No 121 Col: 134—8. C. W. N. 321.*

38 S. 8—*See s. 7, 8, 9 &c.—30. C. 36 No. 27 supra.*

39 S. 9, 16, 40—*Persons known or believed to be interested—Power to take possession—Vesting of land absolutely in Government.*

Land acquired under the provisions of Act X of 1879 vests absolutely in the Government, free from all incumbrances, after a *bona fide* award or reference by the Collector has been made and possession taken, even when no special notice as required by s. 9 of the Act, has been served on persons known or believed to be interested therein —GANGA RAM MARWARI *v.* SECRETARY OF STATE FOR INDIA, **30 C. 576.**

40 s. 9, 12, 18—*Acquisition of land, for Railway Bridge—Railways Act S. 10 (2)—Irregular Notice—Waiver—Civil suit—Juris-*

Sup: Govt. acts (IV of 1893) *(Contd.)*

diction—Limitation—Damages—Injunction.

All the statutory provisions regarding acquisition of lands must be strictly followed and those who claim statutary powers must prove compliance therewith. The notice under S. 9 must contain the material facts identifying the land intended to be acquired and in case of a franchise, the franchise also should be described. A notice curtailing the time prescribed by the statute for submission of defence by a party is bad. But a party may waive the objection of want of notice, but the waiver must be clearly proved and it must be shown that the owner acted with full knowledge of all facts. Where the owner expressly reserves his legal rights no waiver exists. Where jurisdiction has been conferred upon a special Court, over certain matters which may possibly be in controversy, such jurisdiction is exclusive and cannot be exercised by the ordinary Courts. But where a party has not been able to put forward his claim by reason of defects and irregularities in the proceedings or where the claim has been put forward but not adjudged, the jurisdiction of Civil Courts is not superseded. A suit would lie in the Civil Court in respect of claims for damages which could not be foreseen at the time of the acquisition proceedings. To a suit to recover compensation for land acquired, instituted on the refusal of the Collector to award compensation is governed by Art. 120 and not by arts 14, 17 and 18, Limitation Act. The owner of land cannot obtain an injunction, but only damages where damages will adequately compensate him. The mere construction of a railway bridge across a river whereby the profits of the ferry are reduced does not entitle the owner of the ferry to claim damages. Where, however, lands on both banks of a river which were used as landing places for the ferry were acquired for the purpose of a railway bridge for access to the river and with it the exercise of the franchise was destroyed the owner is entitled to compensation. But the profits of a ferry being fluctuating their average would not determine the amount of damage, but allowance ought to be made for diminution of profits by competition for which no damage could be claimed. MAHARAJA SIR RAMESWAR SING *v.* THE SECRETARY OF STATE FOR INDIA **11. C. W. N. 353 = 5. C. L. J. 669 = 34. C. 470.**

41. S. 9, *23—See S. 22, 23, 9— 4. L. B. R. 1907 P. 71. No. 96 infra.*

42. S. 9 *and 25 (2)—Compensation—Award—Land acquisition—Judge's power—Jurisdiction.*

Held that the Land Acquisition Judge under S. 25, sub-sec. (2), had no power to make an award for an amount exceeding that awarded by the Collector, unless the claimant satisfied him that he had sufficient reason for refraining from making his claim in due time, pursuent to notice under S. 9 of the Act.

The Judge should state his reasons for allowing such a person to prefer his claim. THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* GOBIND LAL BYSAK. **12 C. W. N., 263.**

Sup: Govt. acts (IV of 1893) *(Contd.)*

43. S. 9—See S. 3, 9, 11—8. O. C. 118. No. 24 *supra.*

44. S. 9 (2)—See S. 6, 7, 8, 9, &c.—30. C. 36. No. 27 *supra.*

45. S. 9—See S. 6, 9, 12, 16, 18—4. C. L. J. 256. No. 31 *supra.*

45. (a) S. 9—See S. 23, 24, 6, 9, 18—26 B. 1. P. C. No. 101 *infra.*

46. S. 11—*Collector an Agent of Government—Collector's powers—Award binding on Government—Jurisdiction of courts when Act complied with.*

The Collector acting under this Act is merely an agent of the Government, clothed with certain powers to require the attendance of witnesses in conducting enquiries thereunder and is in no sense a judicial officer. The Government cannot require that the value fixed by its own officer acting on its own behalf should be open to question before the civil court. All that the Act requires is that the enquiry should be conducted in accordance with the Act and an award should be made thereafter. EZRA *v.* THE SECRETARY OF STATE. **7 C. W. N., 249 = 30 C. 36 (at 86 and 92)**

47 S. 11, *12, 18, 31, 33—Apportionment of compensation—Award by Collector—Limitation.*

Certain lands in possession of the plaintiff under a *Mokurrari patta* granted by the defendants were acquired by Government for the purposes of a railway. The present suit was for the recovery of compensation money paid to the defendants.

Held that the plaintiff is not precluded from maintaining the suit merely by reason of her having appeared before the Collector and asked reference to the Civil Court on the question of apportionment of compensation. The award of the Collector under S. 11 of the Land Acquisition Act is final only as between the Collector and the claimants and not as between the claimants *inter se.* Any question raised as between the claimants can be determined only by the Civil Court.

Held, also, that S. 33 of the Land Acquistion Act goes to shew that the limitation as laid down in s. 18 (2) proviso (*a*) of the Act is not intended to be an absolute limitation as to time. PUNNABATI DAI *v.* PUDMANUND SINGH. **7 C. W. N., 538.**

48 S. 11 and 18—*Land acquisition—Jurisdiction of Court—Government denying title of claimant.*

Held, that the Divisional Judge is bound to decide a case referred to him under section 18 of the Land Acquisition Act, when the Collector finds that the claimant has an assessable interest in the

property acquired, and he cannot decline to exercise jurisdiction on the ground that the Government denies before him the title of the claimant to the property. AMOLAK SHAH *v.* THE COLLECTOR OF LAHORE. **115 P. R. 1906 = 87 P. L. R. 1907.**

49 s. 11—See s. 6, 11, 18, 21 and 23—34 C. 599 See No. 32 *supra*. 34 C. 599

50 s. 11—See s. 3, 9, 11—8 O. C. 118 No. 24 *supra*.

51 S. 11 -See s. 6, 7, 8, 9 &c.—30 C. 36 No. 27 *supra*.

52 S. 11—See s. 6, 7, 11, 23, 24—No. 28 *supra*.

53 S. 11—See s. 6, 11, 12, 40—32 C. 605 P. C. No. 29 *supra*.

54 S. 11—See s. 6, 11, 26, 50—33 C. 396 No. 30 *supra*.

55 S. 11—See s. 6, 11, 14, 18, 21—34 C. 599 No. 32 *supra*.

55 (a) s. 11—*Apportionment of compensation money—Landlord and Tenant—Land Acquisition Acts (1 of 1894 and XVIII of 1885)—Rent fixed in perpetuity—Bengal Tenancy Act (VIII of 1885), section 50 Sub-sec. (2).*

In apportioning compensation money awarded under Land Acquisition Act, between the landlord and the tenure-holder, the Court ought to proceed on the principle of ascertaining what the value of the interest of the landlord is on the one hand, and that of the tenant on the other, and to divide the sum awarded between them in accordance with these values. Where the rent is fixed in perpetuity, the landlord is not entitled to more than the capitalized value of his rent. *Raye Kissory Dassee* v. *Nilcant Day* (20 W. R. 370); *Godadhar Dass* v. *Dhunput Sing*, (I. L. R., 7 Cal. 585); *Dunne* v. *Nobo Krishna Mookerjee* (I. L. R. 17 C. 144); *Rajah Khetter Kristo Mitter* v. *Kumar Dinendra Narain Roy* (3 C. W. N. 202) *and Shama Prosunno Bose Mozumdar* v. *Brakoda Sundari Dasi* (I. L. R., 28, C. 146) considered. DINENDRA NARAIN ROY *v.* TITURAM MUKERJI. **7 C. W. N. 810 = 30 C. 801.**

56 s. 12, *18—Land acquisition—Compensation—Award—Notice by Collector to be given "immediately"—Limitation—Document—Statute. Construction of.*

In sub-section 2 of section 12 of the Land Acquisition Act, 1894, the immediateness of the notice is provided for solely in the interests of the public with a view to ensure that the compulsory acquisition shall be in all respects facilitated and completed without delay. When the sub-section directs that the Collector shall give "immediate notice" it does not confer a right upon the person to such notice as to entitle him to say that a late notice is bad, but it imposes a duty upon the Collector in the interests of the public, to ensure prompt vigorous action on his part for the speedy determination of all disputes.

The word "notice" as used in clause

(*b*) of the proviso to section 18 of the Land Acquisition Act, 1894, means notice, whether immediate or not. The clause prescribes one of two periods of limitation for a party who has not accepted the Collector's award—either six weeks from the date of the receipt of the Collector's notice, whether immediate or not, or six months from the date of the receipt of the award; 'whichever period shall first expire.' These last words show that the element of notice is an essential ingredient, so to say, of the two alternative periods whether such notice be immediate or not.

Section 18 of the Land Acquisition Act provides that any person interested, who having not accepted the award, desires to have an adjudication of his claim by the Court should, within the period of limitation prescribed in the proviso to the section, do certain thing; first, he must make written application to the Collector; secondly that written application should require the Collector to refer the matter for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the person to whom it is payable or the apportionment of the compensation among the persons interested; and, thirdly, that such application shall state the grounds on which objection to the award is taken. These formalities are matters of substance and their observance is a condition precedent to the Collector's power of reference.

Where a statute or a written contract provides that a certain thing shall be done immediately in construing that word, regard must be paid to the object of the statute or the contract as the case may be and the position of the parties and purpose for which the legislature or the parties intend that it shall be done immediately. IN THE MATTER OF LAND ACQUISITION ACT, IN THE MATTER OF GOVERNMENT AND NANUN, KOTHARE, &c. **7 B. L. R., 697 = 30 B. 275.**

57. s. 12, *18, 49—Award—Compulsory acquisition of buildings—Buildings adjacent and structurally connected—Onus on public body.*

When a public body seeks, under the Land Acquisition Act, to acquire any portion of a block of building which is structurally connected with the main block, the onus is on that body to show that the portion is not "reasonably required for the full and unimpaired use of the house."—VENKATARATNAM NAIDU *v.* THE COLLECTOR OF GODAVARI. **27 M. 350.**

58. S. 12, 18, 53.—*Apportionment—Reference to Civil Court—Dismissal for default—Fresh suit—Civil Pro. Code, Ss. 102, 103, 645.*

Where on the motion of a person dissatisfied with apportionment made by the Collector, the matter was referred to the Civil Courts under s. 18 of the Land Acquisition

Sup: Govt. acts (IV of 1893) *(Contd.)*

Act, and there it was struck off for his non-appearance:

Held, that such a decision was final, and that by force of Ss. 102 and 103 of the Civil Procedure Code, the person who obtained reference was debarred from instituting a fresh suit. Persons who were not parties before the Collector can very well institute a suit for the apportionment of the amount awarded. By virtue of s. 53 Land Acquisition Act and s. 647 of the Civil Procedure Code, the provisions of the Civil Procedure Code generally and so, Ss. 102 and 103 are applicable to the proceedings before the Court.

Per Mukherji, J.—An objection as to the measurement of the land or the amount of compensation payable therefor must be determined exclusively by a reference to the Civil Court under s. 18, cl. (*1*). A question relating to the person to whom the compensation is payable or its apportionment among the persons interested may be determined either under a reference as contemplated by s. 18, cl. (*1*) or by a suit at the instance of a person who may be lawfully entitled to it as against another, who has withdrawn the compensation money either without any right or in excess of his just dues. If, however, a litigant has made his choice and availed himself of a reference to the Court under s. 18, he cannot again litigate the matter in the ordinary Court. *Sri Pannabati Dai* v. *Padmanund Singh* (7 C. W. N. 538), *Raja Nilmoni Singh* v. *Rambandhu Rai* (I. L. R., 7 Cal. 388), *Harmal Jan Bibi* v. *Padma Lochun* (I. L. R., 12 Cal., 33), referred to. BANDI SINGH *v.* RAMADHIN ROY, **10 C. W. N., 991.**

59. S. 12—See Ss. 6, 11, 12, 40—32 C. 605, C. P., No. 29 *supra.*

60. S. 12—See Ss. 6, 9, 12, 16, 18—4 C. L. J., 256, No. 31 *supra.*

61. S 12—See Ss. 9, 12, 18—31 C. 470, No. 40 *supra.*

62. S. 12—See Ss. 11, 12, 18, 31, 33—7 C. W. N., 538, No. 47 *supra.*

63. S. 14—See Ss. 6, 11, 14, 18—34 C. 599, No. 32 *supra.*

64. S. 15 (2) and 18 (2)—*Land acquisition—Collector—Award—Reference to Court—Grounds of objection—Claimant not barred from taking additional grounds before Court.*

Section 18, sub-section 2, of the Land Acquisition Act, 1894, requires that any person interested, who, having not accepted the Collector's award, requires the Collector to make a reference to the Court "shall state the grounds on which objection to the award is taken." Such requirement is one of the conditions precedent to the obligation of the Collector to make the reference. But there is no provision in the Act which expressly lays down that the claimant in question should be confined to those grounds by the Court in determining his objection. *In the matter of the* Land Acquisition Act 1 of 1891. *In the matter of* RUSTOMJI B. JIJIBHOY. **7 B. L. R., 981=30 B. 341.**

But see ss. 15, 20, 21—31 C. 151 No. 78 infra.

Sup: Govt. acts (IV of 1890) *(Contd.)*

65 s. 16, 48—*Madras Forest Act V of 1882, S. 3, 5—Settlement Officer's missing claim—Subsequent suit barred.*

Where compensation money paid to an owner under this Act is taken back from him by the Government the land not being really required for public purposes, the title to the land reverts to the owner.—SUBRAHMANIAN ASARI *v.* COLLECTOR OF TINNEVELLY. **17. M. L. J. 557.**

66 s. 16—*See s. 6, 9, 12, 16, 18—4. C. L. J. 256 No 31 supra.*

67 s. 16—*See s. 9, 16, 10—30. C. 576. No 39 supra.*

68 s. 17 *and* 48, *Limitation Act (XV of 1877), Schedule II, articles 18 and 120, (IX of 1871), Schedule II, Article 120-Land Acquisition Act X of 1870, Section 54—Award refused by Collector—Suit for damages.*

The plaintiffs sued Government for damages for the refusal by the Collector appointed to acquire certain land for public purposes to make an award settling the amount of compensation payable to them in respect of the land which, by virtue of a direction made by the Local Government under section 17 of Act I of 1894, was taken possession of by the Collector before any award had been made and thus became vested absolutely in the Government. The reason for the Collector's refusal was that it had been subsequently discovered that the land belonged to Government and not to the plaintiffs and therefore the plaintiffs were not entitled to compensation. It was found that the property did not belong to the Government. The suit was brought more than one year after the Collector informed the plaintiffs that he was not going to make the award and on appeal the suit was dismissed as barred by article 18 of the second schedule of the Limitation Act.

Held, that article 18 did not govern the case. The article applicable to the suit was 120 of the second schedule of the Limitation Act. Article 18 refers only to suits for compensation for non-completion and refusal to complete the acquisition referred to in section 48 of Act I of 1894. VENKAYYA *v.* THE SECRETARY OF STATE FOR INDIA. **14. M. L. J. 1904. P. 173.**

69 s. 17—*See S. 3 (a) 6, 17, 18, 23—30. M. 151 No. 22 supra.*

70. s. 18—*Petition asking for reference to Court sent by post to Collector—Reference made by Collector, but rejected by District Judge—Revision.*

A petition asking for a reference to Court under s. 18 of the Land Acquisition Act, 1894, was sent by post to the Collector. The Collector received the petition, and, being apparently satisfied that it was the genuine petition of the applicant in whose name it was written, referred the case to the Court as prayed. The District Judge, however, refused to adjudicate upon the matter referred upon the ground that the

Sup: Govt. acts (IV of 1893) (*Contd.*)

application asking for reference a had been sent by post to the Collector, and was therefore not properly presented.

Held, on application to the High Court in revision, that the District Judge had failed to exercise a jurisdiction vested in him by law. SHIVA SUNDARI DASI *v.* THE COLLECTOR OF CAWNPORE—**2. A. L. J. 784 = A. W. N. 1905. P. 220.**

71 s. 18—*How compensation to be awarded —Circumstances to be considered.*

The essential element in determining the market value of land compulsorily acquired is the fact of its probable user. In assessing the compensation the umpire may take into consideration every circumstance which is in existence as a fact at the moment when the notice to quit is given, and not only those circumstances, but also the probable user which might be made of the property. The way in which compensation should be awarded for land compulsorily taken discussed. IN THE MATTER OF GOVERNMENT AND DAYAL-MULJI. **9 B. L. R. 99.**

72 s. 18—*Reference as regards sufficiency of compensation—Power of the Court to decide question of locus standi—Appeal against interlocutory order.*

One B was *mourasidar* under the Government of certain land intended to be acquired. Before the date of the declaration for the acquisition, G entered into a contract with B. Notice under section 9 Land Acquisition Act was issued upon G also and he was the only person who appeared. The Collector in his award gave to G an amount much less than that claimed by him, describing him as an "intending purchaser." G filed a petition for reference under section 18, challenging the sufficiency of the compensation. The Collector, thinking that he was a person who could come in as claiming an interest, made the reference. After the completion of the acquisition, B conveyed to G all he could claim on account of the land and the acquisition of the Government. At the time of hearing, the lower Court, on the petition of the Government pleader, considered the question whether G had a *lacus standi* to ask for a reference, and made at first an order against G and two days later, confirmed the award of the Collector, G appealed against both the orders.

Held that the question whether G had any interest such as would entitle him to any compensation was a matter foreign to the proceeding at the stage as the only matter before the Court was what was the amount of compensation to be paid

Held also that no appeal against the first appeal was necessary and it was very doubtful whether there was any right of appeal against an interlocutory order of the nature appealed from. J. G. GALSTAUN *v.* SECRETARY OF STATE FOR INDIA, **10 C. W. N. 195.**

Sup: Govt. acts (IV of 1893) (*Contd.*)

73 s. 18—*Land acquired by Government—Compensation, how to be determined—Market price—Future utility of land, how to be estimated—Expert's opinion. Points necessary for.*

In estimating the value of land consideration as to its future utility ought to find place; for future utility is a thing that people have an eye to in buying land, and the market price of land is affected by it. Such future utility must be estimated by prudent business calculations and not by mere speculations and impractical imagination.

An accurate valuation of land cannot be made simply by visiting the land and picking up orally some casual and untested information or gossip which may be interested or one-sided.

The advantage of experience in the valuation of land especially in or near large towns lies in this that the expert knows what factors should be considered, what information he should seek for, where he should seek it and how he should test it and apply it. But experience does not enable one to dispense with enquiry. RAJENDRA NATH BANERJEE *v.* THE SECRETARY OF STATE FOR INDIA. **32 C. 343.**

73 (a). S. 18.—*See Ss. 23, 24, 6, 9, 18—26 B. 1 No. 101 infra.*

74. S. 18 (1).—*Award—Collector's order refusing to refer to Civil Court is subject to High Court's revision.*

In rejecting an application made under S. 18, cl. (1) of the Land Acquisition Act, asking for a reference to the Civil Court, the Collector acts judicially, and his order is subject to revision by the High Court, (9 C. W. N. 454=32 C. 605 refd. to. THE ADMINISTRATOR GENERAL OF BENGAL *v.* THE LAND ACQUISITION COLLECTOR, **12 C. W. N. 241.**

75. S. 18 (2).—*See Ss. 15 (2) and 18 (2)—30 B. 341 No. 64 supra.*

76. s. 18 (2) (b).—*Limitation Act (XV of 1877), Section 12—Appeal against order of Divisional Judge confirming award made by Collector and dismissing claim as barred by limitation—Limitation Acts. Construction of—.*

The principle, that statutes of limitation being restrictive of ordinary legal rights should, as far as possible, be construed in favor of the right to proceed, can be applied only in cases of doubt and of ambiguity of language. Where the words of the statute are plain effect must be given to them, no matter what the apparent hardship there may be.

The general provisions of the Limitation Act, 1877, apply to proceedings held under Local or Special Laws. But it is necessary in every case to see whether such provisions are in terms applicable to the circumstances of any particular case.

An application made under section 18 of the Land Acquisition Act, 1894, does not come within the purview of section 12 of the Limitation Act. BHAGWAN DAS *v.* THE

Sup: Govt. acts (IV of 1893) *(Contd.)*

COLLECTOR OF LAHORE. **133 P. L. R., 1904 = 79 P. R., 1904**

77 S. 18—*Land acquired by Government—Award by Collector—Suit to contest validity of award not maintainable.*

Certain land was acquired by Government under the provisions of the Land Acquisition Act, and the claim of the owner of the land was adjudicated by the Collector. No reference under section 18 of the Act was demanded by the owner, but a suit was filed in the Civil Court contesting the validity of the Collector's award.

Held, that the suit did not lie. *7. Cal., 388 referred to.* SHER KHAN *v.* SHAMSHER. **35. P. L. R. 1905 = 37. P. R. 1905.**

77 (a) S. 18.—*Declaration—Land actually acquired not mentioned—Reference to Civil Court.*

When land actually taken up by Government is different from that mentioned in the declaration issued under the Land Acquisition Act, the proceedings of the Collector are void and there can be no valid reference to the Civil Court. GOJENDRA SAHU *v.* THE SECRETARY OF STATE FOR INDIA, **3 C. L. J. 39.**

78 S. 18, *20, 21—Reference to Court—Jurisdiction of Court to consider matters not put in objections.*

The Court can only deal with the objections that have been referred to it under S. 18 and cannot go beyond it. A person who raises no objection to the apportionment of compensation by the Collector must be taken to have accepted it. ABU BAKAR *v.* PEARY MOHAN MUKERJEE. **34 C. 451.**

79 S. 18, *20, 21—Reference to special Judge—Parties, added after reference.*

In a reference under S. 18 of the Act, the special Judge can not go into questions raised by parties who did not object to the award and apply for a reference Where the reference under S. 18 related to a dispute regarding apportionment between the parties *A* and *B*:—

Held, that the special Judge was wrong in allowing parties *C* and *D* to be added on their own application and contest the award on a ground not raised in the reference. 34 C. 415 foll. GOBIND KUMAR ROY *v.* DEBENDRA KUMAR ROY. **12 C. W. N. 98.**

80 S. 18—See s. 1, 18—12 C. W. N. 985 No. 1, 2, 37 P. R. 1905 No. 4 *supra.*

81 S. 18—See s. 3 (*a*), 6, 17, 18, 23—30 M. 151 No. 22 *supra.*

82 S. 18—See s. 3, 18—5 C. L. J. 301 No. 25 *supra.*

83 S. 18—See s. 6, 9, 12, 16, 18—4 C. L. J. 256 No. 31 *supra.*

84 S. 18—See s. 6, 11, 14, 18, 21—34 C. N. 599 No. 32 *supra.*

85 S. 18—See s. 8, 18, 30, 39 &c. 8 C. W. 321 No. 37 *supra.*

86 S. 18 See s. 9, 12, 18—34 C. 470 No. 40 *supra.*

87 S. 18—See s. 11, 12, 18, 31, 33—7 C. W. N. 538 No. 47 *supra.*

Sup: Govt. acts (IV of 1893) *(Contd.)*

88 S. 18—See s. 11, 18—87 P. L. R. 1907 No. 48 *supra.*

89 S. 18—See s. 12, 18—30 B. 275 No. 56 and 27 M. 350 No. 57 *supra.*

90 S. 18—See s. 12, 18, 53—10 C. W. N. 991 No 58. *supra.*

91 S. 19—*Subsequent reference to the Court under the Land Acquisition Act S. 19 whether could be made.*

See Land Revenue Act (Central Provinces) GOVIND RAO BADKAS *v.* COLLECTOR OF NAGPUR. **2 N. L. R. 172.**

92. S. 19 (*d*) and 23.—Under sub-section 4 of Section 23 of the Land Acquisition Act a person is entitled to compensation in respect of a Railway company having made the level-crossing across his private road which gives access to his house, if he could satisfy the Court that he had sustained damage, at the time of the Collector's taking possession of the land, by reason of his other property having been injuriously affected.

To comply with the provisions of Clause (*d*) of Section 19 of the Land Acquisition Act, the Collector must state, in the reference to the Civil Court, the grounds upon which he determined the amount of the compensation. MADHUSUDAN DAS *v.* THE COLLECTOR OF CUTTACK. **6. C. W. N. 406.**

93. S. 19 (d), *23.—Market value—Onus—Collector not stating grounds—Calcutta Municipal Act, section 557—Bustee land—Valuation on the leases of best use, if permissible—Special Judge—Jurisdiction to assess compensation outside the limits of the declaration.*

The methods of valuation of land acquired under Act 1 of 1894 may be classified under three heads; (1) the opinion of valuators or experts; (2) the price paid within a reasonable time in *bona fide* transactions of purchase of the lands acquired or the lands adjacent to the land acquired and possessing similar advantages; and (3) a number of years purchase of the actual or immediately prospective profit from the lands acquired. It is generally necessary to take two or all of these methods of valuation in order to arrive at a fairly correct valuation. Much reliance cannot be placed on the evidence of experts unless it is supported by or coincides with other evidence. The burden of proof is ordinarily on the claimant in the Court of the special Judge to prove that the valuation mane by the Collector is insufficient. But the burden must vary according to the nature of the enquiry made by the Collector. If no evidence has been taken by the Collector and if no reasons have been given in his dicision to support his conclusion the claimant has a very light burden to discharge. The *ipsedixit* of a Collector has very little weight and is not *prima facie* evidence of the correctness of his award. The failure of the Collector in making a reference under section 18 of the land Acquisition Act,

Sup: Govt. acts (IV of 1893) *(Contd.)*

to state the grounds on which the amount of compensation was determined as required by S. 19 cl. (*d*) makes it incumbent on the Collector to justify the award before the special Judge. S. 557 of the Calcutta Municipal Act, precludes any valuation based on the most advantageous disposition of land, *e. g.*, a valuation of bustee land on the supposition of its adaptability for use as building land to carry expensive structures which is the most advantageous use to which land can be put in Calcutta. Both the Collector and the special Judge under Act I of 1894 have limited jurisdiction. They are bound by the official declaration in the local Gazette. The Collector cannot acquire or give possession of any land beyond the boundaries given in the declaration. If he does so he commits an act of trespass. He has to find out the precise quantity of land notified for acquisition within specified boundaries, value the same under the provisions of the Act, and give possession accordingly. The Special Judge has to make similar enquiries. If the Local Government committed a mistake by giving an erroneous boundary the Judge or Collector cannot cure the mistake. If the land acquired be for Government purposes and if the Government takes possession of land beyond the limits prescribed by the declaration or in excess of the area for which compensation is paid, it trespasses on private land and is liable under the law of the country; and so is a company if the acquistion is for its purposes. But such excess land cannot be valued and compensation awarded for it under the provisions of the Act.—HARISH CHUNDER NEOGY *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **11 C. W. N. 875.**

94. **S. 20,** *21—See s. 18, 20, 21—34, C. 451 No. 18 and 14 C. W. N. 93. No. 79 supra.*

95. **S. 21**—*See s. 6, 11, 14, 18, 21,—34, C. 599 No. 32 supra.*

96. **S. 22,** *23, 9—Basis of decision in land acquisition proceedings before Court.*

Proceedings before the Court under section 22 of the Land Acquisition Act are not a continuation of the administrative proceedings before the Collector, but are judicial. The decision therein must therefore be based solely on evidence before the Court or on admissions by the parties.

The Judge must consider the matters referred to in S. 23 of this Act and must allow compensation for such of them as are admitted or proved. A claimant can not be awarded an amount larger or on other heads than he claimed in response to the notice issued under S. 9 of this Act even though he did not then know when the Collector would take possession, and consequently could not accurately estimate the damage he would suffer. The value of trees can not be awarded separately and in addition to the market value of the land, but must be included in the market value assessed. The second head of S. 23 refers only to crops or produce grown between the date of declaration of the intention to acquire and the date of Collector's taking possession.

Ezra v. *Secretary of State for India in Council*, (1905) I. L. R. 32 Cal., 605, followed 3 L. B. R. 117 refd. to. SHEW GAUNG *v.* THE COLLECTOR. **4 L. B. R. 1907 P. 71.**

97. **s. 23**—*Acquisition of land on which buildings stand—Principle of assessment*—See Bombay City Improvement Act S. 48 (II). RAGHUNATH DAS GOPAL DAS *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. **7 B. L. R. 569=29. B. 514.**

98. **s. 23,** *24—Land Acquisition Act (I. of 1894)—Compensation—Principle of assessment—Market-value—Annual value of produce.*

Held, that in assessing compensation for lands acquired by Government under the Land Acquisition Act where the letting value of the land cannot be ascertained and the purchase value of neighbouring lands is not a reliable guide, the best course is to ascertain what is the annual value of the produce of the land in question. RAM SAHOY SHAH *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **8 C. W. N. 671.**

99 **S. 23,** 24—*Land acquired by Government—Compensation. Assessment of—*

Held, that in ascertaining the market value of land acquired by Government the Court was not justified in taking the amount which the claimant had expended in the purchase and improvement of the land as if it was invested on loan since the date of such expenditure at 12 per cent. per annum and treating the total amount so arrived at as the market value of the land. THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* KARTIC CHANDRA GHOSE. **9 C. W. N. 655.**

100 **s. 23,** 24—*Principal to be followed in awarding compensation—Prospective value.*

In assessing the amount of compensation payable to the owner of the land to be acquired by the Government, regard should be had to the probable use of the land which should give the owner the best return at the time. The prospective value of the land after it is acquired by Government should not be allowed to influence the assessment of compensation. *Permanand* v. *Secretary of State* (44 P. R. 1904) and *Hira Nath* v. *Secretary of State* (21 P. R. 1905) referred to.—ZULFIKAR KHAN *v.* COLLECTOR OF MIANWALLI, **90 P. R. 1905. (Civil)=49. P. L. R. 1906.**

101. **S. 23,** *24, 6, 9, 18—Acquirer building before acquisition—Whether the value of buildings to be awarded to the owner—Valuation of compensation.*

A Railway Company took up the land and built upon it before it was actually acquired for it. Subsequently a declaration was made for the acquisition of land un-

Sup: Govt. acts (IV of 1893) (*Contd.*)

der this Act. The question was whether compensation was to be given for the value of the buildings also as having become part of the land under English Law on the date of declaration.

Held that the Mohammadan Law of Zanzibar where the land was and not English Law applied to the case. Under the Mohammadan Law the buildings did not become the part of land and could only have been removed by the owner. But by virtue of the acquisition under this Act the owner could not have them removed and the compensation for the lands only and not for the buildings would be awarded to him. Under S. 23 and 24 the claimants were entitled to compensation the market value of the lands at the date of the declaration of acquisition including such advance in value as had then taken place Any rise in value afterwards likely to accrue from the use to which the land was intended to be put was expressly excluded from consideration in determining the value by S. 24—See also Evidence Act I of 1872 S. 38 No 79 col: 179. THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* CHARLES WORTH PILLING AND CO. **28. I. A. 121=26. B. 1. P. C.**

102 S. 23, 24—*Apportionment of compensation money, principle of—Landlord and Tenant.*

In apportioning compensation money between a landlord and a tenant, the principle to be followed is to ascertain first the amount of rent payable to the landlord and capitalize that rent at so many years purchase, then to put a money value upon the chance (if there be any) of an enchancement of the then existing rent. These two sums, the landlord is entitled to get and the tenant is entitled to get the balance. SHAMA PROSUNNO BOSE MUZUMDAR *v.* BRAKODA SUNDARI DASI, **28 C. 146.**

103 s. 23, 24—*Compensation, determination of—Compensation for severance.*

Under the provisions of the Act part of an owner's teagarden land was taken, and by the construction of a railway line several acres of land to the south of the line were cut off from the northern portion of the garden, where the residence of the manager and all buildings and offices connected with the management and the coolie lines were situated. The line ran through very deep cuttings for a considerable portion of its length of about a mile and a half, some of which were incapable of being crossed by coolies employed on either side of the line of railway.

Held that in computing amount of compensation to be awarded, in addition to the market value of the land and the amount allowed for the "standing charges" and the statutory allowance of 15 per cent, the increassed cost of working the garden in consequence of the severance of the one portion from the other, should also be taken into consideration. BARAOORA TEA CO. *v.* THE SECRETARY OF STATE. **28 C. 685.**

104 s. 23, 24—*Valuation of land—Compensation, determination of—Market value of land—Future utility—Expert opinion.*

In estimating the value of land acquired by Government, the future utility of the land is a consideration which ought to be taken into account; such future utility, however, must be estimated by prudent business calculations and not by mere speculation. The advantage of expert opinion regarding the value of land (especially in or near large towns) explained. Enquiry cannot be dispensed with. A proper valuation cannot be made simply by visiting the land and picking up orally some casual and untested information which may be interested or one-sided.—RAJENDRA NATH BANERJEE *v.* SECRETARY OF STATE FOR INDIA. **I. L. R., 32 C. 348.**

105. s. 23, 25.—*Market value—Valuation by a hypothetical scheme—Demand and supply—Allowance of ground rent—Estimate of returns from building.*

Brokerage :—Compensation, under this Act, must be based on the value of the land at the date of notice and not its value after acquisition. The phrase "market value" in S. 23 of the Act excludes from consideration all circumstances which would not affect the market as such, and the value is to be measured not by the standard of any individual's capacity. A hypotoetical scheme can be open to no reproach merely because it is a calculation of the advantages to be gained by the development of particular land for a special purpose. In dealing with small areas where development could create but a small additional supply, it may without danger be assumd that the additional supply would be readily absorbed by the general public. The first question to consider is the question of demand for the supply which it was proposed to creat in the hypothetical development. It is ordinarily safe to allow for the ground rents one-sixth of the total rent (*i. e.*) one-fifth of returns in bricks and mortar. To estimate the returns from buildings, it is necessary first to estimate the demand for the buildings. It is most unsafe to use the hypothetical method when dealing with large areas. The price of frontage land of the depth required for ordinary buildings is not a proper guide to the price of the rear land; and a rise in the former does not necessarily imply a corresponding increase in the latter. Brokerage fees, payable on purchase, should be deducted when the price is estimated by capitalising returns and deducting inevitable outgoings. When the estimate is on the rental basis, the purchaser looks to annual returns minus outgoings as the value he gets for his money.—*In re* LAND ACQUISITION ACT 1894. *In re* GOVERNMENT OF BOMBAY *v.* MERWANJI MUNCHERJI CAMA.—**9 B. L. R. 1232.**

106 s. 23 and 32—*Aquisition of land—Compensation— Market value, ascertaining of.*

Sup: Govt. acts (IV of 1893) *(Contd.)*

Where the market value of the land has to be ascertained for purposes of sec. 23 of the Land Acquisition Act 1894, the Court must proceed upon the assumption that it is the particular piece of land in question that has to be valued including all interests in it.

Where land compulsorily acquired is held on *vatan* tenure, the money payable in respect of the watandar's interests should be deposited in Court and invested in accordance with the provisions of section 32 of the Act. COLLECTOR OF BELGAUM *v.* BHIMRAO PATEL, **10 B. L. R. 657.**

107 s. 23 (4) and s. 49—*Compensation for severance not less than the value of the portion severed—Acquisition of whole.*

A portion of a holding used for residental purposes was acquired by the Government in such a way as to render the remaining portion useless.

Held that under the circumstances, inasmuch as the compensation on account of the property being prejudicially affected by the severance would not be less than the value of the portion not acquired, it is immaterial whether the Government should pay this compensation or be compelled to acquire the whole under section 49 of the Land Acquisition Act. On this ground the finding of the Judge that the whole should be acquired was not disturbed. SARAT CHANDRA BOSE *v.* SECRETARY OF STATE FOR INDIA, **10 C. W. N. 250.**

108. s 23.—See S. 1, 23, 24—91. P. R. 1905—No 3 *supra.*

109. s. 23.—See S. 3 (a), 6, 17, 18, 23—30 M. 151 No 22 *supra.*

110. s. 23.—See S. 3, 23—28. C. 152—No 26 *supra.*

111. s. 23.—See S. 6, 7, 11, 23, 24—63. P. R. 1907 No 28 *supra.*

112. s. 23.—See S. 6, 23—3. L. B. R. 1905. P. 117. No 33 *supra.*

113. s. 23.—See S. 11, 23—34. C. 995. No 49 *supra.*

114. s. 23.—See S. 19, (d) 23—6. C. W. N. 406. No 92 and 11. C. W. N. 875 No 93 *supra.*

115. s. 23.—See S. 22, 23, 9—4. L. B. R. 1907. P. 71. No 96 *supra.*

116. s. 24.—See S. 6, 7, 11, 23, 24—63. P. R. 1907. No 28 *supra.*

117. s. 24.—See S. 23, 24—8. C. W. N. 671, 9. C. W. N. 655, 49. P. L. R. 1906, 26. B. 1. P. C, 28. C. 146, 28. C. 685, 32. C. 348. No 98 to 104 *supra.*

118. s. 25 (2).—See S. 9, 25 (2)—12. C. W. N. 263. No 42 *supra.*

119. s. 25.—See S. 23, 25—9 B. L. R. 1232—No 105 *supra.*

120 s. 30, *53, 54—Land acquisition—Award—Execution proceedings—Appeal—Restitution—Contempt of Court—Civil Procedure Code (Act XIV of 1882), Sections 2, 244, 433(3), 583—Suit against Ruling Chiefs—Sanction of Local Government — Procedure.*

Held, that the adjudication as to compensation or apportionment of compensation under the Land Acquisition Act, 1894, is tantamount to a decree within the meaning of section 2 of the Civil Procedure Code, though called as an award under the Land Acquisition Act ; such a decree cannot be considered merely a declaratory one, and is capable of execution. When after an award has been acted upon the appellate Court modifies it, restitution ought to be ordered by the Court whose duty it was to execute the award. Orders passed in execution would be appealable to the Chief Court as decrees within the meaning of sections 2 and 244 of the Civil Procedure Code, for the course of appeal is the same as that in the original proceedings.

When objection is made that section 433 (3) of the Civil Procedure Code is a bar to a suit or execution proceedings and application is made to Local Government for sanction, the Court where the suit or proceedings are pending should stay them until orders are passed by the Government granting or refusing sanction. ZAMINDARS OF DHAR *v.* RANA. **S. C., 103 P. L. R., 1906. =53. P. R. 1906.**

121 s. 26—See S. 6, 11, 26, 50—33. C. 396 No. 30 *supra.*

122. S. 29—*Compensation—Landlord and occupancy tenant.*

If the rent payable by a tenant is enhancible, the tenant is entitled to something for that chance of enhancement, but that is difficult to estimate by a money value. The principle upon which the compensation money ought to be divided between them is clearly set forth in this ruling. (33 C. 801 foll ; 17 C. 144 disapproved. BHUPATI ROY CHOWDHURY *v.* THE SECRETARY OF STATE. **5 C. L. J. 622.**

123. s. 29, *30—Compensation—How apportioned—Special Judge jurisdiction—Civil Court's jurisdiction—Proceedings before special judge, how revived.*

When statutory rights and liabilities have been created and jurisdiction has been conferred upon a special Court for the investigation of matters which may possibly be in controversy, such jurisdiction is exclusive and cannot concurrently be exercised by the ordinary Courts. If a person who is interested in any land acquired under the Land Acquistion Act, has any objection to the measurement made by the Collector or to the amount of compensation awarded by him such person must obtain a reference to the Court of the Special Judge and cannot litigate the matter by a suit in the ordinary Courts. If the objection, however, relates to the person to whom the compensation is payable or to its apportionment amongst the persons interested, the matter may be investigated, either upon a reference to the Court of the Special Judge, or having regard to the provisions of S. 31, cl. (2), by a suit in the ordinary Courts. But although either of these two methods is available, the claimant, if he has made his choice and selected his remedy, cannot,

Sup: Govt. acts (IV of 1893) (*Contd.*)

because he has failed in the course adopted, fall back upon the other. When after a reference has been made to Civil Court the proceedings are dismissed for want of prosecution without any adjudication on the merits, a suit is not maintainable for the trial of the questions involved in the reference, but the party who seeks to have such questions tried, must get the proceedings revived in accordance with law. BHANDI SINGH *v.* RAMADHIN RAI. **2 C. L. J. 359.**

124 S. 30—*Lands waste from time immemorial taken up—Compensation awarded—Amount claimed by Mirasidars and Shrotriemdars—Persons entitled.*

Certain lands which had been waste from time immemortial were taken up by Government, and compensation was awarded. Claims were made by the Mirasidars for the amount so awarded. The rights of the Government in the lands had been alienated by Government to certain Shrotriemdars, who also claimed to be entitled to the amount awarded as compensation.

Held that the Shrotriemdars were entitled. SIVANTHA NAICKEN *v.* NATTU RANGA CHAKI, **I. L. R. 26 M. 371.**

125 S. 30, 53—*Civil Procedure Code, sec. 32—Parties—Reference by Collector as to apportionment of compensation—Addition by Judge of party to reference.*

Where under section 30 of the Land Acquisition Act, 1894, the Collector has referred to the District Judge a dispute as to the apportionment of compensation settled under section 11 of the Act, it is not *ultra vires* of the District Judge to add a party to the proceedings before him, having regard to s. 53 of the Act and section 32 of the Code of Civil Procedure. KISHAN CHAND *v.* JAGANNATH PRASAD, **I. L. R. 25 A. 133.**

126 S. 30, 53, 54—*Where a case has been referred to Civil Court for apportionment of compensation and it is dismissed in default of the claimant it can be restored under s. 103 C. P. C. (1882).* The party at whose instance the reference was obtained would be deemed to occupy the position that of the plaintiff and his opponents that of defendants, 30 C. 36 and 25 A. 133 followed.*

See C. P. C. s. 103. BEHARILAL SUR *v.* NANDALAL GOSWAMI, **11 C. W. N. 430.**

127 S. 30—*See s. 8, 18, 30 &c.—8 C. W. N. 321 No. 37 supra.*

128 S. 30—*See s. 26, 30, 53, 54—53 P. R. 1906 No. 120 supra.*

129 S. 30—*See s. 29, 30—2 C. L. J. 359 No. 123 supra.*

130 S. 31—*Compensation—Right of mortgagee.*

The mortgagee of property, a portion of which is acquired under this Act is entitled to the whole of compensation money allowed by Government, when the mortgage money exceeds the sum awarded as compensation, because the whole and each part of the land mortgaged was security for his whole debt—

Sup: Govt. acts (IV of 1893) (*Contd.*)

20. C. 241, 13. M. 321, 16. A. 78 refered to. TOPAN DAS *v.* JESO RAM & SECRETARY OF STATE FOR INDIA IN COUNCIL. **67 P. W. R. 1907=2. P. L. R. 1908=17 P. R. 1907.**

131 S. 31—*See Ss. 11, 12, 18, 31, 33—7. C. W. N. 538 No 47 supra.*

131 (a) S. 31 *(2)—See s. 1, 31 (2)—2. C. L. J. 359. No 20 supra.*

132 S. 31, 32—*Land taken up for public purposes, such land being in the possession of a Hindu widow holding in right of her deceased husband—How compensation in respect of such land should be allotted.*

Where land, which was taken up by the Government under the Land Acquisition Act for public purposes, was held at the time by two widows holding the usual Hindu widow's life estate therein, it was *held* that the compensation awarded for such land should not be paid over to the widows, but should be invested in land to be held on similar terms. *Sheoratan Rai* v. *Mohri*, (All. Weekly Notes, 1899, p. 96) followed.—SHEO PRASAD SING *v.* JALEHA KUNWAR, **A. W. N. 1902. P. 9=24. A. 189.**

133. S. 32—*Person having "no power to alienate—Money awarded as compensation—Claim by Karnavan of Tarwad.*

The Government acquired, under the Land Acquisition Act, property belonging to a Mahomedan family in North Malabar governed by Marumakatayam law, and the money awarded as compensation was deposited in Court under cl. 2 of s. 31 of the Act. On claims being made to this amount

Held that in asmuch as the tarwad had power to alienate the land in respect of which the compensation had been awarded, s. 31 of the Land Acquisition Act did not apply, and an order, directing it to be dealt with in accordance with provisions of that section, was wrong. MAHMMAD ALI RAJA AVERGAL, *v.* AHAMMED ALI RAJA AVERGAL. **I. L. R., 26 M. 287; (F. B.).**

134. S. 32, *33, 54—Order directing refund of money paid as compensation is not appealable—Civil Procedure Code (Act XIV of 1882), Sections 254, 588, 649—Execution of order passed in miscellaneous proceeding.*

An order directing refund of money paid as compensation for land acquired by Government not being on award within the meaning of section 54 of the Land Acquisition Act, an appeal does not lie against it. 21 All., 354, 26 Mad., 287 referred to.

Such an order may be enforced under section 254 read with section 649 of the Civil Procedure Code. NOBIN KALI DEBI *v.* BANALATA DEBI. **2 C. L. J. 595=32 C. 921.**

135. S. 32 *and 54—Compensation paid to Hindu widow—Reversioner's application for reference—Judge on reference directing refund—Appeal—Revision—Civ. P. C. (1882), S. 622.*

A Land Acquisition Collector awarded a certain sum as compensation for land acquired, and paid it to, amongst others

Sup: Govt. acts (IV of 1893) (*Contd.*)

a Hindu widow some six months after the award, her daughter asked for a reference to the Civil Court, and a reference having been made, the Judge ordered the lady to repay the amount withdrawn by her and the same to be dealt with according to the provisions of S. 32 of the Land Acquisition Act;

Held, that until money was deposited in Court by the Collector, the Court could not proceed to deal with it under s. 32;

that the Judge has no power to direct a refund of money already paid by the Collector;

that the order was not one under s. 32, Land Aquisition Act, as the Judge was not in a position to make such an order and so no appeal lay from it and the High Court could properly interfere, under s. 622, Civ. Procedure Code. GOBINDO RANI DASSI *v.* BRINDA RANI DASSI, **12 C. W. N. 1039.**

136 s. 32—See s. 23, 32—10 B. L. R. 657 No. 106 *supra.*

137 s. 32 See s. 31, 32—24 A. 189 No. 132 *supra*.

138 S 33—See s. 32, 33, 54—32 C. 921 No. 143 *supra*.

139 S. 33 (2)—See s. 11, 12, 18, 31, 33—7 C. W. N. 538 No. 47 *supra.*

140 S. 39—See s. 8, 18, 30 &c.—8 C. W. N. 321 No. 37 *supra.*

141. s. 39, 41—See s. 6, 7, 8, 19 &c.—7 C. W. N. 249=30 C. 36 No. 27 *supra.*

142 s. 40—See s. 6, 11, 12, 40—32 C. 605 P. C. No. 39 *supra.*

143. S 40 See s. 9, 16, 40—30 C. 576 *No.* 39 *supra.*

144 S. 40, 41—See s. 6, 7, 8, 19 &c.—7 C. W. N. 249=30 C. 36 No. 27 *supra*,

145 S. 48—See S. 6, 7, 8, 19 &c.—30 C. 36 No. 27 *supra.*

146 S. 48—See S. 16, 48—17 M. L. J. 557 No. 65 *supra*

147. S. 48.—*See Ss. 17, 48—14 M. L. J. 173 No. 68 supra.*

147 (a). S. 49.—*Government desiring to acquire a portion only of property, the owner wishing that the whole or none should be acquired—Meaning of "house."*

The Government proposed to acquire certain land which comprised a court yard and some roofless buildings attached to a Baradari. The upper storey could not be conveniently used as a residence, without the land acquired by the Government. The owners of the Baradari urged that the Government could not acquire a part but was bound to acquire the whole of the property.

Held, that in section 49 of the Act the word "house" is not confined to land covered by a building, but includes court yard attached to a house and also as much of the land appurtenant to the house as is necessary for the convenient occupation of the same, and therefore the Government could not acquire the land, in suit alone without the owner's consent. 8 O. C. 118, 11 A. 378, 30 L. J. Ch. 395 and L. R. 1 Ch. 275 referred to. NAWAB MUMTAZ-UL-DAULA *v.* THE

Sup: Govt. acts (IV of 1893) *(Contd.)*

SECRETARY OF STATE FOR INDIA IN COUNCIL. **9 O. C. 311.**

148. s. 49—See S. 12, 18, 49—27 M. 350 No 57 *supra.*

149. s. 49—See S. 23, 49—10 C. W. N. 250. No 107 *supra*

150. s. 49—*"House, manufactory or building"—Acquisition of part or of whole.*

Held, that land which is not a house, manufactory or building in the literal sense and which is not reasonably required for the full and unimpaired use of a house, manufactory or building cannot be considered as part of the same within the meaning of section 49 of the Act. It is a question of fact depending upon the particular circumstances of each case to decide whether the land is reasonably required or not for such a use of the same. (11 A. 378 distinguished). NITA RAM *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **A. W. N. 1908, 67=30. A. 176.**

151. s. 50—See S. 6, 7, 8, 19 &c. 30—C. 36 No 27 *supra.*

151 (a). s. 50—See S. 6, 11, 26, 50—33. C. 396 No 30 *supra.*

152. s. 52—See S. 6, 7, 8, 19 &c. 30. C. 36. No 27 *supra.*

153. S. 53—See S. 8, 18, 30 &c. 8. C. W. N. 321 No 37 *supra.*

154. S. 53—See S 12, 18, 53—10. C. W. N. 991 No 58 *supra.*

155 S. 53—See S. 26, 30, 53, 54—53. P. R. 1906 No 120 *supra.*

156. s. 53—See S. 30, 53—25. A. 133 No 425 *supra.*

157. s. 53—See S. 30, 53, 54—11. C. W. N. 430. No 126 *supra.*

158 s. 54—See S. 8, 18, 39 &c.—8. C. W. N. 321, No 37 *supra.*

159. s. 54—See S. 17, 48, 54—14. M. L. J. 1904 P. 173 No 68 *supra.*

160. s. 54—See S. 26, 30, 53, 54—53. P. R. 1906 No 120 *supra.*

161. s. 54—See S. 30, 53, 54—11. C. W. N. 430 No 126 *supra.*

162. s. 54—See S. 22, 33, 54—32. C. 921 No. 134 *supra.*

163. S. 54—See S. 32, 54—12 C. W. N. 1039 No 135 *supra.*

164. s. 54—*Acquisition of site and buildings occupied by tenants—Compensation to zamindars and tenants*—Haq-i-chaharam.—*Right of.*

When a site and buildings thereon, occupied by tenants, situate in a village in which the custom of *haq i charharam* prevails, are acquired under the Land Acquisition Act, the zamindars cannot claim to any portion of the compensation awarded to tenants for buildings in addition to that allowed them (zamindars) for the site as the principle on which the rule of *haq-i-chaharam* is based has no application when land is compulsorily taken and the buildings are to be demolished. MUHAMMAD ABBAS *v.* JEWAT. **A. W. N. 1903. P. 5.**

165. s. 54. *Land acquired by Government—Charity property—Award directing com-*

Sup: Govt. acts (IV of 1893). *(Contd.)*

pensation-money allowed for charity property acquired by Government to be invested--Appeal.

The award ordered the compensation allowed to be invested in the purchase of Government promissory notes. The property acquired by Government was the endowment of the family charity.

Held, that the order was appealable; but since the property was not alienable, the direction was right. If the appellant wished to have the investment changed, that could be done on proper application. SHIV RAO *v.* NAGAPPA. **29 M. 117.**

166. s. 54. *Final award—Appeal—High Court.*

Under S. 54 of the Act an appeal lies to the High Court only from the final award of the Court.

No appeal therefore lies from an award which merely determines the amount of the gross sum payable as compensation, as preliminary to the further question, to whom the amount so determined should be paid. ARDESHIR MANCHERJI KHARADI *v.* ASSISTANT COLLECTOR, POONA. **10 B. L. R. 517.**

167. s. 54. *Consolidation of appeals—Test case—Stay of proceedings until trial of test case.*

See Court-Fees Act VII of 1870 S. 17 No. 82 col. 124--29 C. 140.

84. Act XV of 1895. *(Crown Grants Act).*

1. s. 1. See Grant of Revenue by Government. BALWANT *v.* SECRETARY OF STATE. **7 B L. R. 497 = 29 B 480.** *See also Court Fees Act VII of 1870 No. 37 Col. 111.*

2. S. 1, 3. *This Act validates all grants made by Government even though their effect may be contrary to the tenor of any rule of Hindu Law.*

See Oudh Estates Act I of 1869—S. 22. RAJ INDER BAHADUR SINGH *v.* RANI RAGHUBANS KUNWAR. **2 C. L. J. 194 = 9 C. W. N. 1009 = 15 M. L. J. 352 = 8 O. C. 317 = 27 A. 634 P. C.**

3 s. 1—*Crown Grant—Settlement Register—Alienation of Crown lands—22 & 23 Vict. cap. 41, &c.—Power of Governor in Council to alienate through authorized agent under Dharkast rules—Alienation so made binding and irrevocable—Jurisdiction of Civil Court to determine validity of grant under dharkast rules--Assignment of waste duly made in accordance with dharkast rules not liable to revision by any one.*

The Civil Courts have jurisdiction to determine whether a grant of land, alleged to have been made by an officer on behalf of the Crown, is binding on the Crown or persons claiming under it subsequent to the grant; and the mere fact that the alleged grant purports to have been made under the dharkast rules by an officer empowered by them to make it, is a grant made by a person authorized in that behalf and has the validity of a grant

Sup: Govt. acts (XV of 1895) *(Contd.)*

made by the Governor in Council. Such an officer is an agent generally or specially appointed by the Governor in Council in that behalf and his acts, if within the scope of his authority, are as binding on the Crown as if they had been done by the Governor in Council. Where such a grant has been made, the action of the officer, to whom an appeal lies with reference to it, is final and binding on government, if his act was within the scope of his authority. His action is not subject to any other control. And when the proposal of an applicant is accepted by an officer duly authorized in that behalf by the dharkast rules, and the acceptance is communicated to the applicant, there is a valid contract and disposal of the land (unless the grant was procured by fraud, misrepresentation or mutual mistake as to any matter of fact essential to the agreement). Such a grant cannot, therefore, be annulled or revoked by the the officer who made the grant, his successor in office, or even by the Governor in Council. Such a grant is subject under the rules only to one condition, namely, it may be revoked or annulled by an officer of a higher grade, on an appeal being preferred to him. Observations by Bhashyam Ayangar, J., on alienation by the Crown under Statutes 21 and 22 Vict., cap. 106; 22 & 23 Vic., cap. 41; 32 & 33 Vic., cap. 29; 33 & 34 Vic., cap. 59; Act XV of 1895 (India) and under the dharkast rules.—SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* KASTURI REDDI, **I. L. R., 26 M. 268. 12. M. L. J. 453 = 26. M. 268.**

4 S. 2—*Execution-sale of property granted by the Crown.*

This was an application by the judgment-debtor objecting to the sale of certain villages forming part of property granted by the Crown, in execution of a mortgage decree which had become absolute, on the ground that in view of s 2 of the Crown Grants Act, such property was not saleable

Held that the judgment-debtor was not entitled to raise such objection. In passing the Crown Grants Act, it was not intended by the Legislature that unconditional grants made by Crown free from restrictions as to alienations should not be the subject of a sale at the suit of a mortgagee.—DOST MUHAMMAD KHAN *v.* UPPER INDIA BANK, **3. A. L. J. 628 = A. W. N 1906. P. 255.**

5 s. 2, 3--*Construction of grant.*

S 2 of the Crown Grants Act does not render all the provisions of the the Transfer of Property Act inapplicable to lands held under grant from the Crown, but the meaning of the section is that when the Court is called upon to construe an instrument granting land by the Crown, it shall construe such grant irrespective of the provisions of the Transfer of Property Act. Where the grant contains any provision or condition restrainting the grantee or his representatives from alienating or mortgaging the property, such restriction would be valid under s. 3 notwithstanding the provisions of the Trans-

Sup: Govt. acts (XV of 1895) *(Contd.)*

fer of Property Act or any other Act or Law. Property comprised in such grant may be sold in execution of a mortgage decree.—DOST MOHAMMAD KHAN *v.* BANK OF UPPER INDIA. **3 A. L. J. 129.=A. W. N. 1906. P. 44.**

6. S. 3.—*Grant by Government of estate not recognised by Mohomedan Law is not invalid.*

A grant by the Crown for the maintenance of a tomb cannot be contended to be invalid, on the ground that it created an estate not recognised by the Mahomedan Law, as the Crown has, under S. 3 of the Act, power to make any such grant or transfer, "any rule of law, statute, or enactment of the legislature to the contrary notwithstanding." (2 M. 294, 32 I. A. 215 referred, 18 M. 201 distinguished). HAJI MAHOMAD NASURUDIN KHAN BAHADUR *v.* EGAMBARA MUDALY, **2 M. L. T. 55.**

7. S. 3.—*See Ss. 1, 3—27 A. 634 No. 2 supra.*

85—A. I. of 1896—*(Administrator General's Act.)*

1. S. 4 (2).—*Administrator General and Official Trustees Act (V of 1902), Sections 4 clause 2, 5—Discharge of executor—Future liability. Discharge as to—Trustee.*

Section 4, clause 2 of the Administrator General and Official Trustees Act, 1902, authorizes the High Court to discharge an executor even, on the application of the executor himself. The question whether the Court will exercise that power must depend on the merits of each case.

It is open to the Court to discharge the executor in regard to future liability and future acts and not in the least affect his liability in regard to his past transactions.

As a general rule an executor ceases to be executor and becomes a trustee as soon as he has discharged the debts of the testator and paid the legacies and funeral and testamentary expenses and has invested any surplus that may have remained. *Ex parte* AMERCHAND MADHOWJI. **7 B. L. R., 195=29 B. 188.**

2. S. 52, 54. *Administrator-General—Assets, meaning of—Revenue-paying estate.*

The Administrator General is entitled to charge only one commission upon his commission. He is entitled to commission upon the entire collections of a revenue-paying estate. He is not entitled to commission on the value of the corpus of such part of the estate as is in the hands of a Receiver, but only on realizations made and handed over to him by such receiver.

Per, Sale J. The entire rents of a revenue paying estate, when collected by the Administrator General, become the "property of the estate in his hands, and the application of such property in the payment of revenue is a distribution of such property in due course of administration. In this sense the property of a deceased person applied in payment of revenue is "an asset" within the meaning of the Administrator-General's Act and as such is chargeable with commission. WATKINS *v.* SARAT CHUNDER GHOSE MOULICK.—**31 C. 572.**

Sup: Govt. acts (IX of 1897).

86—Act IX of 1897—*(Provident Funds Act).*

1. S. 4.—*As amended by Act IV of 1903, Ss. 2 (4), 4—Compulsory deposit—Provident Fund—Contributions by a railway servant—Liability of the contributions to be attached on the servant's leaving the Company's service—Attachment—Civil Procedure Code (Act XIV of 1882), s. 278.*

The contribution with the employe of a Railway Company makes towards the Railway Provident Fund, governed by the provisions of the Provident Funds Act (IX of 1897), is a "compulsory deposit" within the meaning of s. 4 of the Provident Funds Act XI (of 1897, as amended by Act IV of 1903). The deposit does not cease to be compulsory, when the employe leaves the service of the Company, since it was not, when made, repayable on demand, and was, therefore, at that time a "compulsory deposit," and having once acquired that character with the attendant consequences, it continued to retain it. A "compulsory deposit" of the above description does not become liable to be attached, under s. 268 of the Civil Procedure Code (Act XIV of 1882), on the subscriber's leaving the Company's service. The expression "compulsory deposit," as used in the Provident Funds Act (IX of 1897, as amended by Act IV of 1903) is not merely descriptive of the sum deposited, but is a term of art, which by virtue of legislative provision includes that which is not within its natural meaning; for under s. 2, cl. 4 of the Act, it includes "any contribution which may have been credited in respect of, and any interest or increment which may have accrued on, such subscription or deposit under the rules of the fund." VEERCHAND *v.* B. B. & C. I. RAILWAY COMPANY. **6 B. L. R., 921=29 B. 259.**

2. S. 4.—*Insolvent Debtor's Act, (II and 12 Vict. cap. 21), s. 7—Vesting order—Sum due to an insolvent from a Provident Initiution—Right of Official Assignee to claim—Construction of statutes—Distinction between enactments affecting vested rights and those regulating procedure.*

A member of a Railway Provident Institution who had made compulsory deposits therein became insolvent and the usual vesting order was made under s. 7 of the Act for the relief of insolvent Debtors. By the rules of that Institution, a member is to be paid, on his retirement from service, the sum of money standing to his credit. At the date of vesting order, the insolvent had not yet retired from service. Subsequently to the date of the vesting order, but before the retirement of the insolvent, the Provident Funds Act, 1897, came into force, s. 4 of which provides that after the commencement

Sup: ovt. acts (IX of 1897) (*Contd.*)

of that Act, the Official Assignee shall not be entitled to or claim any such compulsory deposits in any Railway Provident Fund. On a claim being made by the Official Assignee to the amount, on the ground that when the Act came into force the interest of the insolvent in the Fund had become vested in the Official Assignee:

Held, that by s. 4 of the Provident Funds Act, all the right and title of the Official Assignee was determined as from the coming into operation of the Act, and that its operation was not limited to cases where the vesting order had been made after its commencement. The distinction between the construction of enactment affecting vested rights and those which merely affect procedure recognised. *Javanmal Jitmal v. Muktabai*, (I. L. R., 14 Bom., 516), referred to. Under s. 7 of the Insolvent Debtors' Act the right of the insolvent to be paid the sum standing to his credit in the fund, on his retirement from service, vested in the Official Assignee. OFFICIAL ASSIGNEE OF MADRAS *v.* MARY DALGAIRNS, **26 M. 440.**

3. S. 4.—*Civil Procedure Code (Act XIV of 1882), Section 266—Attachment—Compulsory deposits.*

As soon as a member of a provident fund retires the sums standing to his credit are repayable on his demand or at his option and therefore are no longer "compulsory deposits" within the meaning of clause 4 of Act IX of 1897. From the moment of his retirement the sum is a debt due to him by the Company (although the exigencies of business and possible enquiry may prevent the Company paying him his money immediately). If so it is attachable under section 266 of the Code of Civil Procedure. ALEXANDER MILLER *v.* B. B. AND C. I. RAILWAY, **5. B. L. R. 454.**

4. *Attachment of Provident Fund invalid —The Calcutta Municipal Act (III, B. C of 1899), S. 73—Trustees of the Fund's claim.*

The Provident Fund established by the Corporation of Colcutta to which the provisions of the Provident Funds Act IX of 1897 (and consequently the amending Act IV of 1903) were made applicable by the Local Government Notification, dated 8th July 1902, is not liable to attachment.—SETT MUNNA LALL PARRUCK *v.* FREDERIC GAINSFORD, **12 C. W. N. 633. =35. C. 641.**

87. Act X of 1897—(*General Clauses Act*).

1. S. 2 (*8*)—*C. P. C. S. 229 (a)—British India.*

Held that Mourbung in the Tributary Mahals of Orissa is no part of British India—KHATTU SAHOO *v.* RATTAN MAHANTI. **6. C. W. N. 573.**

2. S. 3. (*5*).

Held that in Oudh Rent Act (XXII of (1886) S. 132—"Year" means year, reckoned according to the British calendar under S. 3 (5 of this Act—SHAIKH MAIGOL *v.* PERTABNARAIN. **3. O. C. 67.**

3 S. 3, (25) and S. 4—*Standing timber is immoveable property under section 3 Registration Act.* See Act VIII of 1885 Bengal Tenancy Act s. 144, 184, 193. ABDULLA SARKAR *v.* ASHRAF ALI, **7 C. L. J. 152.**

4 S. 3 (27)—*An accused was convicted on evidence taken by commission issued under s. 503 Criminal Procedure Code in Nepal.*

Held it is for prosecution to prove that Nepal is in India as defined in s. 3 (27) of this Act on their failing to do so the conviction must be set aside. SINGHIR LAMA *v.* EMPEROR, **7 C. W. N. 635.**

5 S. 8, 24—*Notification in Government Gazette extended old Petroleum Act to a particular place.*

The old Act was repealed and the new Petroleum Act substituted therefor did not expressly preserve that notification.

Held that the notification was an order within the meaning of s. 24 of this Act and a second notification in the Gazette under the new Act on the repeal of the old Act was unnecessary by the operation of s. 8 and 24 of this Act. PADAN SHAH *v.* THE EMPEROR **7 C. W. N. 658.**

6 S. 10—*Where money was deposited under s. 310 (A)—C. P. C. on the opening of the Court after vacation although more than 30 days after the sale which time had expired during the vacation.*

Held that having regard to s. 10 of the General Clauses Act the money was tendered within time. RADHELAL *v.* SHEO PRASAD, **9 O. C. 214.**

7 S. 11—*Proceedings include the whole proceedings from the filing of the plaint down to the final order in execution.* See U. P. Tenancy Act S. 32 (2). SALAGRAM *v.* KHARAG JIT. **I. A. L. J. 428.**

8 S. 24—*See s. 8, 24—7 C. W. N. 658 No. 5 supra.*

88.—Act VI of 1898—(*Post Offiees Act*).

1. S. 20.—*See Ss. 61, 20—32 C. 247, No. 3 infra.*

2. S. 34.—*Value payable insured parcel—Parcel delivered but money not recovered—Indian Postal Guide, Rule 130—Principal and agent—Breach of contract—Measure of damages—Small Cause suit—Secretary of State, Liability of—*

The plaintiff sent jewellery by a registered and insured parcel through the Post Office as a value payable article, paid the required fees and obtained receipt, but by some mistake of a clerk in the Post Office the parcel was delivered to and accepted by the addressee without its value being collected from him. The plaintiff sued the Secretary of State for India in Council for the value of jewellery.

Held, (1) that according to rule 130 of the Indian Postal Guide the relation between

Sup: Govt. acts (X of 1897) *(Contd.)*

the plaintiff and Postal Department was that of principal and agent and the Post Office was bound by contract to collect the money when it delivered the parcel;

(2) that if the Post Office neglected to collect money when it actually delivered the article, it committed a breach of contract and was liable to pay damages.

(3) that the effect of the proviso to section 34 of the Indian Post Office Act, 1898, was that the Post Office did not guarantee the collection of the money, but it did not absolve it from the common law liability to pay damages for delivering the parcel without collecting the money.

(4) that the measure of damages was the value of the article sent or the amount for which it was insured.

(5) that the case was one of breach of contract and not of tort and the suit was maintainable in the Small Cause Court and against the Secretary of State. MOTHI RANGAYA CHETTY *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **M. L. J. 1905, P. 226=28 M. 213.**

3. S. 61, 20.—*Obscene matter—Transmission by post.*

Transmission by post of printed post-cards containing an advertisement of a patent medicine in language of an obscene character, is punishable under sections 20 and 61 of the Post Office Act (VI of 1898).

The test of obscenity is this, whether the tendency of the matter is to deprave and corrupt the minds of those who are open to immoral influences and into whose hands the publication may fall. *L. R.*, 3 *Q. B.*, 360, 371, 3 *All.*, 837, 20 *Bom.*, 193 *referred to.* SARAT CHANDRA GHOSE *v.* KING-EMPEROR. **32 C. 247.**

89. Act II of 1899.—(*Stamp Act*).

1. S. 2 *(5) b—Bond—Promissory Note.*

The defendant passed to the plaintiff a document to this effect: "I have this day taken from you in cash Rs. 48 (forty-eight) I have received this amount. I shall repay this money without taking any objec- when you should demand [it]." The document was attested by two witnesses. It bore a one-anna adhesive stamp.

Held on the construction of the document, that it was a bond within the meaning of s. 2 (5) (*b*) of the Stamp Act (II of 1899) since the decument was attested and was not payable to order or bearer, and the executant obliged himself to pay the money to another. VENKU *v.* SITARAM. **29 B. 82=6. B. L. R. 841.**

2. s. 2 *(5) (b), Schedule I, Articles 1 and 15—Acknowledgment—Bond.*

Held, by the Full Bench, that the following entry in the books of account of the plaintiff, being an acknowledgment of a debt signed by the debtor and attested by witnesses, was chargeable with stamp duty as a bond and not as an acknowledgement.

Sup: Govt. acts (II of 1899) *(Contd.)*

Lekha paya Ganda beta Sujana da, Suhela beta Sujana da, Miti Jeth, sudi 13, Sal 1957. Ticket 1 anna.

Rs. 948 baqi lene Ganda pason, Suhela pason biaj saikra da Re. 1 robkari Jhaba Singh, beta Bure da robkari Mehtab Singh, beta Sarup Singh da. Nishani ganda di; nishani Suhela di (Mohar) Roda, Lambardar. Zubani Suhela di; Ganda di Zabani. DAULA *v.* GONDA. **101 P. L. R. 1903=35 P. R., 1903.**

3. S. 2 *(5) (c)—Band—Agreement to sell cotton attested by witnesses.*

An agreement for sale of cotton between two merchants, attested by witnesses is a bond within the meaning of section (2) (5) (*c*) of the Indian Stamp Act and is liable to stamp duty as such. *In re* RALLI BROS. **8 B. L. R. 134.**

4 S. 2, *Cl. (10), Art. 62 Cl. (b) Assignment of contract—Chose in action.*

A document which assigned the benefit of a contract to the plaintiff contained the words "I have sold the whole of my right and interest in this contract and in the goods mentioned therein to plaintiff."

Held, that the document was a chose in action and therefore came under S. 2 Cl. (10) of the Stamp Act and that an *ad valoram* stamp would be necessary.—NATHU GANGARAM *v.* HANSRAJ MORAJI. **9 B. L. R. 119.**

5 s. 2, *7, sch. I, art. 47 A—Bil-of-lading —Policy of sea-insuranee.*

The documents, annexed to the statement of the case referred, are bills of lading within the meaning of the Stamp Act (II of 1899), and as such are liable to stamp duty under that Act. *Sewell* v. *Burdick* (L. R. 10 A. C. 74) referred to. When by such a document, a Company, for an increased payment, takes upon itself all risks attending goods while on board of a ship or vessel, the document is not a 'policy of sea-insurance,' but only a 'contract for sea-insurance,' and is not, therefore, liable to be stamped as a 'policy of sea-insurance' under the Act.—REFERENCE UNDER THE STAMP ACT, **30. C. 565.**

6 s. 2 (12). (23) Art 53 and s. 12, 17, 63—*Receipted bill bearing uncancelled adhesive stamp—Stamp duty chargeable.*

At the foot of a bill for ~~Rs~~ 89 were printed the words received payment and beneath them the signature of the firm by which the bill was presented was written. The money due by the debtor had not been paid by him and the document had not been delivered to him.

Held that the document was a receipt chargeable with one anna stamp duty. 9 A. 210 and 2 B. 846, (1847) followed. In re reference from the FINANCIAL COMMISSIONER BURMA. **1. L. B. R. 1900—1902 P. 281.**

6 (*a*) **S. 2** (12)—*See s. 62 (1) (B) and 64 (C)—A. W. N, 1903 P. 173 No. 61 supra.*

7. s. 2 (15)—*Partition-deed—Decree made in accordance with Commissioner's report—Civil Procedure Code (Act XIV of 1882) sec. 396.*

Sup: Govt. acts (II of 1899) (*Contd.*)

A decree passed under section 396 of the Civil Procedure Code in accordance with a Commissioner's report is final order for effecting a partition passed by a Civil Court, and must, therefore, be stamped as an instrument of partition under section 2 (15) of the Indian Stamp Act, 1899. BALARAM BUDHARAM *v.* RAMKRISHNA. **7 B. L. R. 1905. P. 308 = 29 B 33.**

8. s. 2 (*15*), *Schedule I, Article 45—Partition suit—Parties. Joinder of, before decree is engrossed on stamped paper C. P. C.* (*1882*) *S. 32.*

Under section 2 sub-section 15 of the Stamp Act the final order in a suit for partition is an instrument of partition within the meaning of the expression in the first schedule of the Act, the order must be engrossed on non judicial stamped paper.

An order under section 32 of the Civil Procedure Code may be made at any time during the pendency of the suit, and a partition suit must be deemed to be pending until the decree is engrossed on stamped paper; the order confirming report of the Commissioner appointed to make partition must be taken to be an interlocutory order made in the course of the suit and preparatory to the order that might determine finally the rights of the parties. *6 Mad., 227, 18 All., 332, 12 Cal., 642, W. N., (1883) 173, 194, L. R., 25 Ch. D. 750 referred to.*

The High Court dismissed the appeal in a suit for partition on the ground that necessary parties to the appeal were not impleaded in the appeal. JOTINDRA MOHAN TAGORE *v.* BEJOY CHAND MAHATAP. **32 C. 483.**

9. s. 2. (*15*)—*See Registration Act III of 1877. S. 3 No. 2 Col: 457*—**8 O. C. 197.**

10. s. 2. (*15*) *Award of lugyis—Instrument of partition—Unstamped deed—Stamp duty and penalty not tendered in original Court—Admission of document by appellate Court.*

Where the stamp duty and penalty on an award by lugyis, which fell under the description of "instrument of partition" as defined in the Stamp Act was not tendered in the original Court:

Held that an Appellate Court could not admit the document in evidence even if the stamp and penalty have been tendered to it. 4 C. 213 followed. MA SHWE KYAN *v.* MA BOK GALE. **1. L. B. R. 1900—1902. P. 84.**

11 s 2. *Cl. 15, Article 45 (c)—Instrument of partition—Award directing a partition—Stamp.*

An award whereby the arbitrators indicate the division of property among the rival litigants is an instrument of partition within the meaning of Section 2, Cl. 15 of the Indian Stamp Act 1899. KALI DAS LALBHAI *v.* TRIBHUWAN DAS BHAGWAN DAS. **8. B. L R. 869 = 31 B. 68.**

12 S 2 (*17*)—*Trust deed—Stamp duty on trust deed for securing mortgage debentures*

Sup: Govt. acts (II of 1899) (*Contd.*)

—*Mortgage deed.*

A document described as a "Trust Deed for securing Mortgage Debentures" was presented for adjudication under section 31, Indian Stamp Act, and the question of the stamp duty due was referred for decision to the Chief Court by the Chief Controlling Revenue authority. The document was admittedly executed for the purpose of securing money to be advanced by way of loan, but it was argued on behalf of the executants that it could not be regarded as a mortgage deed as it did not itself purport to transfer to and vest in the trustees any interest in the properties specified in it. The trustees were, however, given the *right* to have the properties vested in them to be held by them as trustees for the debenture holders and as security for the amount to be advanced on the debentures. They were also given the rights of entry, taking possession and management that mortgagees and trustees for debenture holders are usually given.

Held,—that as the document created rights over the property specified in it in favour of the trustees, it was a mortgage deed under the definition contained in section 2, clause 17, Indian Stamp Act. *Queen-Empress* v *Debendra Krishna Mitter*, (1900) I. L. R. 27 Cal., 587; *The United Realisation Company, Limited* v. *The Commissioners of Inland Revenue*, (1899) 1 Q. B. D. 361; referred to. *Financial Commissioner of Burma, reference under section 57, sub-section (1) of the Indian Stamp Act*- **4. L. B. R. 1907. P. 2.**

12 (a). s. 2. (21). *See Sch. I Art. 48—3. B. L. R. 697. No. 91 infra.*

13 s. 2. (22) and 23.—*Promissory Note.*

Held, that a document in the following terms was a promissory note:—

Account of the debt owed to Patel Mathurbhai Hirabhai of Sarbhou—by Shah Ranchhode Damodar of the same place—(Date) Shravan Sudi 14th, Samvat 1954.

Cr.	Dr.
	100-1-0 (in words) Rs. one hundred & one anna, British coin. The Balance found due after making the accounts of the *khata* (acknowledgment) of Samvat 1950. (We) shall pay the same with interest at the rate of ¾ (Dokada) per Rupee per mensem, whenever the owner (of this khata) demands it. The above writing is correct.

Signature of Ranchhode Damodar

Sup: Govt. acts (II of 1899) (*Contd.*)

MATHURBHAI HIRABHAI *v.* DALPAT DAMODAR. **3 B. L. R., 839.**

14 S 2 (22)—*Promissory Note—Bond.*

Held, that a document in the following terms was a Promissory-Note, as defined in Section 2 (22) of the Stamp Act, and not a bond.

"Rupees 37 which remain due to be paid, to be paid to "Gurditta according to this receipt, thirty-seven rupees. To be paid in 2 or 3 days. To be paid by Dhanna Singh, *Bazaz*, 10th *Poh*, *Sambat* 1954— written by Das Mal Wadhawa at the dictation of Dhanna Singh. Stamp affixed—Signed by Dhanna Singh with his own pen." GURDITTA MAL *v.* DHANNA SINGH. **3 P. L. R., 1902.=14. P. R. 1902.**

15 S. 2. (22) and 7 *Bond.*

Held, that the following writing was a bond and liable to stamp duty as such :—

"The acount of Gola Gopal Daya of the village Panar for the year 1953 ;

CREDIT SIDE DEBIT SIDE

316-1-0. Aso Vad 3; balance of the previous account Rs. 316-4-0 in words Rupees three hundred sixteen and four annas. This money shall be given (*i. e.*, paid) whenever you shall demand it. Written by the hand of Shah Dyal Hirji.

Gopal Daya (his) signature by his own hand. The attestation (of) Shah Pronemchand Hiraj by his hand." LALA JETHAJI *v.* BHAGA GOPAR. **3, B. L. R., 699.**

16 s. 2. (23), *Receipt—Meaning of term in section 2, sub section 23, Stamp Act—Certificate to the effect that a premium on an insurance policy has been paid issued for the purpose of supporting a claim to exception from income-tax not a receipt.*

The meaning of the terms "acknowledged" and "acknowledgment" used in section 2, sub-section (23), of the Stamp Act must be limited to documents given to or issued for the benefit of the debtor, acknowledging to him the payment of money, etc., or delivery of goods, in discharge or satisfaction of his debt or the demand upon him.

Accordingly a certificate to the effect that a preimum on an insurance policy has been paid, issued for the purpose of supporting a claim to exemption, from income-tax on the amount paid and not primarily intended for use as evidence of payment between the policy-holder and the Insurance Company is not a receipt, and is therefore exempt from stamp duty.

Rex v. *James Harvey* (1812) Russell *and Ryan*, 227 ; *In the matter of (Act* XVIII of 1869) *the Uncovenanted Service Bank* (1879) I. L. R , 4. Cal., 829; *Queen-Empress* v. *Juggernath*, (1885) I. L. R., 11. Cal., 267 ; 267 referred to.

Civil Reference No. 5 of 1904—Reference made by the Financial Commissioner of Burma under section 57, sub-section (1) of the India Stamp Act, 1899—**2. L. B. R. 1904 P. 307**

17 S. 2 and 36—*Document insufficiently*

Sup: Govt. acts (II of 1899) (*Contd.*)

stamped—Promissory Note—Negotiable Instrument Act (XXVI of 1881), s. 4—Appeal.

Held, that when any Court admits in evidence a document, bearing a receipt-stamp of one anna, as properly stamped, that decision of the Court cannot be called in question, though the document does not fall within the definition of a Promissory Note given in section 4 of the Negotiable Instrument Act (XXVI of 1881), or in section 2 of the Stamp Act (II of 1899). ALLAH RAKHEE *v.* DILDAR ALI, **4 O. C., 318.**

18. s. 4—*Stamps—Deed of conveyance of land, duly stamped, accompanied by deed of mortgage of same land by purchaser in favour of vendor as security for balance of price—Stamp duty on deed of mortgage.*

The vendor Company sold a piece of land for Rs 3,00,000, in consideration of Rs 50,000 already paid and the execution of a mortgage of the land by the purchaser to the Company as security for the payment of the balance in yearly instalments. The conveyance was correctly stamped with a stamp of the value of Rs 3,000. The mortgage, which bore the same date as the conveyance, bore a stamp of the value of Re. 1.

The Financial Commissioner, Burma, referred the following question for the decision of the Chief Court, under section 57, sub-section (1) of the Indian Stamp Act, 1899:—

"Of the two instruments attached to this order, *viz.*, a conveyance and a mortgage, is the first, *viz.*, the conveyance, to be regarded as a "principal instrument" within the meaning of section 4 of the Act, and is the second, *viz*, the mortgage, to be regarded as an "other instrument" within the meaning of the said section or are the two instruments distinct instruments and is the second instrument, *viz.*, the mortgage, chargeable with duty on the full amount of the consideration ?

Held,—that the mortgage deed was a distinct instrument and was not "employed for completing transaction" within the meaning of sub-section (1) of section 4 of the Indian Stamp Act, 1899. It was, therefore, chargeable with stamp duty on the full amount of the consideration expressed in it.

Civil Reference No. 12 of 1905—Reference made by the Financial Commissioner of Burma under section 57, sub-section (1) of the Indian Stamp Act, 1899

19. S. 5, 57.—*Agreement with numerous landholders for mining rights—Community of interests*

A company, having obtained from the Secretary of State for India the right to search for and work minerals in a certain district, prepared an indenture with the object that it should be executed by numerous persons who were landholders and owners of surface and mining rights over the lands comprised in that district. By the indenture, each intended executant, for a consideration of one rupee and a royalty, granted

to the company a license to prospect and work upon a piece of land belonging to him and covenanted to sell or lease the making rights over it if required. The executant further covenanted to indemnify the company from claims that might be made by other persons, and undertook not to sell the mining righs to any other person for fifty years:

Held that the instrument was chargeable with the aggregate amount of the duties with which separate instruments relating to the same matter would be chargeable. Upon the face of it, the instrument dealt with several distinct matters, nameny, with agreements with several persons with regard to their separate property; and the proper stamp to be affixed was an eight anna stamp, or as many such stamps as there were separate landholders who were made parties to the agreement:

Held also that the instrument did not contain distinct agreements with any one raiyat—*Reference under* STAMP ACT, S. 57, **24 M. 176.**

20. S. 5, *Sch. I, Art. 31—Lease for three years containing covenant by lessor to renew at option of lessee for further term of one or two years from expiration of original term—Stamp duty—Not an instrument comprising or relating to several distinct matters.*

A lease for three years at a specified rent containing a covenant on the part of the lessor to renew it, at the option of the lessee, for a further period of one or two years from the expiration of the original term, is not an instrument comprising or relating to several distinct matters within the meaning of s. 5 of the Stamp Act 1899. Such an instrument contains but one contract, namely, a demise. The option to renew is ancillary to and forms part of the consideration for entering into the lease. *Reference under* STAMP ACT, S. 57. **25 M. 3.**

21. s. 7—*Instrument relating to "several distinct matters"—Consideration for lease.*

Where the consideration for a lease consists partly of rent to be paid each month and partly of a sum equal to a month's rent paid in advance and repayable at the end of the lease, the instrument relates to only one matter, namely, the leaso, and is not chargeable with duty as an instrument "dealing with two distinct matters." REFERENCE UNDER STAMP ACT. **I. L. R. 26 M. 473.**

22. s. 7—See S. 2, 7 Sch I Art 47 (A)—30. C. 565 No. 5 *supra.*

23. s. 7—See S. 2 (22) and 7—3. B. L. R. 699. No. 15 *supra.*

24. s. 12—*Promissory-note—Stamp not cancelled—Extrinsic evidence to prove debt aliunde admissible.*

The plaintiff brought a suit to recover a sum of money alleged to have been lent by him to the defendant and to have been secured by a promissory note. At the trial when the note was produced, it was found,

that, though it bore the stamp, the stamp was not cancelled as required by section 12 of the Stamp Act, and the note was treated as an unstamped document inadmissible in evidence, and the Court refused to allow other evidence to be given of the debt.

Held that evidence of the debt was admissible *aliunde.*

When a cause of action for money is once complete in itself, whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always as a rule sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note under such circumstances as to make the debtor liable upon it to some third person. *7 Cal., 256, followed.* BANARSI PRASAD *v.* FAZAL AHMAD. **A. W. N. 1906 P. 9=3 A. L. J. 25=28 A 298.**

25 s. 12 *(2)—Stamp. Cancellation of—Omission to date when cancelling.*

The omission to date the adhesive stamp, if it is cancelled in any effectual manner, such as by writing the name of the person who means to cancel it, does not render the instrument unstamped within the purview of sub-section (2) of section 12 of the Stamp Act. KIRPA RAM *v* BARU MAL. **4 A. L. J., 326.=A. W. N. 1906. P. 95.**

26. s. 12 (3).—*Adhesive stamp—Cancellation.*

The mere drawing of parallel lines without more over a receipt stamp affixed to an instrument does not have the effect of cancelling it "so that it cannot be used again" within the meaning of the Stamp Act.—VIRBHADRAPA *v.* BHIMAJI. **6 L. R. 436=28 B 432.**

27 S. 17—*Act (I. of 1879), s. 16—"Stamped at the time of execution"—Affixing and cancelling stamp immediately after signature—Letters Patent, art. 12—Part of the cause of action—Promissory note payable in Madras or Secunderabad—Payments of interest in Madras—Jurisdiction.*

A promissory note was executed in plaintiff's favour at Vizianagram payable in Secundrabad or Madras. Payment of interest due on the note were made in Madras. The note was signed first, the stamp having been affixed and cancelled after signature, the acts being practically simultaneous. Leave to sue in the High Court had been obtained under art. 12 of the Letters Patent:

Held that part of the cause of action had arisen in Madras. *Also,* that the note was stamped at the time of execution, within the meaning of section 16 of the Stamp Act (I. of 1879).—SARIJ MALL *v.* HUDSON, **I. L. R., 24 M. 259.**

28 s. 17—*S. 16 Act I of 1879 and Sch. I Art: I—Acknowledgment.—Accou t stated—Contract to pay, novation of—Cause of action.*

A lent to B a money on the 30th June

Sup: Govt. acts (II of 1899) *(Contd.)*

and another sum on the 12th July, 1895, and B on the occasion of each loan executed a *Rukka* in favour of A. On the 22nd November, 1895, an account was made of the money due to A from B in respect of the two *Rukkas* and other debts. B executed a *Rukka* for the amount found due on the said date in which the debts due were acknowledged. The *Rukka* bore a one-anna adhesive stamp.

Held, that the acknowledgment of the balance found due on the *Rukka* was clearly an acknowledgment within the meaning of art. 1, sch. 1, Act I of 1879, and under s. 16, Act I of 1879, was stamped at the time of execution. The mere acknowledgment of a debt, signed by the debtor, although it may amount to the so-called account stated does not evidence a new contract to pay the debt admitted to be due.

Held further, that the acknowledgment contained in the *Rukka*, dated the 22nd November, 1895, was not in itself evidence of a new contract to pay that debt and did not give an independent cause of action to the plaintiff. - JAWAHIR SINGH *v.* LACHMAN PRASAD. **3. C. C., 195.**

29 S. 17, *35—Cheque—Post dated cheque—Duly stamped—Evidence.*

When a cheque is tendered in evidence with a one anna stamp upon it, it is "stamped" under Section 17 of the Stamp Act even though it may be post-dated.

In determining whether a particular instrument is sufficiently stamped the Court should only look at it as it stands. MOTILAL SHIVLAL *v.* JAGMOHUNDAS VUNDRAVANDAS. **6. B. L. R. 699.**

30 S. 23—*See s. 2 (22) and 23—3. B. L. R. 639. No 13 supra.*

31. **S. 24** —*Explanation—Proviso—'Mortgagee'—Assignees.*

The proviso to the explanation to section 24 of the Stamp Act (II of 1899) does not qualify the term 'mortgagee' by prefixing the word "orignal." The concession is not limited to the original mortgagee but extends to his assignee also. REFERENCE UNDER THE STAMP ACT. **5 B. L. R., 523.**

32. **S. 24**.—*Proviso—Mortgage—Exemptions in construction of Acts imposing burden.*

The proviso to section 24 of the Stamp Act, 1899 contemplates that to entitle the mortgagor to a deduction thereunder, the property transferred should be identical with that mortgaged and should not merely form a portion thereof.

An enactment imposing a burden requires a strict construction in favour of the subject, but exemptions in the Stamp Act must be construed strictly in favour of the State. *In re* NIRABAI *In re* LUMAN AND GANPAT. **6 B. L. R., 844=29 B. 203.**

33. **S. 24**.—The conveyance in this case was for Rs. 99. The father of the executant had mortgaged, with possession, Sub No. 1 of Survey No. 232 to the vendee for Rs. 50. Subsequently after his father's death, the executant conveyed to the vendee for Rs. 99 Sub No. 1 of Survey No. 234, and also portion

Sup: Govt. acts (II of 1899) *(Contd)*

of Survey No. 234, which was not subject to a mortgage.

Held, that the executant of the conveyance was entitled to deduct from the duty payable on the transfer, the amount of the duty already paid in respect of the mortgage of Survey No. 232, under section 24 of the Stamp Act. REFERENCE UNDER THE STAMP ACT. **4 B. L. R., 430.**

34. **S. 24**.—*Has no connection at all with the question whether a document is liable to registration or not?* See Sale. JAIRAM *v.* BAL KRISHNA DAS. **3 N. L. 72.**

35 **S. 26**—*Schedule 1, Articles 62 (c) and 57 (b)—Security bond—Contract—Illegal consideration—Forbearance to prosecute—Hindu Law—Father's debts—Son's duty to pay sums cirminally misappropriated by father.*

One R. and his minor sons, members of of a joint Hindu family, were sued by the plaintiffs M. and Co., Limited, for sums due on two martgage deeds executed by R. for himself and on behalf of his minor sons. The following questions arose in the case:—

1. Whether the later of the two mortgages was an instrument falling within the provisions of section 26 of the Stamp Act?

2. Whether the mortgage was illegal on the ground that it was executed in consideration of the company forbearing to prosecute R. for embezzlement of funds held by him as their cashier?

3. Whether any portion of the debt was not binding on the sons of R. under the Hindu Law and therefore not chargeable upon their shares of the mortgaged property?

The later mortgage was executed between the members of the firm of M. and Co., of the first part, R. for himself and on behalf of his sons of the second part and M. and Co., Limited, of the third part. It purported to transfer M. and Co., Limited, by the firm of M. and Co., the first mortgage executed by R. The provisions of the mortgage-deed also related to the accountability to the Company of R. in respect of the company's funds coming to his hands as the Company's cashier. There was also a promise on the part of R. to pay to M. and Co., Limited, the amount payable by him under the first mortgage.

It appeared from the plaintiffs' evidence that every one of the items making up the total of the claim related to Company's moneys taken by R. and misappropriated under circumstances which constituted the taking itself a criminal offence.

There was no evidence to show that the execution of the mortgage-deed was the result of an arrangement to compound the offence.

Held, (1) that the mortgage-deed did not fall within the provisions of section 26 of Stamp Act. The deed as transfer of the prior mortgage was liable to a fixed stamp duty under Article 62 (c) of Schedule 1 of the Stamp Act and as security for the due fulfilment of duties as cashier was charge-

Sup: Govt acts (II of 1899) *(Contd.)*

able under Article 57 (b). As the subtenance of the present claim did not involve giving effect to the promise in the later document the claim was unaffected thereby, even if the promise could be treated as one requiring the payment of an *ad valorem* duty.

2. That the mortgage contract was not shown to be illegal.

3. That the sons of R were not liable under the Hindu Law rule as to the pious duty of a son to pay his father's debts., *24 Cal., 672; 6 All. 234; followed, 16 Mad., 99, explained.* Mc.DOWELL AND Co., LD. *v.* RAGAVA CHETTY, **27 M. 71.**

36. S. 26—*(Act I of 1879)—Act XXXVI of 1860, s. 14—Meaning of the word "claimable"—Mortgage to secure future advances.*

The word "claimable" in s. 26 of Act 1 of 1879 means "claimable in a Court of Justice." A mortgage bond, intended to secure future advances up to the sum of Rs 10,000 at a time, was executed on a stamp-paper of Rs. 50, and under it altogether more than Rs. 10,000 was privately realised by the mortgagee on different occasions.

Held, that there was nothing in s. 26 of the Stamp Act of 1879 to prevent the mortgagee from suing to recover the balance of the debt due on the mortgage. HARENDRA LAL ROY CHOWDHRY *v.* TARINI CHARAN CHAKRAVARTI, **I. L. R., 31 C. 807; 8 C. W. N., 667.**

37. S. 32, 57—*Reference to High Court—Determination by Collector as to duty leviable final—"Case"—Jurisdiction of High Court.*

An adjudication by a Collector, under the powers conferred on him by S. 31 of the Stamp Act 1899, as to the duty with which an instrument is chargeable is, by S. 32 of that Act, final, and such a case cannot be referred by the Revenue authorities to the High Court under S. 57 of the Stamp Act for an adjudication—*Reference under* STAMP ACT, s. 57, **25 M. 751.**

38. S. 33 *(1)—'Comes.'*

The word 'comes,' in section 33 *(1)* of the Stamp Act, is sufficiently wide to include the production of documents under a search-warrant issued by a Magistrate. KING-EMPEROR *v.* BALU KUPPAYYAN **25 M. 525.**

39. S. 34 *(Act I of 1879)—Instrument admissible in evidence on payment of duty and penalty—Promssory-note—Unconditional undertaking to pay money.*

A letter was written in the following terms:—"In addition to Rs. 115 already received, Rs. 385 is also required. Please send it by the bearer Streenevasan. The amount will be returned with interest at 12 per cent. without delay":

Held, that there was no unconditional undertaking on the face of the document to pay the money; that the undertaking was conditional on the amount being remitted as requested; and that it was not a promissory note within the meaning of that term as used in s. 34 of the Stamp Act, 1879. *Channamma v. Ayanna*, (I. L. R., 16 Mad., 253), dissent ed from. *Narayanasami Mudaliar v. Lokambalammal*, (I. L. R., 23 Mad., 156 footnote), approved. BHARATA PISHARODI *v.* VASUDEVAN NAMBUDRI. **27 M. 1; F. B.**

40. S. 35 and 36.—*Objection as to document admitted in evidence—Negotiable promissory note. Assignment of—Acknowledgment—Extension of limitation.*

Section 36 of the Stamp Act provides that when a Court has admitted a document in evidence, no objection can subsequently be made under section 35.

When a debtor requests his creditor in writing for extension of time for payment of the loan and the request is granted, time begins to run against the debtor from the expiry of the extended period.

An assignment by separate deed is not invalid in the case of a document which is not a negotiable promissory note.

Held, that the following document was not a negotiable promissory note:—

"We three will pay to the President of——— ——— Fund, Ld., Rs.———, borrowed from you on——— ———three months hence. If we fail to pay accordingly, we jointly, or any one of us, will pay with interest according to rule——of the Fund rule." SUGAPPA *v.* GOVINDAPPA. **12 M. L. J. 1902, P. 351.**

41. S. 35—*Stamp—Promissory note not duly stamped—Suit on oral agreement contained in promissory note—Evidence—Admission—Oral evidence as to contents of documents.*

The plaintiff sued for recovery of money on a book account and alleged that the defendant had executed a pro-note in favor of plaintiff for the amount due but as the pro-note was not duly stamped the plaintiff claimed on the book account. The defendant admitted having executed the pro note but contended that it was not admissible in evidence for want of proper stamp and that the suit on book account was not maintainable and was barred by limitation.

Held, that the contentions were valid, and the admission of execution of the pro-note by the defendant was not sufficient for the claim to be decreed. 21 Bom., 201 (F. B.) 20 P. R., 1883; 18 Bom., 369; 24 Bom. 360, referred to. GANGA RAM *v.* AMIR CHAND. **66. P. R. 1906=73. P. L. R. 1907.**

42. S. 35—*Unstamped document if admissible in evidence—Secondary evidence.*

An instrument which should have been stamped according to law, but is unstamped is not admissible in evidence for any purpose whatsoever, and secondary evidence is not admissible in proof of its execution or its contents even if it be for the purpose of showing the character in which possession was transferred. TAJI BEEBI *v.* TIRUMALAIAPPA. **17 M. L. J., 308=30 M. 386.**

43. S. 35.—*See Ss. 17, 35—6 B. L. R., 699—No. 29 supra.*

44. S. 35 (a), *38, Cls. (1) and (2).—Im-*

Sup: Govt. acts (II of 1899) *(Contd.)*

pounded instrument admissible in evidence on payment of penalty—Court bound to accept it.

When an instrument not being one of the excepted instruments in Sub-S. (*a*) of S. 35 of the Stamp Act is tendered in Court, the Court is to accept it and shall admit it as evidence on payment of the duty, and the person tendering it is entitled to compel the Court to accept the instrument if the duty and penalty are paid. S. 35 of the Stamp Act does not prevent an instrument which is not absolutely rejected or which comes within the excepted ones, from being admitted on payment of penalty. NATHA *v.* HANSRAJ. **9 B. L. R. 122.**

45. S 35 (b) and 42.—*Penalty—Unstamped receipt.*

In applying proviso *(b)* of section 35 of Act II of 1899 the Court should not levy the duty of one anna as well as the penalty of one rupee, and when a receipt is admitted in evidence under the proviso above referred to, it is not necessary that the receipt should be endorsed in the manner provided for in S. 42. *Reference under S. 57 of* STAMP ACT, **A. W. N., 1902. P. 72 = 24 A. 374.**

46. S. 35, 38, 40, 60—*Stamp—Reference to Chief Court, when may be made—Powers of Court as to documents not put in evidence—Adjudication by Collector binding on Courts.*

The reference under Section 60 of the Stamp Act can only be made under the circumstances specified in it. The Judge must feel doubt as to the amount of duty to be paid in respect of any instrument under proviso (*a*) to section 35.

Section 60 does not deal with a case where reference has been made to a Collector and his adjudication obtained.

Where a suit is dismissed without being called to hearing no reference can be made as to a document produced in Court by the plaintiff with his plaint.

A Court has no power to overhaul an account-book produced in a case for the purpose of putting in evidence an entry contained in it and take action under the Stamp Act in regard to entries not put in evidence.

A Court acts without jurisdiction in calling upon a party to produce his account-book in Court and to impound the same, when there is no case before the Court.

Under section 40 (*a*) of the Stamp Act the adjudication of the Collector as to the amount of duty chargeable on an instrument is final and cannot be questioned by Court.

The Chief Court declined to entertain the reference submitted by the District Judge as made in contravention of the provisions of section 60 of the Stamp Act.—*Mussammat* JAI DEVI *v.* GOKAL CHAND. **131 P. L. R., 1906.**

47. S. 36—See S. 2 and 36—4. O. C. 318 No. 17 *supra.*

48. S. 36—See S. 35, 36—12 M. L. J. 1902, P. 351. No. 40 *supra.*

Sup: Govt. acts (II of 1899) *(Contd.)*

49. S 37—*Sch. I, Art. 1—Notification (Government of India) No. 786, S. R., dated the 17th February 1890, Rule 16—Acknowledgment stamped with a postage stamp instead of a receipt stamp—Such stamp not "a stamp of sufficient amount but in proper description."*

S. 37 of the Stamp Act 1899, as also Rule 16 of the rules of the 17 February 1899 passed by the Governor-General in Council under the powers conferred by the Act, does not include within the words "a stamp of an improper description," a description of stamp appropriate to purposes altogether outside the Stamp Act, but is confined to a stamp which is used for the purpose of denoting the stamp duty chargeable on an instrument, but which is improper in a particular case having regard to the Act and the rules. Hence, where an acknowledgment of a debt of the kind described in Art. I. of the first schedule to the Act was stamped by the debtor with a one-anna postage stamp instead of with a one-anna receipt stamp, it was held that the acknowledgment must be treated as if it had not been stamped at all. *Reference* under s. 57 of STAMP ACT, 1899. **23 A. 313.**

50. S. 38—*See S. 35 (a), 38, (1), (2)—9. B. L. R., 122. No. 44 and S. 35, 38, 40, 60—131. P. L. R., 1906 No. 46 supra.*

51. S. 40, 42—*Effect of Collector's certificate that document is properly stamped.*

A Subordinate Judge finding that a document upon which the plaintiff's suit depended was not properly stamped impounded the document and sent it to the Collector, meanwhile dismissing the plaintiffs suit. The Collector certified under S. 40 of the Indian Stamp Act, 1899, that the proper amount of duty and penalty had been realized.

Held, that the document then became admissible in evidence and the Court should have taken it into consideration. UMDA BIBI *v.* TIKAI RAM. **A. W. N. 1907 P. 38 = 4 A. L. J. 205.**

52. S. 40—*See S. 35, 38, 40, 60—131 P. L. R. 1906 No. 46 supra.*

53 S. 42 *See S. 35 (b) and 42—24. A. 374. No 45—supra.*

54 S. 43 *See S. 40, 42 4. A. L. J. 205 No 51 supra.*

55 S. 57 *Certificate by Deputy Collector under s. 40 (1) (a) exempting documents from stamp duty—Reference by Board of Revenue to High Court—Jurisdiction of High Court to decide the question.*

A Sub-Registrar, acting under s. 33 of the Stamp Act 1899, impounded two documents which had been produced before him for registration, and under s. 38 (2), forwarded them to the Deputy Collector, who, under s. 40 (1) (*a*), certified that they were exempt from stamp duty. The Inspector-General of Registration disagreed with the opinion formed by the Deputy Collector and reported the matter to the Board of Revenue for orders. The Board of Re-

Sup: Govt. acts (II of 1899) (*Contd.*)

venue referred the question as to the stamp duty, if any, payable on the documents to the High Court, under s. 57 of the Act:

Held, (the Chief Justice dissenting), that the High Court had no jurisdiction to decide the question.—*Reference under* STAMP ACT, s. 57, **I. L. R., 25 M. 752.**

56 S. 57 *See S. 5,757—24. M. 176. No 19 supra.*

57 S. 57 *See S. 32, 57 25. M. 751 No 37 supra.*

58 S 60 *See S. 35, 38, 40, 60—131. P. L. R. 1906 No 46 supra.*

59 S. 62 "*Accepting,*" *unstamped Promissory Note.*

J. was convicted under section 62, Act II of 1899, of "receiving or accepting" or a Promissory Note without the same being duly stamped.

Held, that the word "accepting" in the first clause of section 62 of Act II of 1899, does not mean "receiving" but "executing as an acceptor."

Held, *further*, that J. was not liable to punishment under the first clause of section 62 of the Act, merely because he received from another a Promissory Note without the same being duly stamped.—EMPRESS *v.* JADU MAL, **4 O. C., 163.**

60 S. 62 (1) *(a)—Promissory note.*

In the account-book of the creditor his debtor made a note to the effect that the money borrowed would be repaid on a certain date.

The Magistrate held that the entry amounted to a promissory note, and the debtor in making the entry and not stamping it in the manner required by the Stamp Act, committed an offence, under clause (*a*) of sub section (1) of section 62 of the Act, and that the creditor was guilty under that section "of receiving payment of a promissory note," which was not stamped.

Held, that the view of the law taken by the Magistrate was wrong, that the document was not a promissory note, and the mere receipt of a promissory note is not receiving payment of it. Nor is such receipt the acceptance of a promissory note within the meaning of the section.—20 *All., 440 referred to.*

An instrument to be a promissory note must on the face of it contain a promise to pay to, or to the order of, a person certain or to the bearer. There should be a specified person who is the payee of the note or the note must be payable to the bearer. The entry in question only contained a promise to pay a specific sum on a specific date, but not to a specified person, and it did not purport to payable to the bearer.

Semble: That the document was neither an acknowledgment nor "an agreement not otherwise provided for" within the meaning of those terms as used in the schedule to the Stamp Act. EMPEROR *v.* KALLU MAL AND EMPEROR *v.* GULZARI LAL **A. W. N. 1903. P. 174.**

Sup: Govt. acts (II of 1899) (*Contd.*)

61. S. 62, *(1) (b), 64 (c) and 2 (12)—Receipt—Execution—Entry in account-book signed by debtor.*

The essential ingredients of an offence, under section 64, clause (*c*), of the Stamp Act 1899 are, that there was an intent to defraud the Government, and that with such intent some act was done, which was calculated to deprive the Government of Stamp duty.

When a debtor paid through his clerk the money due by him to the accused, and the clerk at the time of payment made an entry in the account-book of the accused and did not demand any recept for the amount paid—

Held, that the mere fact of the accused not granting a receipt to his debtor or the debtor's clerk, or allowing the clerk to make a note of payment made by him could not be held to be an act done by the accused calculated to deprive the Government of Stamp duty and the accused could not be prosecuted for an offence, under clause (c) of section 64, of the Stamp Act.

The word "executed" used in reference to an instrument means "signed," and the accused could not be prosecuted even for the offence, under section 62 (1) (*b*).

There is no obligation on a creditor to grant a receipt for the repayment of the debt unless a receipt is demanded by the debtor. EMPEROR *v.* KALLU MAL, **A. W. N. 1903. P. 173.**

62. s. 62 (*b*).

The accused alleged to be sole member of a firm was convicted of an offence under section 62 (b) of the Stamp Act for an unstamped receipt for a sum over Rs. 20 having been granted by a person found to be the agent of the firm. There was nothing on the record to connect the accused with the granting of the receipt.

Held that the conviction of the accused was illegal. GULAM HUSSAIN ARIF *v.* THE EMPEROR. **8 C. W. N. 378.**

63. S. 62 (*b*) *See S. 2 (10) and 62 (b)—9. B. L. R. 119. No 4 supra.*

64. s. 64. (c)—*See S. 62, (1) (b) and 64, (c)—A. W. N. 1903. P. 173. No 61 supra.*

65. s. 69.—*See Court Fees Act VII of 1870 S. 34. No 109 Col: 131—24. M. 319, 320.*

66 *Sch 1 Art. 1—Acknowledgment—Bond—Promissory note—Memorandam of loan.*

The plaintiff brought a suit to recover the sum of Rs 500 lent by him to the defendants. At the time when money was borrowed a paper was written and signed by the defendants. That paper or memorandum was in these words:—

"Account (lekha) of Bhawani Din Kalwar, Katwari Kalwar and Bindesri Kalwar, 8th February 1901, interest 1 per cent. per mensem, payable 3rd May 1901, Rs 500 borrowed from Udit-Upadhaya for sugar factory."

The document bore a stamp of one anna,

Sup: Govt. acts (II of 1899) *(Contd.)*

The plaintiff's suit was dismissed on the ground that the document was an insufficiently stamped promissory note and parol evidence could not be admitted in proof of its terms.

Held, that the document was not a promissory note, nor a bond, nor an acknowledgment of a debt containing a promise to repay the debt or a stipulation to pay interest. As it was nothing more than a mere memorandum or note drawn up between the parties to a transaction which had just been settled between them it was not insufficiently stamped and was admissible in evidence. UDIT UPADHYA *v.* BHAWANI DIN. **A. W. N. 1904, P. 169 = 1. A. L. J. 483 = 27 A. 84.**

67. *Sch 1, Article 1—Acknowledgment—Limitation Act (XV of 1877) Section 19.*

The mere fact of a document being an acknowledgment of a debt would not make it liable to a stamp duty. There are other conditions to be fulfilled, one of which is that it should be written or signed on behalf of a debtor in order to supply evidence of a debt. In each case the instrument of acknowledgment must be carefully examined in connection with the surrounding circumstances to ascertain whether it has been signed to supply evidence of a debt. 8. Cal., 282, 15 All., 56, 21 Bom., 201 *referred to.* AMBICA DAT VYAS *v.* NITYANUND SINGH. **30. C. 688.**

68. *Sch I, Article 1—*Sarkhat*—Memorandum of money-dealings—Stamp.*

In a suit for recovery of money the plaintiff stated that the defendants had executed two *sarkhats*. It appeared that they were memoranda of money-dealings between the plaintiff and the defendants in the handwriting of one of the defendants, and that they did not purport to be in the nature of an acknowledgment of any debt, nor did they contain any promise to repay any debt, or any stipulation to pay interest. These *sarkhats* were not admitted by Court in evidence for want of proper stamp and the suit was dismissed.

Held, that the Court below was wrong in treating them as the sole foundation of the plaintiff's claim for they did not require any stamp to be admissible in evidence. 27 *All., 84, followed.* DULMA KUNWAR *v.* MAHADEO PRASAD. **3. A. L. J., 242 = 28. A. 436 = A. W. N. 1906. P. 80.**

69. *Sch. I, Art. 1—Acknowledgment—Agreement.*

Plaintiff sued upon an acknowledgment passed by the defendant to the following effect:—"This day rupees two hundred and forty-one I received. The interest thereon is by agreement fixed to be at the rate of Re. ¾ per cent. per month. This is the account in respect of the same." The acknowledgment bore an anna stamp.

Held that the above acknowledgment was an agreement and as such required an eight anna stamp.—LAXUMIBAI *v.* GANESH, **25 B. 373.**

Sup: Govt. acts (II of 1899) *(Contd.)*

70. *Sch. 1 Art I and 15—See S. 2 (2) (b)(and Sch. I Art 1 and 15—101 P. L. R. 1903. No 2. supra,*

71. *Sch. 1 Art. 1—See S. 37, Sch. I. Art 1. 23. A. 213. No 49 supra.*

72. *Sch. I. Art, 5 (b)—Agreement to deliver goods in exchange for goods—Price.*

Agreements or memoranda of agreements to deliver goods in exchange for goods are not agreements of sale under art. 5, sch. I., of Stamp Act *(II. of 1899)*, and are liable to stamp duty of eight aunas each as agreements "not otherwise provided for."—SAMARATMAL *v.* GOVIND, **3. B. L. R. 384 = 25. B. 696.**

73. *Sch. 1 Art 5 (b)* Hatchitta, *stipulating to pay interest - Acknowledgment or agreement—Stamp duty.*

Held, that the document sued upon was not a mere acknowledgment of a debt, inasmuch as it contained a stipulation that the amount should bear interest at a certain rate, and should therefore have been stamped as an agreement or memorandum of agreement with a stamp of 8 annas under cl. (*b*) of Art. 5 of Sch. 1 of the Stamp Act. 25 B. 373 relied on. MULCHAND *v.* KASHIBULLAH, **11 C. W. N. 1120.**

74. *Sch.* I, *Article 5—Agreement—Lease.*

A document in which no rent is reserved is not liable to stamp duty as a lease, it comes under the category of agreements not otherwise provided for. NARAYANDAS DWARMAL............LESSEE. **3 B. L R, 401.**

75. *Sch. I, art. 5, Negotiable Instruments Act (XXVI of 1881), Sections 4 and 5—Promissory note.*

A document agreeing to pay a certain sum on demand is a promissory note though it provides for payment of interest by the debtor. *3 All. 260 was passed under old law and is obsolete.* REFERENCE UNDER STAMP ACT. S. 60. **4 B. L. R., 912.**

76. *Sch I Art 15—Bond.*

Held, that the bond which ran as below was chargeable with stamp duty on Rs. 10 only.

"I have taken from you in cash a loan of Rs. 9-4-0 to which 12 annas have been added for "Kasar" total Rs. 10; interest on this sum amounts to Rs. 2-8-0; total Rs. 12-8-0. This debt will be repaid by 25 monthly instalments of eight annas each. Instalments in default will carry future interest at the rate of two rupees per cent. per mensem."

P. J. 1887, p. 35, followed, I. L. R. 26 Cal., 179, not followed. VITHU *versus* NATHU SAO. **3 B. L. R., 133.**

77. *Sch. I Article 15—Lease—Agreement to pay balance of rent for previous year—Bond.*

The agreement in a lease to pay a certain thing on account of balance of rent for the previous year amounts to a bond, and should be stamped as such under Article 15 of Schedule I of the Stamp Act, 1899. RAM CHANDRA GOVINDRAO

Sup: Govt. acts (II of 1899) (*Contd.*)

v. DHONDOO RAGHU CHAVAN. **7 B. L. R., 929.**

78. *Sch.* I, *Art. 23, 24—Conveyance—Havala—Letter by a debtor authorising payment to his creditor of money due to him (the debtor) by a third person.*

The defendant authorized the plaintiff, his creditor, to receive a sum of money on his behalf, due to him by the Panjrapol authorities at Bhiwandi, by a letter which ran as follows:

To—THE DAROGA OF THE PANJRAPOL, Bhiwandi.

I, Goubin Halia of Khoni, beg to apply that I have completely fulfilled the agreement to supply fodder for Samvat year 1956, and that the sum of Rs. 22, due to me on account, should be made over on my behalf to Shet Maogaldas Bhanji. He will sign on my behalf, and I consent to his doing so. This application for the *havala* is given in writing. It is requested you will accept it—6th March 1900.

(Signed) GAU HALIA.

This letter was written on an unstamped paper. On a reference by the Subordinate Judge to ascertain the requisite stamp upon it,

Held, that as the document in question effected a transfer of property by defendant to his creditor (plaintiff) in consideration of a debt due to the latter, it fell within the definition of conveyance in the Stamp Act (II of 1899) and should be stamped as such. NANDUBAI *v.* GAU, **4 B. L. R., 951**=27 **B. 150.**

79. *Sch. I Arts. 23, 55, 62 (c)—"Conveyance"—"Release"—Document executed by a benami purchaser professing to relinquish in favour of the real purchaser any claims which he might have in virtue of the purchase.*

Held that a document by means of which the certified purchaser of property sold by auction in execution of a decree purported to relinquish in favour of a person whom the alleged to be the real purchaser of the property, any claims which he might have in respect of the property by reason of his being the certified purchaser thereof was to be stamped as a release according to art. 55 of the first schedule to the Stamp Act 1899.—*Reference under* STAMP ACT, S. 57, **A. W. N. 1903. P. 71=24. A. 372 (F. B.)**

80. *Sch. 1, Art. 24—Civil Procedure Code (Act XIV of 1882), S. 141 a, 142 a—Copy —Extract—Account books.*

A copy or extract from an entry in an account book, filed under the provisions of sections 141 A and 142 A of the Civil Procedure Code, requires no stamp.—CASTUR *v.* FAKIRIA, **4. B. L. R. 223=26. B. 522.**

81. *Sch: I Art. 24—See Sch: I Art 23, 24 —27. B. 150 No 78 supra.*

82. *Sch. I. Art 31—See S. 5. Sch: I Art 31—25. M. 3. No. 20 supra.*

83. *Sch: I., Arts. 32, 40—Mortgage—Further charge.*

Sup: Govt. acts (II of 1899) (*Contd.*)

Certain property was mortgaged with possession for Rs. 180 by a deed of mortgage dated 23rd May 1895. The deed was on a stamp paper of Rs. 2 (two) On 23rd August 1899, the same property was re-mortgaged to the same mortgagee for Rs. 250, made up of Rs. 180, the consideration for the former deed, and another sum of Rs. 70 due to the mortgagee. This second deed was written on a stamp paper of Re. 1.

Held that the second deed was not intended to operate merely as a further charge but as a new mortgage in which the previous one merged, and that it should therefore be stamped as a mortgage-bond with possession for Rs. 250.—*In re* MEGHA, **3. B. L. R. 42=25. B. 370.**

84. *Sch. 1 Art 35 Execution—Signing—*

Held—that a parabaik mortgage deed, dated 1256 B. E. (1894-95) though not signed was executed within the meaning of the Stamp Act then in force (1 of 1879) and therefore liable to Stamp duty—

Held also—that where the defendant was alleged to be withholding an unstamped parabaik document, that did not render secondary evidence admissible U. B. R. 1892—96. I. P. 303, U. B. R. 1907. 2. P. 1., U. B. 1897—1901. vol. 2. P. 421. U. B. R. 1897—1901. 2. I P, 365., 19. B. 635, 26. I. A. 262. *referred to.* MI TA *v.* NGA SEIN. **U. B. R. 1907 P. 1 Stamp.** (*Execution signing P. 5).*

85. *Sch. 1 Art 45—See S. 2 (15) Sch. 1 Art 45—32. C. 483. No 8 supra.*

86. *Sch. I Art 45, (c)—See S. 2 (15) Art 45 (c)—31. B, 68. No 11 supra.*

87. *Sch. 1. Art 46. Partition-deed.*

Held, that the following writing was an instrument of partition and liable to stamp duty as such.

"I had a partnership share in the firm of Baijnath Ramgopal of Amraoti. It has this day been amicably settled by Nathmalji and Ramdhanji in a meeting. The debts due from debtors as found in their (respective) accounts have been divided according to a three and a half *biswa* share (21 *biswas* is the number representing the entire partnership). Below are shown the names of the debtors which fell to the share of Choturam Ramgopal and of which he has become the owner. The debts due from the debtors abovementioned have fallen to your share. You have (the full) ownership over them. I have no right of whatever description over these debts. Besides excluding the outstanding (abovementioned) there are in your and my partnership debts due. on account books, over which you and I have joint right according to our shares. I have the (full) ownership over the debts which have fallen to my share." CHOTURAM RAMGOPAL *v.* GANESH AMBA DAS MARWADI. **3 B. L. R., 132**

88. *Sch. I, Art 47 (a) See S. 2, 7, Sch Art 47 (a)—30. C. 565. No. 5 supra.*

Sup: Govt. acts (II of 1899) (*Contd.*)

89. *Sch. I, Art 47 (d)—Certificate of membership—Policy of life insurance.*

The certificate of membership of a Provident Society was to the following effect:—

"You have on condition of your conforming to the rules and regulations of this society from time to time in force, insured your life in the class of this society at the age of . " The name of Mr. , residing at , has been registered as that of the person to whom the amount due under the rules of this society after your death should be paid."

Held that the above certificate was a policy of life insurance within the meaning of art. 47 (*d*) of Act II. of 1899, and as such liable to pay *ad valorem* duty.—*In re* HIMAT PROVIDENT SOCIETY. **3 B. L. R. 43**=**25. B. 376.**

90. *Art. 48 (d)—Power of attorney—Transactions—Stamp.*

A power-of-attorney authorising the agent to recover a judgment debt, and for this purpose to take out execution of the decree as well as to bring a fresh suit if necessary, is an instrument which falls within Art. 48 (*d*) and should be stamped as if it related to more than one transaction. *In re* GOPAL RAO. **3 B. L. R. 890.**

91. *Sch. I. Article 48, Section 2 (21)—Power of attorney.*

A document which authorises a person to receive money and sign a receipt is not a power of attorney when it does not empower him to do so in the name of the executant of the document. TRIBHOWAN *v.* PANDURANG. **3. B. L. R., 697.**

92. *Sch. 1 article 49—Promissory note.*

Held, that a mere promise to pay at a certain place made in a document does not deprive it of its character of a promissory note if it otherwise falls within the definition of a promissory note. DEV RATNA *v.* FAKIR ADAM. **4. B. L. R., 428.**

93. *Art 55—See Art 23, 55, 62. (e)—24. A. 372. No 79 supra.*

94 *Sch 1 Article 58 A—Settlement deed—Stamp for.*

A deed of settlement is chargeable with stamp duty as such under Article 58 A sch. 1 of the Stamp Act, 1899 (as modified by Act XV of 1904), although it records the terms of a disposition, made previous to the passing of the Act XV of 1904.

In the matter of the trust constituted by MANSUKHRAM SURYARAM TRIPATHI. **7 B. L. R. 931.**

95 *Sch. I Art. 62 (c) and 57 (b)—See s. 26, Sch. 1 Art. 62 (c) and 57 (b) 27 M. 71—No. 35 supra.*

96 *Sch. 1 Art. 62 (e)—See Art. 23, 55, 62 (e)—24 A. 372 No. 79 supra.*

97 *Sch. II, Art. 1—Promissory Note—Acknowledgment—Construction of Document.*

The suit was for the recovery of the sum of Rs 500 lent by the plaintiff to the defendants. At the time when the money was lent, a memorandum was signed by the borrowers in the following terms: "Account (*lekha*) of B and K, 8th February 1901, interest 1 per cent. per mensem payable 3rd May 1901, Rs 500 borrowed from U for a sugar factory".

Held that the document was not a promissory note, nor a bond, nor an acknowledgment of a debt containing a promise to repay the debt or a stipulation to pay interest. It was a memorandum or note drawn up between the parties as to a transaction which had just been settled between them. It was doubtful even if it was an acknowledgment requiring to be stamped with the auna stamp that it bore. As to that matter, however, as the stamp had been affixed on it, the question was not gone into. So the document was not insufficiently stamped.—UDIT UPADHAYA *v.* BHAWANI DIN. **A. W. N., 1904 p. 169.**

90 Act IX of 1899 (*Indian Arbitration Act*).

1—*Oral submission—Necessity for submission in writing—Award on oral submission—Validity—Applicability of the Act—C. P. C. S. 375*—See Arbitration. RUKHANBAI *v.* ADAMJI SHAIK RAJBHAI. **10. B. L. R. 366.**

2 s. 4, 5—*Submission—Contract by bought and sold notes—Arbitration clause—Award ex-parte—Rules of the Bengal Chamber of Commerce.*

A clause providing for the reference of any dispute to arbitration, contained in a contract effected by means of bought and sold notes, identical in their terms and signed by the respective parties or their agents, constitutes a "submission" within the meaning of s. 4 of the Arbitration Act. *Caerleon Tinplate Company* v. *Hughes*, (60 L.J. Q. B. 640), distinguished. A party to such a contract and the arbitrators are entitled to proceed in the absence of the other party, if the latter has had due notice to attend the reference, and, although the Court will not decree specific performance of an agreement to arbitrate, yet it will enforce an *ex-parte* award made on such reference. *In re Smith and Service and Nelson and Sons*, (25 Q. B. D. 545), referred to.—RAM NARAIN GUNGA BISSEN *v.* LILADHUR LOWJEE, **10 C. W. N. 814.**=**33. (c) 1237.**

3 s. 4, *19—Taking time to file written statement is step in proceedings.*

Taking out a summons for further time to deliver a written statement is taking a step in the proceedings within the meaning of S. 19 of the Arbitration Act; which was examined and explained.—SARAT KUMAR ROY *v.* THE CORPORATION OF CALCUTTA. **11. C. W. N. 306**=**34. C. 443.**

4 s. 4, *20—See Contract Act IX of 1872. s. 28. No 143 Col 294. 33. C. 1169.*

5 s. 5—*See s. 4. 5—10. C. W. N. 814. No 2 supra.*

6 s. 5 and 10—*Permission to revoke submission to arbitration—Stating a case by arbi*

Sup: ovt. acts (IX of 1899) *(Contd.)*

trators to Court for opinion—Admissibility of evidence.

In moving for leave to revoke a submission to arbitration under s. 5 of the Act, the paper procedure is that it should be by motion in Court.

In the case of more agreements than one between the parties to refer their differences to arbitration, and their consisting that the evidence recorded by the arbitrators in one of them would be treated as evidence in all the submissions, but there being no order consolidating the reference, and no consent anywhere that the different references should be treated as one, it is not competent to any party to seek to revoke the submission to arbitration in all the different cases, by one application alone.

The Indian Arbitration Act (section 10) leaves it to the discrection of the arbitrators to state a special case or not to the Court as they choose; and the Court has no power to enforce its rulings or directions upon the arbitrators if they do not choose to follow the rulings or obey the directions. But in England the Court can compel an arbitrator to state a case.

A party to a submission to arbitration feelings as aggrieved by the arbitrators deciding improperly or erroneously to admit evidence which they should have rejected, must as a proper course apply to the Court for leave to revoke the submission. On such application the Court will accord or refuse such leave according to the circumstances of each particular case that comes before it. The power of the Court is discretionary and ought to be cautiously and sparingly exercised, but such power should be exercised by the Court in favour of the applicant, if it appears to the Court that the main object of all submissions to arbitration which is to obtain "speedy end of the strife" is not likely to be attained and the applicant is likely to be subjected to "multiplied expenses" and "interminable delays" by the conduct of the arbitrators. Leave to revoke should be accorded to the applicant in all cases where he "can establish that there will be failure of justice if the reference is allowed to proceed." (2 Q. B. 915, 23 Q B. D. 12 and 1 Q. B. D, 102 referred to and approved).

The arbitrators ought to form a clear and definite opinion as to what questions are referred to their arbitrament, and decide what is within the scope of the reference and what is not. This will easily decide the question of admissibility of any evidence that may be tendered by one or other of the parties before them. *In re*, INDIAN ARBITRATION ACT RE ATLAS INSURANCE Co., **10 B. L. R. 351.**

7 S. 10—*See s. 5, 10—10. B. L. R. 351 No. 6 supra.*

8 S. 11 (2) *& 14 – Lower Burma Courts Act, S. 14—Civ. Pro. Code, S. 2—Order dismissing application to set aside award is not a decree and is non-appealable.*

Sup: Govt. acts (IX of 1899) *(Contd.)*

Under this Act no order of the Court is necessary for the filing of an award; and an order dismissing an application to set aside the award is neither a suit nor an appeal, and there is nothing in the Arbitration Act to show that it is to be treated as a suit.

Such an order, therefore, is not a decree within the meaning of S. 2. Civ. Pro. Code, and is not appealable as such.

The Arbitration Act clearly indicates that an award, upon a submission, which contain no provision to the contrary, is final, unless the Court in which it has been filed remits it or sets it aside. 33 C. 757 Diss. KHATOUN BEE *v.* ABDOOL RAHMAN, **14 B. L. R 129 =4. L. B. R. 219**

9. S. 13.—*Reference to arbitration by the parties—Award—Leave to file by plaintiff, application for—Title-deeds—Discretionary power of Court to remit award for reconsideration to arbitrators—Arbitration Act (IX of 1899), S. 13—Civil Procedure Code (Act XIV of 1882), S. 506 to 526.*

A and *B* referred certain matters in dispute between them to arbitrators under the Arbitration Act (IX of 1899), and an award was made by which *A* was ordered to pay a sum of money to *B*, upon *B* delivering up certain title-deeds. A thereafter applied to the Court to have the award filed. *B* objected upon the ground that there was no finding that he was in possession of the title-deeds, and asked to have the award remitted.

Held that an order in the award on *A* to pay a sum of money to *B*, on the latter giving up certain title-deeds (possession of which was denied by him) could not amount to a finding that *B*. was in possession of the title-deeds.

Held, further, that S. 506 to 522 of the Civil procedure Code apply to arbitrations in a suit.—PROTAB CHUNDER DEY *v* TOOLSEQ DASS DEY, **29 C. 793.**

10. S. 14—*See S. 11, 14—4. L. B. R. 249. No 8 supra.*

11. S. 19.—*Jurisdiction of the High Court to stay proceedings in the Court of the Small Causes—Arbitration, reference to.*

The legal proceedings referred to in Section 19 of the Indian Arbitration Act does not necessarily mean legal proceedings in the High Court alone. Section 19 of the Indian Arbitration Act gives jurisdiction to the High Court to stay proceedings in any Court in the Presidency Town subordinate to its jurisdiction. It does not indicate that the legal proceedings contemplated must in Presidency Town be proceedings in the High Court and not in any other Court subordinate to it in that town.

Proceedings taken by a party to a suit to stay legal proceedings under the provisions of Section 19 of the Indian Arbitration Act are not steps "in the proceedings." RALLI BROTHERS *v.* NOOR MAHOMED. **8. B. L. R. 955=31. B. 236.**

Sup: Govt. acts (IX of 1899). *(Contd.)*

12. S. 19.—*Application to stay proceedings pending arbitration.*

Section 19 of the Arbitration Act only applies where there has been a submission to arbitration before the commencement of the legal proceedings. RAMJIDAS PODDAR *v.* HOWSE, **35 C. 199.**

13. S. 19.—*See. S. 4, 19—34. C. 443—No 3 supra.*

14. S. 20.—*See S. 4, 20—33. C. 1169—No 4 supra.*

91—Act XXII of 1899—*(Coinage and Paper Currency Act.)*

1—*See Tender*—JAGAT TARINI DASI *v* NABAGOPAL CHAKI **5. C. L. J. 270=34. C. 305.**

92—Act. V of 1902. *(Administrator General and Official Trustees Act.).*

1—S. 4. (2)—*See Administrator Generals Act I of 1896 S. 4 (27)* (5) *No 1.* **7. B. L. R. 195=29. B. 188.**

2—*Officials trustee whether prohibited from being appointed as executor*—See Probate and Administration Act V of 1881—S. 17. No. 17 Cal. 516. **35. C. 156.**

93—Act IV of 1903—*(Provident Funds Act—Amendment).*

(See Act IX of 1897 Provident Fund)

94—Act V of 1908 *(Civil Procedure Code).*

(N. B).—The corresponding sections of the old Civ. Pro. Code Act XIV of 1882 are given along with the Sections of the new Code Act V of 1908)

1 S. 1=S. 1.—*The Code of Civil Procedure is not intended to be and is not exhaustive—A Lunatic may sue through his next friend though not adjudged so.*

See Order XXXII Rule 15=S. 463. **10. C. W. N. 719=4. C. L. J. 306=33. C. 1094.**

2 S. 1=S. 1—*This Code is not exhaustive*—

The Civil Courts in this country have, in matters of procedure, powers beyond those which are expressly given by the Code of Civil Procedure, which binds the Courts only so far as it goes. The Code does not affect powers previously possessed by them unless it expressly takes them away. It does not affect the power and duty of the Courts to act according to equity and good conscience in cases for which no express provision is made. The Court has an inherent power to do that justice for the administration of which alone it exists. See also C. P. C. D. XLI R. 5, O. XXII R. 11 and S. 107 (S 545 582). PANCHANANSINGHA ROY *v.* DWARKA NATH ROY. **3. C. L. J. 1906. P. 29.**

Sup: Govt. acts (V of 1908) *(Contd.)*

3. s. 1=*S. 1.*—See to the same effect as No 2 C. P. C. O. XLI R. 5, O. XLI R. 6. & S. 144 (1) (Ss. 545, 546, 583). HUKAM CHAND BAID *v.* KAMLANANDSINGH.—**3. C. L. J. 67=33. C. 927.**

4. s. 1=*S. 1.*—*Code not exhaustive.*—See S. 24 and O. XLJ R. 23 (Ss. 25 and 562).—GURDEO SINGH *v.* CHANDRIKAHSINGH. **5 C. L. J. 611.**

5. s. 1=*S. 1.*—*The Tributary Mehals of Orissa, of which Mourbhunj is one, do not form part of British India*—See S. 44 and 45 Ss. 229 (a) and 229 (b). RATAN MAHANTI *v.* KHATOO SAHOO. **6 C. W. N. 573=29 C. 400.**

6. s. 1=*S. 1. Interpretation of statutes.*

The Court should not in interpreting a statutes consider what the Law was before the passing of the statute, but what the legislature has said to be the Law after the Act is passed. LALA SURAJ PRASAD *v.* GOLAB CHAND. **5 C. W. N. 640=28 C. 517 at** (528).—*See Construction of statutes.*

7. s. 1=*S. 1.*—*Non-appearance of the appellant on being summoned by the respondents as witness—Suit to recover diet money.*

The appellant failed to appear in pursuance of the summons served on him at the instance of the respondents.

Held, he had no right to retain the batta paid to him to cover the expenses of his attendance, and the respondents whose money was paid are entitled to recover it as money had and received by the appellant (26 L. J. Q. B. 29 followed). There is nothing in the Code or in the rules enacted, thereunder, restricting the respondents to proceedings to be taken in the cause by way of application for taxation of costs and recovery of it as such. NATARAJA DESIKAR *v.* VEERABADRAN CHETTY. **17 M. L. J. 143.**

S. 2=S. 2.—*Decree*—**The following orders have been held to be decrees:—**

8. *In a suit for accounts a preliminary order directing accounts to be taken.* See O XX R. 16=S. 215 (a). KAKARAM *v.* RAM SARAN. **13 P. R. 1901.**

9. *Execution of decree—Order dismissing application for execution without fixing a date for its disposal—Appeal.*

Where the Court executing a decree dismissed an application for execution of a decree without fixing a date for its disposal and giving a notice of such date to the decree holder—

Held, that the order of dismissal was a decree and appealable as such and was *ultra vires.* The lower Court was apparently actuated by a desire to clear its files of a long pending execution case. RAM CHAND *v.* RAHIM DAD. **130 P. L. R. 1902.**

10. *An order dismissing objections to the execution of a decree for default.* See S. 2, 47 (3) and 96. LAL NARAIN SINGH *v.* RAFI-UD-DIN. **28 C. 81.**

11. *A deceased plaintiff's son applied for appointment of Commissioner to divide the*

Sup. Govt. acts (V of 1899) *(Contd.)*

property for which a compromise decree had been passed.

The application was dismissed as time barred under Art 178 Limitation Act. On appeal the order rejecting the application was reversed. On second appeal it was contended that the order was not appealable and that the application was time barred.

Held the order was a decree and appealable under section 244 (47). LATCHMANAN CHETTY *v.* RAM NATHAN CHETTY. **14 M. L. J. 436.**

12. *An order setting aside on appeal the order of the Lower Appellate Court by which it had remanded the case to the court of original jurisdiction is a decree under section 2 of the Act.* See Execution of Decree, LALA RAGHURAJ SINGH *v.* HERPERSHAD. **5 O. C. 301.**

13. *Land Acquisition Act—Award—Decree.* The adjudication as to compensation or apportionment of a compensation, under the Land Acquisition Act, though called an award is a decree within the meaning of this section. See Land Acquisition Act I of 1894 S. 26, 30, 54. THE ZAMINDARS OF DHAR *v.* RANA OF BHAGAT. **103 P. L. R. 1906 =53 P. R. 1906.**

14. *The word decree when used in the N. W. P. Tenancy Act II of 1901 must be interpreted as defined in this code. An order passed in the execution proceedings when it falls under S. 244 (47) is a decree under section 2.* See N. W. P. Tenancy Act II of 1901. S. 176, 177, 193. KHARAK SINGH *v.* POLA RAM **A. W. N. 1904 P. 156, 1 A. L. J. 305=27 A. 31.**

See to the same effect DHANI RAM *v.* BHOLA SINGH, **A. W. N. 1904 P. 152=27 A. 21 P. C.**

15. A decree holder claimed mesne profits in the execution proceedings for 9 years from the date of the institution of the suit down to the recovery of possession by him (which was after his being successful in the Privy Council). The District Judge allowed him mesne profits for three years only.

Held, that the decision was a decree under this section and appealable under section 540 (96). BHUP INDER BAHADUR SINGH *v.* BIJE BAHADUR SINGH. **23 A. 152 P. C.=2 B. L. R. 978=5 C. W. N. 52 =27 I. A. 209 P. C.**

16. *An order allowing agreement to refer to arbitration to be filed is a decree.* See C. P. C. Sch. II Rule 17 (S. 523). NARPAT RAI *v.* DEBIDAS. **126 P. R. 1907=50 P. L. R. 1908.**

17. *An order passed on an application to file an award refusing the same is a decree and as such appealable.*—See Sch. 11, Rule 20 and Sections 96 and 115, (S. 525, 540, 622). PONNUSAMI MUDALI *v.* MANDI SUNDARA MUDALI, **M. L. J., 1904, P. 356 =27 M. 255.**

18. *An order rejected appeal as presented out of time is a decree within the meaning of this section and from such decree a second appeal would lie to the High Court.*—7 A. 42, 9 B. 452, 12 C. 30, 16 M. 285, 22 M. 156 followed. SAMINATHA AIYAR *v.* VENKATA SUBBA AIYAR. **13 M. L. J., 300=27 M. 21.**

Sup. Govt. acts (V of 1899) *(Contd.)*

19. *An order directing an award made on private arbitration to be filed is a decree and as such appealable, but an order disallowing the filing of such award is not appealable.*—KATIKRAM *v.* BABOOLAL. **A. W. N., 1903. P. 234=26 A. 205.**

20. *An order passed on an application praying for the revocation of Letters of Administration, presented to the Court under s. 50, Act V of 1881 which rejected such an application is a decree and is as such appealable.*—See Probate and Letters of Administration, Act V of 1881, Sections 50, 55. 69 and 83, No. 40, col. 522. SHEIKH AZIM *v.* CHANDRA NATH. **8 C. W. N. 748.**

S. 2=S. 2.—The following orders have been held not to be decrees.

21. *Held*, by the full Bench of the Chief Court. (Reid and Chaterji, J. J., dissenting) that an order by which a suit is dismissed in default under S. 102 of the Code (O. IX R. 8) does not amount to a decree as this term has been defined in section 2 of the Code and therefore no appeal lies from that order. KANHAYALAL *v.* THE NATIONAL BANK OF INDIA, LD., DELHI. **121 P. R., 1907.**

N. B.—This ruling was under C. P. C., Act XIV of 1882, but now section 2, clause 2, sub-clause (b) of the new Code Act V of 1908 makes it clear that such an order is not a decree.

See to the same effect Amritolal Mukerji *v.* Ram Chandra Roy, 29 C. 60, 12 M. L. J., 1902, p. 473, 4 L. B. R. 17, 5 O. C. 294.

Therefore 30 C. 660 F. B.=7 C. W. N., 486, &c. to the contrary must be held to be overruled by S. 2 (2) (b) of the new Code.

22. *A District Judge's order dismissing an application made to him for apportionment of compensation under Ss. 18 and 30, Land Acquisition Act I 1894 is not a decree.*—See Court Fees Act VII of 1870, No. 121, col. 134. HARRISH CHANDRA *v.* BHOBA TARINI DEBI. **8 C. W. N., 1904, P. 321.**

23 An order in execution of a decree passed under section 9 of the Specific Relief Act is not a decree and therefore not appealable. THOMAS SOUZEA *v.* GULAM MOIDIN BEARI **13. M. L. J. 214=26. M. 438.**

24. Where a plaintiff withdraws from a suit or appeal without permission to sue again obtained from the Court and the suit is consequenty dismissed, such a dismissal is not a decree **6 O. C. 48 at 50.**

25. *The proceeding of a Court of Justice in the exercise of its inherent power to punish for contempt—2 A. L. J. 16=A. W. N. 1905 P. 9=27 A. 3 8* See also to the same effect **=2 A. L. J. 18=A. W. N. 1905. P. 10= 27 A 350.**

26. An order passed by a District Judge refusing to entertain a claim under the Land Acquisition Act and directing the parties there to have a resort to the Civil Court

Sup: Govt. acts (V of 1899) (*Contd.*)

for their redress is not a decree **8. C. W. N. 321.**

See decree. Construction of—Form of—interpretation of, etc., under Decree.

27. S. 2=*S. 2—Decree-holder*—The transferee of a decree-holder is a decree-holder and can apply as such for the execution of the decree so transferred to him. **2 M. L. T. 339, 14 M. L. J. 393.** *See to the same effect to M. L. T. 93.*

28 S. 2.=*S. 2.—Foreign Courts.*

The Supreme Court of Mauritius is a Foreign Court within this definition and its judgments are foreign judgments—**6. C. W. N. 829 at 833.**

28 A S. 2.=*S. 2—Judge—His discretion.*

The Judicial Committee are always slow to interfere in and reverse the decisions of Courts below when they are made in the delicate exercise of a discretion vested in them by Law. **6 A. 238. 243. (P. C.)**

29. A judgment of any Colony Court subject to British Crown against a person who was absent when the judgment was passed and who was not a resident nor the subject of the colony can not be enforced against him simply because he is a subject of the same Sovereign—**29 C. 509.**

30. S. 2.=*S. 2—Legal Representative.*

This term includes an executor and administrator, a "next of kin", a reversioner, an executor de son tort an heir and also a person who represents the estate of a declosed person, **8. C. W. N. 843.**

30 a. It includes a Reversigner and a surviving co-parcener—**11 C. W. N. 163.**

31. S. 2=*S. 2—*

Legal Representative includes subsequent transferees from the transferce of the decree-holder—**27 C. 670.**

31 b. It also includes a person who without any title at all becomes the possessor of a deceased Hindus estate *i. e.* an executor de son tort, **30 C. 1044.**

32. An auction purchaser is the representative of the decree holder for the purpose of—**S 244=S 47-28 M. 87.** *But See contra 25 B 631.*

32 a. It includes the purchaser of a Rutui Tinure 9 C. W. N. 824=32 C. 1031 and the lessee of a lease from the judgment debtor when his property was under attachment, **28 C. 492.**

33. Legal representative includes a transferee of the judgment debtor. 2 M. L. T. 347=17 M. L. T. 291. 9 C. W N. 134, 1 N. L. R. 49; and an official assignee. **5 C. W N, 761=28 C 419.**

But see to the contrary in the case of an Official Assignee 29 C. 428.

See also S. 47 and 50 and Legal Representative on this point.

34. *Legal Representative does not include:—*

A transferee of a decree 8 O. C. 370, nor the company which is the transferee of another company 30 C. 961, nor a person who does not in law represent the estate of a deceased person nor a purchaser of the rights of a tenant before a rent decree was passed against the latter 6 C. W. N. 127, nor the purchaser of a mortgaged property sold in execution of a simple money decree, is such in respect of the mortgaged decree an execution of which is sought against him. **23 A. 450.**

Sup: Govt. acts (V of 1899) (*Contd.*)

35. S. 2=*S. 2—Mesne profits.*

This term includes profits which a person in the wrongful possession of the property has actually realised from the property without a failure to use ordinary diligence in collecting the same. **25 A. 266 at 269.**

35 (a). Mesne profits are due from the date of wrongful possession but interest thereon would be due from the day on which each instalment becomes due. **A. W. N., 1903, P. 42=25 A. 275.**

36. S. 2=*S. 2.—Order.*

See notes on "decree" Nos. 21 to 26 *supra.*

37. S. 2=*S. 2.—Pleader, Advocate—Suit against an Advocate for return of back fee.*

A suit is not maintainable against an Advocate for return of back fee, deposited with him by his client. **49 P. R. 1906 F. B.=106 P. L. R. 1906.**

37 (a) A Barrister can not sue for his fees for professional services nor can he be sued for refund of fee on his failing to perform his services. **25 A. 509.**

37 (b) A Barrister can sue his clients for his fee for professional services and likewise he can be sued by his clients for negligence. **4 L. B. R. 55 F. B.**

37. (c) Where there is no special agreement a pleader can recover only a fair remuneration for the work done by him. **40 C. 345.**

38 *A Barrister has no right to practice in India as a Barrister, but he asks for permission to practice as an Advocate.*

On being admitted on the rolls of a High Court he acquires rights and becomes subject to the liabilities of an Advocate. Therefore his professional status in this country is that of an Advocate. **4 L. B. R. 55=1 M. L. T 252=3 A. L. J. 592=A. W. N. 1906 page 226 F. B.**

38 (a) A pleader's fee under s. 52 regulation 2 of 1827 should be calculated on the actual. value of the property in dispute and not on the valuation of the claim for the purposes of Court fee. **7 B L. R. 131=29 B. 229.**

38. (b)—In a redemption suit the Pleader's fee should be calculated on the amount of the principal sum secured by the mortgage deed. **6 O. C. 130.**

38. (c) In a pre-emption suit it ought to be calculated on five times the Govt. Revenue assessed on the land **7. O. C. 43.**

38. (d)—No agreement to pay fee can be sued upon unless it is in writing and filed in Court **1. M. L. T. 242=3 A. L. J. 579=A. W. N, 1906 P. 235 F. B.**

38 (e) *Extortionate fees.*

An Agreement by which a client agreed to pay one lack of rupees to his pleader for conducting his case and a proportionately

Sup: Govt. acts (V of 1899). (*Contd.*)

less sum if the suit was decreed for a lesser amount was held to be a grossly unprofessional conduct as it amounted to sharing in property in dispute. **4 O. C. 229.** *See Legal Practitioners Act 18 of 1879 S. 28, 29, etc.*

39. The Advocate General can not be compelled to make discovery upon Oath, in a suit filed by him at the instance of the relators, under the provisions of S. 539 (S. 92, 93) **C. P. C.—8. B. L. R. 565 = 30. B 574.**

40. *Pleader's power to bind his client.*

A pleader has not generally a power to compromise a case on his client's behalf unless he is specially authorized by him to do so. But where a pleader entered into a compromise on the instruction of a person waiting the case on behalf of his clients such a compromise will bind the client if he ratifies the acts and the compromise, even though such other person had no authority at all to bind the client by his Act—**6. C. W. N. 82.**

41. *Giving up of an issue.*

A Vakil having a general power given to him by his client to conduct a case has by implication a power to give up an issue which he does not consider fit to be pressed **25. M. 367 P. C.**

42. *His power to refer to arbitration.*

A pleader can not refer a case to arbitration unless he is expressely authorized to do so by his client. A Vakalat Nama in general terms is not sufficient for this purpose. But where his client knows about the reference and acquires therein he can not afterwards raise an objection to the effect that his Pleader had no authority to make the reference, **A. W. N. 1907 P. 139 = 4. A. L. J. 342 = 29 A. 429.**

43. Remarks against a Pleader. Where a Court makes any remarks against a Pleader or an Advocate he is entitled to a copy of them, so that he may place his own conduct before the particular court in the light most famourable to him so that such Court may alter or modify the remarks—**6 B. L. R 540.**

44. Where a Pleader fails to appear in answer to a charge preferred against him under S. 14 Act XVIII of 1879, there is no provision of law which authorises the issue of summons or warrant against him—**8 M. L. T. 237.**

45. *Professional Misconduct—Non-payment of Money drawn from Court.*

A pleader drawing money from Court and not paying it to his client but compelling the latter to institute a suit against him for recovering the money is guilty of professional misconduct—**31 C. 41.**

46. *Pleader's bribing a witness.*

Where a Pleader pays or offers the payment of money to a witness to induce him to speak the truth or to prevent him from giving false evidence in a case or to induce him to keep back unfavourable remarks.

Held that this act of the Pleader amounts to a professional misconduct—**5 C. W. N.**

Sup: Govt. acts (V of 1899) (*Contd.*)

45.

47. *Previous misconduct of a Legal Practitioner.*

Defect of Character which was in existence prior to the enrolment of a legal Practioners e. g. his being departmentally punished when in Government service before his enrolment as a pleader can be made a ground for his dismissal—**6 C. W. N. 556 F. B.**

48. The use of highly objectionable language by a Mukhtar in a letter, which he was retained to address to the presiding officer of a Court concerning his supervision of his subordinates was held to amount to a gross improper conduct **2. P. L. R. 166 = 9 P. R. 1902.**

48 (A) An Advocate making reckless imputations regarding a court of justice cannot shelter himself behind his clients' instructions. An advocate was suspended for this misconduct. **L. B. 1903 P. 130 F. B.**

48 (B). A Pleader scandalising a court of justice libeling its integrety or the integrity of its officers and proceedings amounts to a misconduct—**3. A. L. J. 592 = 1. M. L. T. 252—A. W. N. 1906 P. 223.**

49. Where a mukhtar who had been retained by the complainant to conduct his case defended the accused when the latter was retried after the order of his discharge was set aside on revision—

Held that the mukhtar's conduct was grossly unproper—6. C. 79. 12 B. 95 referred to, **45 P. L. R. 1904 = 2. P. R. 1904. Cr:**

50. It amounts to professional misconduct of a legal practitioner to stipulate with his client to share in the results of litigation—**141 P. L. R. 1904 = 69 P. R. 1904.**

51. An agreement to receive any part of fees on a client's success is professional misconduct.—**33. P. L R 1907 = 61. P. R. 1907.**

51 A. An advocate agreeing with his client to do his work at half the usual rates is guilty of professional misconduct **34. C. 729.**

52.—Advising a client whose witnesses had not come to absent himself in order that the suit may be dismissed in default and not on the merits for lack of evidence was held to amount to professional misconduct under S. 13 Act XVIII of 1879—**56. P. R. 1902.**

53 —*His negligence.*

Where a legal practitioner for the respondent refused to sign a receipt of notice of the date fixed for hearing of an appeal and did not inform his clients of the notice, the court was held to have acted properly in hearing the appeal *ex-parte* and an application to restore the appeal was rejected. It was held that the client could sue the pleader for his this negligence. **A. W. N. 1905. P. 44.**

54.—A pleader's being guilty of a criminal offence or of a misconduct is not a sufficient reason for not renewing his certificate. If the judge thinks that the pleader is guilty of any misconduct, an action should be taken by him under S. 14 Act XVIII of 1879. **A. W.**

N.1901 P. 60.

55. *No Professional Misconduct.*

A Pleader indebted to his client endeavouring to get the client accept a less amount than that originally due from him is not guilty of grossly improper conduct. **5 A. L. J. 126**

56. If a Pleader's practice is small, it is no reason for refusing to renew his certificate. **A. W. N. 1901 p. 60 at p. 61.**

57. A Pleader alleging in his capacity of a suitor that a certain officer of the court had been bribed by his adverse party in the suit does not amount to professional misconduct. **5 C. W. N. 45.**

58. *Changing sides.*

A Pleader who after his dismissal without a misconduct on his part or after the close of the business, can change sides against his former employer provided he has no secret to carry with him that can be used to the prejudice of his former client. But he can not do so when he is neither discharged by his client nor the business is closed for which he was retained. **45 P. L. R. 1904 = 2 P. R. 1904 Cr.**

58. **(a)** No Legal Practitioner who has substantially conducted the case of one party in the first court should be allowed to appear against that party in any subsequent stage of that case whether in the original or in any superior court except in the case of 2nd appeals under circumstances I. N. L. R. 52 at 57. For other cases, see Legal Practitioners Act XVIII of 1879 columns 500, 512.

59. **s. 2** = *S. 2—59. Public Officers.*

The following persons are public officers:—

60. *The Administrator-General, 8 C. W. N. 913.* See C. P. C. S. 80 (S. 424)

61. An Official Assignee of the Insolvent Court. **4 B. L. R. 929 = 26 B. 809.**

62. A peon attached to a Superintendent of the Salt Department. **28 C. 344.**

62. **(a)** An officer attached to the Indian Staff Corps but not an officer of the regular forces. **143 P. L. R. 1902.**

63. The following persons are not public officers:—

The Manager of an estate under the Court of Wards. **28 C. 344.**

64—**s. 2** *and 47 S. 2, 244—Limitation Act (XV of 1877), Schedule II, Articles 178, 179 —Partition decree. Application for—Actual partition—Limitation.*

A suit for partition was compromised. One of the plaintiffs died and his son made an application for appointment of a Commissioner to divide the property. The application was dismissed on the ground that it was barred by article 178 of the second schedule of the Limitation Act. On appeal the order rejecting the application was reversed. On second appeal it was contended that the order was not an appealable one, and the application was barred by limitation.

Held that the contention had no force. The order was a decree and the question having been decided under section 244 of the Civil Procedure Code an appeal lay against it. Assuming that there was no decree to be executed, that the Court erroneously supposed the matter was one in execution and that he proceeded to decide that the right to obtain such execution was unenforceable by lapse of time, such usurpation of jurisdiction with the object of putting an end to litigation could not make the order passed in consequence thereof the less appealable than would have been the case had the order been passed in execution proceedings under a decree duly passed.

Held, also, that the application by the son was not governed by article 178 of the second schedule of the Limitation Act. The appointment of a Commissioner was one which it was competent to the Court to make without being put in motion by any party to the litigation LATCHMANAN CHETTY *v.* RAMANATHAN CHETTY. **14 M. L. J. 436.**

65 **s. 2** *and 47, S. 2 and 244—Order passed in exercise of power to punish contempt of Court — Decree— Appeal — Revision —Appeal treated as revision.*

The appellants collected debts due to their debtor after those debts had been attached by Court. On the application of the attaching decree-holders the appellants were ordered to deposit in Court the sums recovered by them including the amount of costs they had spent in realizing the debts. On appeal against the order—

Held, that no appeal lay from the order of the Court, for the order of Court was passed in the exercise of its inherent power to punish for contempt of Court; and the proceedings did not come under s. 244 of the Civil Procedure Code.

In this case the High Court directed that the memorandum of appeal be entered on the file as an application for revision, and—

Held, further, that the appellants were wrongly required to deposit in Court the amount of costs of suits spent by them in realizing the debts which they recovered along with the debts. GODU RAM *v.* SURAJ MAL, **A. W. N. 1905 P. 10 = 2 A. L. J. 18 = 27 A. 380.**

66 **s. 2** *and 47, s. 104 O. XLIII R. I and s. 115 = s. 244, 588 and 622—Order absolute for foreclosure—Notice—Appeal—Second appeal —Revision.*

When an order absolute for sale of mortgaged property has been made, any question that arises as to that order absolute for sale, is not a question relating to the execution of the decree, within the meaning of s. 244 of the Civil Procedure Code—*25 Cal., 133, followed.*

No second appeal lies against an order passed by an appellate Court setting aside such an order.

Section 87 of the Transfer of Property Act does not require any notice to be given

Sup: Govt. acts (V of 1899) *(Contd.)*

to the judgment-debtor before an order absolute is made.

The High Court in the interests of justice treated the second appeal filed in this case as a revision, and reversed the order of the Lower Appellate Court, setting aside the order absolute passed by the Court executing the decree. TARA PADO GHOSE *v.* KAMINI DASSI **29 C. 644.**

67.—*S. 2, 47, O. XXI. R. 69—S. 244, 291 and 588—Mortgage-decree—Order absolute for sale—Appeal against order postponing sale—Transfer of Property Act (IV of 1882), Sections 17 and 89.*

On appeal against an order postponing the sale of the mortgage properties mentioned in an order absolute for sale and giving the judgment-debtor time to have his estate taken charge of by the Court of Wards, so that arrangements might be made for paying off the decree objection was taken for the respondent that no appeal lay from the order as it was an order under section 291 of the Civil Procedure Code and not under section 244. It was also urged for the respondent that the execution Court had no power under section 545, Civil Procedure Code, to stay execution, that it could not stay the sale for the purpose of giving time to the judgment-debtor to pay off the decree, the granting of such time being in contravention of the provisions of section 89 of the Transfer of Property Act, and that if it had power to adjourn the sale it ought not to have exercised that power without imposing terms upon the judgment-debtor.

Held, that the order was appealable.

Held, also, that the Court had no power to adjourn the sale with a view to give time to the judgment-debtor to raise money to pay off the decree, but it could adjourn the sale in order to have a better sale in the event of want of bidders or for other similar reasons. 25 *C.*, 703 *distinguished*, 24 *B.*, 300 *dissented from.* SHYAM KISHEN *v.* SUNDER KOER **31 C. 373.**

68.—s. 2. *47, O. XLI. R. 69. s. 244 and 545—Appeal against order refusing to stay execution—Decree—Order—Discretion of Court.*

An order passed by an appellate Court under section 545 of the Civil Procedure Code refusing to stay execution, being not a decree as defined in section 2 and being not an order mentioned in section 588, is not appealable. 12 *B.*, 279 *not followed.*

Courts of appeal should not lightly interfere with a discretion deliberately exercised by a lower Court. 26 *All.*, 238 *referred to.* RAMCHANDRA KASTURCHAND *v.* BALMUKAND CHATURBHUJ. **6 B. L. R. 780=29. B. 71.**

69 S. 2.—*and 96=O XXXV R. 1. S 104 OXLIIIR1=S.* 2, 473 (c), 540, 588, (23) *—Decree—Order—Appeal—Interpleader suit.*

Held that an adjudication upon the claims of defendants in an interpleader suit is a decree and appealable as such under S. 540 of the Code of Civil Procedure and not under S. 588 of the Code.—MAHARAJ SINGH *v.* CHITTAR MAL. **1907 A. W. N. 270=4 A. L. J. 633.=30. A. 22.**

70. s. 2 *and 106=S. 2, 351, 540 and 589.*

The order granting a petition to be declared an insolvent passed by a Court of Small Causes exercising the powers of a Subordinate Judge is appealable in every case to the District Court and not to the High Court. *17 Mad., 377,* dissented from, *12 Mad., 472; 15 Mad., 89* and *21 Bom., 15 referred to.* DEBI PERSHAD *v.* JAMNA DAS. **23 A 56.**

71. s. 2. *O. 9 R. S=S. 2, 102.* See Provincial Small Cause Courts Act IX of 1887—S. 17 (1) No. 20 Col. 768—4 L. B. R. 1907. P. 17.

72. s. 2. *O. 9 R. 9, O. 9 R. 13, S. 47 (3), S. 96, S. 141=S. 2, 103, 108, 244 (c), 540, 647.*

Held, that an order dismissing objections to the execution of a decree, for default, is appealable. 15 *All.*, 359; 23, *Cal.*, 115 and 827, *distinguished.* LAL NARAIN SINGH *v.* RAFI-UD-DIN. **23 C. 81.**

73. s. 2 *O IX R. 9, O. XLI R. 17, O. XLI R. 19. s. 100. s. 104. O XLIII R. 1=s. 2. 103, 556, 558, 584 and 588—Order dismissing appeal for default not a decree.*

A decision, dismissing a suit under S. 102 for default of appearance of the plaintiff or dismissing an appeal under S. 556 of the Code for default of appearance by the appeallant, is not a decree within the meaning of S 2 of the Code, inasmuch as there is no 'formal' expression of an adjudication upon any right claimed or defence set up. (8 A 354, 9 A. 427, 16 B. 23 30 C. 630. 2 M 75, 22 M. 221 all dissented from) DAKSHINAMURTHY PILLAI *v.* THE MUNICIPAL COUNCIL OF TRICHINOPOLY BY ITS CHAIRMAN. **3 M. L. T 333=31 M. 157.**

74. 8. s. 2=*O. IX R 13 O. XLIII R-1=S. 2, 108, 588 (9). Applicability of, to execution proceedings—'Decree,' meaning of—*Ex-parte *decree—Appeal lies from order rejecting application under Section 108—Civil Procedure Code, as not maintainable—Inherent power of Court to revise its order, made* ex-parte.

Section 108 of the Code of Civil Procedure applies to execution proceedings. When, therefore, an order was passed *ex-parte* in the execution proceedings, directing the payment of a certain sum of money by the judgment-debtors to the decree-holder in satisfaction of the decree, the order was one under section 244, Civil Procedure Code, and was a 'decree' within the meaning of section 2 of the Code, and if it was passed without service of any notice under section 248, Civil Procedure Code, upon one of the judgment debtors, he may apply under section 108, Civil Procedure Code, to have the *ex parte* order set aside.

An appeal would lie under section 588 clause (9), Civil Procedure Code, from an order dismissing an application under section 108 of the Code on the ground that

Sup: Govt acts (V of 1899) (*Contd.*)

section 108, Civil Procedure Code, did not apply to execution proceedings, if the application could be entertained under that section.

The Court has an inherent power to prevent an abuse of its processes and is competent to revise an order made in the absence of opposite party and without service of notice upon him which the law directs should be served. KRISHNA CHANDRA PAL *v.* PROTAP CHANDRA PAL. **3. C. L. J. 276.**

75. S. 2, *O. XX R. 12, O. XXI R. 26 (3), O. XLI R. 3.=S. 2, 211, 240, 543—Mesne profits.*

The plaintiff's suit for possession and future mesne profits was decreed by the Original Court on the 12th November 1887. On appeal to the High Court the suit was dismissed with costs. The plaintiff then appealed to the Queen in Council who on the 11th May 1895, ordered that the decree of the High Court should be reversed and the District Judge's decree of the 12th November be affirmed. The plaintiff recovered possession on the 30th November 1895. The plaintiff claimed mesne profits from the 23rd September 1886, on which day his suit was brought down to the recovery of possession by him. It having been settled that the Queen's Order gave mesne profits by reference to the original decree the District Judge went on to frame issues. The second of such issues was "For what period are mesne-profits recoverable?" The District Judge decided that mesne-profits were due for the three years next after the date of the original decree, *i. e.*, from the 12th November 1887 to the 12th November 1890.

Held, that the decision of the District Judge was appealable. The plain meaning of section 2 Civil Procedure Code was to make the decision a decree appealable under S. 540.

Held, also that the plaintiff was entitled to recover mesne-profits from the 23rd September 1886 to the 30th November 1895. BHUP INDAR BAHADUR SINGH *v.* BIJAI BAHADUR SINGH. **23 A. 152 P. C.**

76 s. 2, *O. XX. R. 12=s. 2, 211.—Mesne profits—Collection expenses.*

In awarding mesne profits a Court would make allowance for collection expenses except in very special cases. *L. R., 1892, A. C. 75, followed, L. R., 9 I. A. 1 at p. 5, L. R., 27 I. A. 110 at p. 124, 1 All., 518, 20 All., 208, 10 All, 13, referred to.* ABDUL GHAFUR *v.* RAJA RAM. **W. N. A. 1901. p. 80.**

77. s. 2, *O. XXI R. 16=s. 2, 232—Application for execution by assignee from decree-holder—Court's sanction unnecessary before transfer of decree.*

The word "Decree-holder" as defined in S. 2 includes a person, to whom a decree has been transferred, and S. 232 itself appears to recognise that the decree has been transferred, before the transferee applies to execute it. There is nothing in S. 232 to make transfers of decrees conditional upon obtaining the sanction of the Court. It is the assignment in writing, which effects the transfer. (16 A 483 refd. 2 M 216 explained) ABBOY NAIDU *v.* MUTHUKRISHNA NAIDU, **2. M. L. T. 93.**

78 s. 2, *O. XXI R. 16—s. 2 232.*

Held that an application for execution of a decree by the transferee thereof made under O. XXI R. 16 (s. 232) is a decree-holder's application and must be considered to be according to law 14. M. L. J. 393 followed. 20. C. 38. Diss: SUBBAYA CHETTY *v.* RANGA SWAMI CHETTY. **2. M. L. T. 339.**

79 s. 2. *O. 41. R. 17, O. 41. R. 19=s. 2, 556, 558.*

An Order under section 556, Civil Procedure Code, dismissing an appeal for default, is not a decree under section 2—Special procedure under section 558 must be followed, because where a speical procedure is provided the proper course is to follow that special procedure and the law does not contemplate an appeal. 14. A. 361, 15. A. 359, 16. B. 23, 23 C. 115 referd. to. FATEH SHAH *v.* AKBER SHAH. **U. B. R. 1901. P. 115.**

80 s. 2, O. *XXI I. R. 89=s. 2, 310 (a).* See Transfer of Property Act IV of 1882 s. 88, 89, 93—No. 502 Col. 676—3 M. L. T. 281.

81 s. 2, *O. XXII R. 10, O. XLIII R. I. (l) =S. 2, 372, and 588 (21)—Appeal against order refusing assignee to be brought on record as appellant.*

An order disallowing an application of a person claiming under s. 372 of the Civil Procedure Code, to be made an appellant, as assignee of the appellant, is not a decree within the meaning of s. 2 of the Code, and no appeal lies against such an order. *4 C. W. N., 403, followed; 22 All., 380, overruled 19 All. 142, distinguished.* JUMNA BIBI *v.* SHEIKH JHAU, **A. W. N. 1902 P. 112=24 A. 532.**

82 s. 2, *O XXII R. 10, O XLIII R. 1. (l) =s. 2, 372 and 588 (21)—Appeal—Order allowing objections under s. 372.*

When an application under s. 372 of the Civil Procedure Code for the applicant's name to be substituted as plaintiff on the ground of transfer of the plaintiff's interests to him was refused and the suit was dismissed on the merits, and upon appeal filed by the transferee the Appellate Court allowed substitution of names and remanded the case under s. 562 of the Civil Procedure Code—

Held, that no appeal was allowed by s. 588 (21) from an order allowing an objection under s. 372, and that the order refusing the application was not a decree within the meaning of s. 2, *viz.*, an adjudication so far as regards the Court expressing it which decided the suit pending before the Court at the time when the order was passed. The order on appeal was accordingly set aside. *22 All., 380; 19 All., 142, distinguished; 4 C. W. N., 403, referred to.* TEJ SINGH *v.* CHABELI RAM, **A. W. N., 1902, P. 84=24 A. 342.**

Sup: Govt. acts (V of 1899) *(Contd.)*

83. s. 2. *O. XXXIII R. 9 (a), O. XLI R. 23 s. 100, O. XLIII R. (a)=s. 2, 414 (a), 562 584, 588 (28)—Rent Recovery Act, Madras, Section 69.*

An appeal lies against an order passed under section 562 of the Civil Procedure Code by a District Judge on appeal against the decision of a Sub-Collector in a summary suit under the Rent Recovery Act holding a *patta* to be improper and releasing certain property from attachment as that order of the Sub-Collector is a decree. G. VEERASWAMY *v.* MANAGER PITAPUR ESTATE. **13 M. L. J. 296=26 M. 518.**

84. s. 2. *O. XLI R. 17=s. 2, 256—Appeal dismissed in default—Mesne profits—Limitation—Date of decree.*

Held, by the Full Bench (*Princep, J., dissenting)*, that an order dismissing an appeal for default is a decree within the meaning of section 2 of the Code of Civil Procedure —*23 Cal., 115 and 827, overruled.*

For purposes of limitation, as expressed in section 211 of the Civil Procedure Code, the period of three years runs not from the date of the decree of the original Court but from the date of the decree of the Court of appeal, though the appeal may have been dismissed in default. RADHA NATH SINGH *v.* CHANDI CHURN SINGH **7. C. W. N. 486=30. C. 660.**

85 s. 2, *O. XLI. R. 23, s. 144 (1), s 104 & s. 152, O. XX R. 6.=s. 2, 562, 583, 588 & 206. Decree. Amendment of—Appeal—Limitation (Act XV of 1877), Section 5—Construction of decree.*

Where the plaintiff obtained a decree in a mortgage suit on the 31st January 1901, which was made absolute on the 28th September following, and the decree was subsequently amended under section 206, Civil Procedure Code, on the 12th July 1902, and the plaintiff preferred an appeal to the High Court against the amended decree.

Held, that an amended decree was a decree between the parties with the meaning of the Code, and as such was appealable and the plaintiff was accordingly competent to prefer an appeal against the amended decree. *9 W. N., Cal., 605, followed, 28 Cal., 177, distinguished.*

Held, also, that for the purpose of determining whether the appeal was barred by limitation, time must be taken to have run from the date of the decree as originally drawn up. *14 Mad., 150, 6 Cal., 22, 22 Mad., 364, followed.*

Every amendment made in a decree under section 206, Civil Procedure Code, does not necessarily entitle a party, who prefers an appeal against the decree, to claim an extention of time under the second paragraph of section 5 of the Limitation Act; whether there is sufficient cause for such extension must depend upon the circumstances of each individual case. If the amendment has no relation to the grounds upon which the validity of the decree is sought to be challenged in appeal, such appeal should not be admitted out of time. On the other hand, if the grounds on which the appeal is based are intimately connected with the amendment of the decree or if the grounds are directed against the decree, only in so far as it has been amended, the Court should exercise in his favour the discretion vested in it by para 2 of section 5 of the Limitation Act, *32 Cal., 908, 21 Cal., 259, referred to.*

It is an elementary principle of construction that when an order of a Court, the terms of which are ambiguous, have to be interpreted, such construction must, if possible, be adopted as will make the order an order, in accordance with law and not an order such as the court making it has no power to pass. *19 All., 174 followed.*

Under a decree as provided by the Transfer of Property Act, interest should be calculated on the basis of the bond from the date of the bond up to the date fixed by the decree for the repayment of the money due. *29 Cal., 43 (51) referred to.* BROJO LAL RAI CHOWDHURY *v.* TARA PRASANNA BHATTACHARJI, **3 C. L. J. 188.**

86 s. 2. *O. XLT, R. 23, s. 144 (1), s. 104= s. 2, 562, 583, 588—Ex-parte decree. Property taken in execution of—Decree set aside and case remanded in appeal. Effect of—Court remanding a case. Power of.*

When a decree is set aside on appeal and the case is remanded under section 562 of the Code of Civil Procedure, the appellant is entitled to restitution of the property taken possession of in execution of the decree so set aside, although an appeal has been preferred against the order of remand. *14 Cal., 484, 21 Cal., 989, followed.* SARODA PROSAD CHATTERJEE *v.* SAUDAMINI DEBYA, **3 C. L. J. 181.**

87 s. 2, *Sch. II R. 16=s. 2, 523—Agreements to refer to arbitration—Order of a reference is a Decree and is appealable.*

A Court, acting under s. 523 of Civil Procedure Code caused an agreement to refer to arbitration to be filed and made an order of reference.

Held, that the order is a decree, as defined in s. 2 of the Code, and is, therefore, appealable. 84 P. R. 1901 (F. B.), 25 P. R., 1902 (P. C.) 27 M. 255, 29 M. 303, 33 M. 757 *followed*; 26 A. 205, 28 A. 21, *not approved.* NARPAT RAI *v.* DEVI DAS, **88. P. W. R. 1907=50 P L. R. 1908=126 P. R. 1907.**

88. S. 4.=*S.—Suit for possession upon the basis of a title.*

The application of the Code to a suit for possession upon the basis of title will not affect any of the provisions contained in the Chhota Nagpur Landlord and Tenant Procedure Code Act I of 1879 (Bengal), because that Act does not embody any provision for such a suit. **1. C. L. J. 557. at 564.**

89. S. 4.=*S. 4. A suit for rent under the Landlord and Tenant Act X of 1859 (Bengal) was tried by a Deputy Collector and its appeal was heard by the District-Judge.*

Sup: Govt. acts (V of 1899) *(Contd.)*

Held that the 2nd appeal would be to the High Court as appeals from ordinary Civil Courts SADAI NAIK *v.* SERAI NAIK —5. C. W. N. 279=28 C. 532 at 537.

90 S. 6, *38, 39—S. 6 Last Para and 223—Execution of decree of superior Court.*

Held, by the Full Bench that the term "suit" in section 6, Civil Procedure Code, includes execution proceedings, the provisions of section 223 are governed by section 6; and that a Court to which a decree has been sent for execution has not jurisdiction to execute such decree when it is in excess of the limits of its pecuniary jurisdiction as an original Court. *P. R.*, 45 *of* 1882, 31 of 1887, F. B., *overruled.* 7 *M.*, 397 *and* 17 *M.*, 309; *dissented from.* 12 *B*, 155 *and* 16 *C.*, 457 *and* 465, *followed.*

Held, also, that the appeal against the order passed by the Munsiff, 1st Class, to whom the decree was transferred for execution lay to the Divisional Court and not to the Chief Court, although the original decree was appealable to the Chief Court; the Chief Court, however, transferred the appeal from the Divisional Court with the consent of the parties. KHAN BAHADUR NAWABZADA SHAMSHER ALI KHAN *v.* MUSSAMMAT AHMED (ALLAHDI?) BEGAM 1. P. L. R, 1901.=9. P. R. 1901.

91 S. 9 *—S. 11.—Assignee of collaterals suing for possession the alienee of a childless proprietor.*

Where a childless male proprietor gifted his land to a person and after the death of the childless proprietor his collaterals transferred the rights in the land to the plaintiff who sued the decree for possession:—

Held that the collaterals were competent to transfer their rights to challenge the gift and to transfer their rights to sue for possession in favour of the plaintiff and that their suit was maintainable without joining the collaterals as parties thereto. 66 P. R. 1897, 12 P. R. 1894. 27 A. 271 P. C. *referred to* 22 P. R, 1900 =P. L. R. 1900. L. 186 doubted. SHER SINGH *v.* SIDHU—30 P. L. R. 1907= 9. P. W. R. 1907=11 P. R. 1907.

92. S. 9—*S. 11. A. Conditional Assignees' right to sue.*

A the payee of a non-negotiable promissory note assigned it to B. by way of security for a debt due to him until its repayment.

Held that as only a conditional assignment was made to B. he could not in his own name sue the maker of the promissory note for the amount of the note L. R. I. Q. B. 1898 P. 765 followed. NIHAL CHAND *v.* ALI BAKHSH. 25 P. L R. 1908 =41. P. W. R. 1907=9. P. R. 1907.

93. S. 9. *Sch. II R. 17=S. 11 and 523—Award—Suit on a void award under S. 523 C. P. C. not maintainable. Where in proceedings taken under S. 523 (Schedule II R. 17) C. P. C. an award was found to be void.*

Sup: Govt. acts (V of 1899) *(Contd.)*

Held that the award could not form the basis of a regular suit—113 P. R. 1890, 15 M. 99, 15 M. 474, 20 M 490 not applied. MIRAN BAKHSH *v.* CHIRAGH-UL-DIN 46. P. L. R. 1907=19, P. R. 1907.

94. S. 9.=*S. 11.—Arbitration contract referred to—Right to sue—Where A. and B. contracted to refer their dispute to arbitration and A sued B for that very matter,*

Held that before B could successfully set up S 21 of the Specific Relief Act as a bar to the suit he must prove a refusal by A to refer. The mere filing of the suit by A is not such a refusal as is contemplated by that section. 5 C. L. R 284, 23 C 956 referred to. RALLI *v.* WALAITI RAM 70 P. L. R. 1907=80 P. R. 1906. *(See Act I of 1877 S 21 Col. 404 supra).*

95. S. 9=*S. 11.—Brokerage, suit to recover.*

A broker when he has performed his part of the contract can sue the other party for the brokerage agreed upon, even where the transaction has fallen through but through no fault of the broker.—7 C. W. N. 297—30 C. 202.

95. (a)—S. 9—*S. 11.—Burial right.*

The right of burial is a Civil right and if the recitation of a prayer at a particular spot in the mosque is a necessary part of the burial a suit will lie for the hindrance of such a customary right.—1 M. L. T. 423—16 M. L. J. 471—30 M. 15.

96. S. 9—*S. 11.—Burial prayer and religious rights.*

A suit will lie for a declaration that the plantiffs have a right to perform the accustomed religious rights at the graves, and for an injunction to restrain defendants from obstructing the plaintiffs in their such rights. 26 B. 198.

97. S. 9.—*S. 11.—Contribution, suit for—By a co sharer.*

An objection to a partition which takes the form of a claim for improvements is an objection raising a question of title within the meaning of S 136 G. of C. P. Land Revenue Act. Where improvements are made by a tenant in common on the common property honestly for the purpose of improving the property and not for embarassing his co-tenants or encumbering their estate or hindering partition he can claim from his co-tenants contribution for the improvements. So where a tenant in common of a co-sharer in a village purchases a tenants rights, the other co-sharers in order to share in the benefit acquired by the purchaser must contribute their proper proportion of the purchase money 10. C. P. L. R. 37 and 10 C. P. L. R. 40. followed. SETH BIRDHI CHAND *v.* KAIM BIBI 17 C. P. L. R. 1903 p. 5 at p. 9.

97 (a) S. 9=*S 11.*

A Lamberdar who has paid the Government Land Revenue for himself and others can sue them for contribution and such a suit

Sup: Govt. acts (V of 1899) *(Contd.)*

would be cognizable exclusively by a Rent Court. **3 O. C. 308.**

98. S. 9—*s. 11.*

Where an annuity is charged on several properties and the owner of one of these properties, has paid it he can sue the owners of the properties for contribution. **A. W. N. 1906 P. 216—28 A. 743.**

99 S. 9—*s. 11—Contribution—Suit by a Joint Judgment-debtor.*

One of several Judgment debtors discharged a decree for costs passed jointly against him and other judgment-debtors.

Held, that he could sue them for contribution and the suit was cognizable by a Court of Small Causes. **4 A. L. J. 543—A. W. N. 1907 P. 230.** *(See to the same effect—28 A. 292).*

100 S. 9—*s. 11—Contribution for costs.*

101. S. 9=*S. 11*—

Surety's right to be indemnified by the principal for whom he has paid the money for which he stood a surety. **26 M. 322.** *(See Col 357 where this ruling is wrongly given as 26 M. 222 in reality it is 26 M. 322).*

102. S 9.=*S. 11—Contribution—Joint tort feasors.*

When joint tort feasors knew or from the circumstances ought to have known that they were doing a wrongful act, no suit for contribution will be on behalf of one of them against the others, but if they acted under a bona fide claim of right they can claim contribution. **5. C. W. N. 393.**

103. S. 9.=*S. 11.—Contribution—By mortgagee of a share.*

When a mortgagee of a share paid Revenue and cesses due from a defaulting mortgagor to save the property from sale *Held* he was entitled to have the amount so paid added to his mortgage debt. **7. C. W. N. 609=30 C. 794** *(See Contract Ac S. .0 No 219 Col 329.)*

104 S. 9=*s 11—Charge—Payment of revenue by one of several co-owners—Limitation Act (XV of 1877), Schedule II, Article 132.*

Where one of two or more co-sharers owning an estate subject to the payment of revenue to Governmet pays the whole revenue in order to save, a d so does save, the estate from liability to be sold by Government for realizing the arrears of revenue, he is by operation of law entitled to a charge upon the share of each of his co-sharers for the realization of the latter's share of the revenue as between the co-sharers.—11 *Mad.*, 452, *followed*; 11 *Bom*, 313; 14 *Cal.*, 809; 14 *All*, 273, *dissented from*: 21 *Cal.*, 142; 25 *Mad.*, 736; 4 *Cal.*, 529; 20 *Mad*, 23; 11 *M. I. A.*, 241; 6 *Cal.*, 549; 8 *Cal.*, 402; 14 *B. L. R.*, 155; 9 *Cal.*, 377; 15 *Mad*. 258; 13 *All*, 371; 26 *B.*, 379, *referred to*. RAJAH OF VIZIANAGRAM *v.* RAJAH SETRUCHERLA SOMASEKHARARAZ **26 M. 686. (F. B)**

105. S. 9=*S. 11.—Contribution—Pleadings—Agreement to make contribution—Agreement relied upon by plaintiff found invalid—Decree on general right.*

Sup: Govt. acts (V of 1899) *(Contd.)*

The plaintiff in his suit for contribution relied upon an agreement by which defendants had bound themselves to pay him fixed amount of contribution. The defendants did not deny their liability to contribute, but pleaded that the agreement was not valid. On appeal the suit was dismissed on the ground that it was bad for misjoinder and that the agreement relied upon by the plaintiff was not valid.

Held, that as all the parties liable to contribute were proper parties to the suit there was no misjoinder; and that the lower appellate Court instead of dismissing the suit should have determined the amount payable by the defendants.—PERIYA AIYA *v.* MUTHU KANA PANA VENA VENKATACHELLUM CHETTIAR.—**14. M. L. J. 24.**

106. S. 9—*S. 11.*—

Land belonging to B. was registered in A's name. A paid the Revenue his right to recover it from B. **1. M. L. T. 323—160 M. L. J. 569—30. M. 35.** *See Contract Act IX of 1872. No 233. C. 323.*

107. S. 9—*S 11.—Co-sharer's right to sue for accounts—Joint propery—Right to quarry—Accounts.*

A tenant-in-common cannot be held liable to his co-tenant for damages for use and occupation of the joint property, unless there has been waste or an ouster of his co-tenant.

When a tenant in possession has prevented his co-tenants from obtaining from the premises such profits as they were capable of yielding, or has taken possession of the whole and used them as his own, and thereby made a profit, he must account, either for the fair rental value or the profits, or be liable for mesne profits, for one tenant is bound to account to another only as his bailiff, under contract, express or implied.

Where one tenant-in-common occupies the joint property, without assertion of hostile or exclusive title on his part, and without claim on the part of his co-tenants to be admitted into possession, he is under no obligation to account, for he has a right to such occupancy.

In this case the suit of the plaintiff, co-sharer, against his co-tenants and their lessee, for an account of all the stones quarried and carried away by the lessee from a hill jointly owned by the parties and for damages, was dismissed on the ground that there was no allegation of ouster or exclusion from the enjoyment of the joint property, or any suggestion that the defendants had taken more than their share of the total quantity of stone from the hill.—MAHESH NARAIN *v.* NOWBAT PATHAK.—**32. C. 837.**

108. S 9=*S 11.—A co-sharer in exclusive possession—His right of retainer.*

Where a co-sharer has been for many years (20 years in this case) in exclusive and peaceable possession of sir land in excess of his legitimate share he cannot under ordinary circumstances be deprived of sub-posses-

Sup: Govt. acts (V of 1899) *(Contd.)*

sion. 8 C. 708, 9 A. 661, 14 C. 189 referred to. If a co-sharer attempts to take exclusive possession in excess of his share and his co-sharers apprehend loss a Court would grant injunction to prevent such loss. But when a co-sharer has already taken exclusive possession, a Court should not deprive him of such possession except on very strong grounds. L. R. 17 I. A., 110, followed; L. R. 19 I. A., 48, referred to. PADAM SINGH *v.* SAHADEO SAO. **14 C. P. L. R., 1901, P. 76.**

109. S. 9=*S. 11.—Joint property—Co-sharer planting trees on joint land with the consent of other co-owners—Adverse possession. Plea of, set up by co-owner planting the trees—Form of decree.*

The plaintiffs, co-owners of a joint land, brought a suit against the defendant, who was also a co-owner in the same land, for the removal of a grove planted by him upon the joint land without their knowledge and consent, and to be restored to joint possession. It was found that the plaintiffs had acquiesced in the planting of the trees by the defendant and that the land upon which the trees were planted was waste land which was re-claimed by the defendant at his own expense and the act of the defendant was beneficial to all. The defendant had, *inter alia*, pleaded adverse possession which he failed to prove.

Held, that the removal of the trees could not be ordered, but since the defendant had set up adverse possession which he failed to establish, the plaintiffs were entitled to a decree declaring that they and the defendant were joint owners of the land in dispute and that as such joint owners they were entitled to an account of the profits of the land. A decree to be restored to joint possession could not be passed. 26 *All.*, 588, 27 *All.*, 88 *referred to.* RAM SARUP *v.* GULZAR BANU. **A. W. N. 1905, p. 160.**

110. S. 9=*S. 11.—A co-sharer's right to sue for joint possession of one out of several joint properties.*

Such a suit i maintainable without claiming a similar relief in respect of the other joint properties. SURAJ SINGH *v.* SANT SINGH. **122 P. L. R., 1906=43 P. R., 1906.**

111. S. 9=*S. 11.—Co-sharers—Right of khas possession—Denial of title on written statement.*

The plaintiffs co-sharers in a tank sued other co-sharers and tenants for *khas* possession of their share. It was found that the tank was all along in the possession of the defendants, co-sharers, it was excavated and improved by the tenants at a considerable cost and the plaintiffs did not raise objection. It did not yield any profit before.

Held, that the plaintiffs were not entitled to a decree for *khas* possession. Decree for their share of rent passed.

When one co-sharer is holding possession of a certain land and deals with it in a particular way and in the ordinary course, if the other co-sharers are not satisfied with that dealing or with that course of conduct, their proper remedy is by partition. In a partition suit the rights of all the parties are adjudged upon a proper basis, and loss or damage suffered by one set of partners is made good at the expense of the other.

An assertion or denial of a right in a written statement does not give rise to a cause of action. A cause of action must be antecedent to any allegation made in the pleadings. MADAN MOHAN SHAHA *v.* RAJAB ALI, **28 C. 223.**

112. S. 9.=*S. 11—Co-sharer's Exclusive possession of land—Share of rent—Dispossession—Damages.*

Where one co-owner takes exclusive possession of land which has been through a tenant in the possession of all the co-sharers and had been yielding profits in the shape of rent to all of them, such co-sharer must compensate his other co-sharers for the loss of their share of the rents. 18 C. 10, L. R. 17, I. A. 110 Expl.—RAM SANKAR BHADURI *v.* JNANADA SUNDARI DEBYA.—**5 C. L. J. 267.**

113 s. 9=*s. 11—Co-sharer's building on joint land. Right of—Way of necessity—Judgment—Decree. Contents of.—*

On the suit of the plaintiff the Munsiff decreed demolition of a wall built by the defendant on land belonging jointly to the parties and on appeal the decree was confirmed. It was not suggested that the defendant had been warned not to build the wall and no specific injury to the plaintiff had been proved. It was stated in the plaint that the site of the wall had been used as passage of egress and ingress by the plaintiff. Upon second appeal to the High Court

Held, that the appeal must be remanded for retrial. In the absence of warning by the plaintiff and proof of injury done to him the plaintiff was not entitled to have the wall demolished. If the plaintiff had a way of necessity which was obstructed by the wall a portion of the wall might be removed in order to afford the plaintiff a convenient passage. 18 *All.*, 115 *not followed*; 8 *Cal.*, 708, 14 *Cal* 189, *and* 236 *referred to.*

(2) That in such cases the decree and the judgment should state the precise nature of the relief granted. FAZILATUNNESSA *v.* IJAZ HASSAN. **30 C. 901.**

114 s. 9—*s. 11—Second appeal—Evidence, misreading of—Evidence, absence of—Acquiescence, meaning of—Waiver—Estoppel—Fraud, proof of, if necessary—Buildings, erection of—Improvement—Assent—Protest, absence of—Review of judgment—Joint owners.*

A misreading or misconception of evidence is not a ground for interference in second appeal. The remedy in such a case is by an application for review of judgment. 19 *W. R.*, 222; *I C. L. J.*, 232 *(235) referred to and followed. L. R.*, 17 *I. A.*, 122; s.c., 18 *Cal.*, 23; *L. R.* 14 *I. A.*, 101, s.c, 14 *Cal.*, 940; *L. R.*, 16 *I. A.*, 233; s.c., 17 *Cal.*, 291; *L. R.*, 19 *I. A.*, 1, s.c., 19 *Cal.*, 249; *L. R.*, 21 *I. A.*, 39 s.c., 21 *Cal.*,

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504 *referrred to.* 20 *Bom.*, 753; 30 *Cal.*, 207; 33 *Cal.*, 200 *distinguished.*

If, however, there is no evidence in support of the finding of the Subordinate Court, the Court of Second appeal would be entitled to interfere. *L. R.* 17 *I. A.*, 65; s.c. 17 *Cal.*, 875 *followed.*

Per Rampini, J.—The question of acquiescence or waiver is a question of fact and the finding of the lower appellate Court on such a question is final and cannot be interfered with in second appeal.

Per Mookerjee J.—Acquiescence is not a question of fact but of legal inference from facts found, and it is open to the appellant in a second appeal to invite the High Court to consider whether the question of acquiescence has been properly decided by the Lower Courts. *21 All., 496* (P. C.) *followed.*

Per Mookerjee, J.—The plaintiff who complains of the act of his co-owner cannot obtain a decree for demolition of buildings or for joint possession, unless he can establish that he has sustained some substantial injury by reason of the act of which he complains. The Court will not interfere unless it is proved that injury has accrued to the plaintiff by reason of the erection of the building and that he took reasonable steps in time to prevent the erection. 14 *Cal.*, 189; 14 *Cal.*, 236; 4 *C. W. N.*, 788; 28 *Cal.*, 223; 29 *Cal.*, 500, 30 *Cal.*, 901 *referred to.* 1 *C. L. J.*, 437 *cited and followed.*

Acquiescence is quiescence under such circumstances as that assent may be reasonably inferred from it and is no more than an instance of the law of estoppel by words or by conduct; in other words, acquiescence does not mean simply an active, intelligent consent, but may be implied if a person is content not to oppose irregular acts which he knows are being done. 2 *Phill* 117; *L. R.*, 3 *H. L.*, 249; 2 *Ha. and Tw.* 224 *referred to.* *L. R.*, 19 *I. A.*, 203. S. C., 20 *Cal.*, 296 *referred to and followed.* ANANDA CHANDRA SEN *v.* PARBATI NATH SEN. **4 C. L. J. 198.**

115. S. 9=*S. 11.—Co-sharers—Joint property—One co-sharer dealing exclusively with joint property—Decree for joint possession.*

Held following W. N. All., 1904, *p.* 106 (*F. B.*) that a decree for joint possession may legally be passed in favour of co-sharers found entitled to hold the property in suit jointly with the defendants who did not allow the plaintiff to exercise their rights as joint owners of the property. RAM CHARAN RAI *v.* KAULESHAR RAI. **W. N., A. 1904, p 199=27 A. 153.**

See to the same effect—2 A. L. 256.

116. S. 9=*S. 11.—See Specific Relief Act I of 1877. S. 54 No. 175. Col. 540—29. C. 500.*

117. S. 9=*S. 11—Co-sharers—Exclusive possession by one co-sharer—Suit by other co-sharers for recovery of possession—Injunction —Decree. Form of.*

On the death of a tenant a co-owner of property took possession of a portion of the joint property to the exclusion of the other co-sharers, and got his name recorded as owner in the mutation department. The other co-owners brought a suit and claimed that they be put into joint possession of their share and for the costs of the suit, interest *pendente lite* and further interest.

Held, that in such a case the plaintiffs are entitled only to a decree declaring that they and the defendant are joint-owners of the land in dispute, and that they are entitled to an account of the profits of the land. But the plaintiffs cannot obtain an injunction restraining the defendant from dealing with the land in dispute without their consent. *W. N. All.*, 1894, *pp.* 127, 166; *W. N. All.*, 1901, p. 48; 27 *All.*, 88; *W. N. All.*, 1905, *pp.* 119. 160; 18 *Cal.*, 10 *referred to.* PHANI SINGH *v.* NAWAB SINGH. **A. W. N. 1905 P. 233.**

118. S. 9=*S. 11—Co-sharers—Joint property—One co sharer dealing exclusively with joint property—Remedy of other co-sharers—Declaratory decree.*

One *C. B.*, who was a tenant of the parties to the suit, died without heirs. After his death one of the co-sharers took possession of the entire holding and proceeded to cultivate it. Thereupon the plaintiffs, the remaining three co-sharers, brought a suit to recover physical possession of three-fourths of *C. B's.* holding and also claimed mesne profits of the land. A decree for joint possession of the holding and for mesne profits was passed in plaintiff's favour.

Held, that the only decree to which the plaintiffs were entitled was a decree declaring that they and the defendant were joint owners of the land in question, and as such joint owners, were entitled to receive from the co-sharer in possession an account of the profits. JAGAR NATH SINGH *v.* JAI NATH SINGH. **W. N. A. 1904, p. 194. 27. A. 88.**

119. S. 9=*s. 11.—Pre-emption—Rival pre-emptors—Compromise between first pre-emptor and vendee—Second suit for pre-emption by second co-sharer filed on the date of compromise—Decree for moiety of the property.*

On the date fixed for the settlement of issues in a suit for pre-emption brought by a co-sharer a decree for pre-emption based on a compromise was made in favour of the plaintiff. Before decree another co-sharer having equal rights with the plaintiff brought a suit for pre-emption in respect of the same property. The plaintiff in the first suit was made a defendant in the second suit. He contended that the second suit was too late and did not lie.

Held, that the compromise did not dispose of the suit, that the first suit being still pending when the second suit was brought, the second pre-emptor was entitled to a decree for pre-emption in respect of one-half of the property sold. 7 *All.*, 720 *follow-*

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cd. W. N. All., 1886. *p.* 56 *distinguished.* SALIG RAM *v.* KALI SHANKAR. **2 A. L. J. 690=A. W. N., 1905, P. 50.**

120 S. 9—*S. 11.—Profits, suit for—Mortgagee of co-sharer's shares to be joined as defendant in a suit for profits.*

In a suit for profits by a sharer against another co-sharer, who has mortgaged his share to a third party, and when both mortgagor and mortgagee are in possession, both may, at the option of the plaintiff, be impleaded as defendants. THAKUR BAKHSH *v.* BHAGWAN DIN. **9 O. C. 142.**

120 (a) S. 9=*S. 11.—Suit for the recovery of money voluntarily paid.*

The plaintiffs who were the vendees of a property which was attached in the execution of a decree of a third party against heir vendor paid the decretal amount to save the property from sale.

Held that the plaintiffs could not claim from the owner the amount paid by them to raise the attachment, for the money was paid by the plaintiffs to clear their own title to the property under attachment, and must be considered as a voluntary payment and not a payment for or on behalf of the owner. KAYYANA CHITTEMMA *v* DOOSY GAVA RAMMA. **16 M. L. J. 136=29 M. 225.**

See to the same effect Act IX of 1872 Contract Act S. 69 30 M. 35. Col 323 and A. W. N. 1908 P. 58. Col. 326, 3 M. L. T. 111 Col. 326, and S. 69. 70, 7 O. C. 146 Col. 328.

121. S. 9—*S. 11.—Suit against principal for acts of his agent.*

A suit for damages will lie against a principal for acts of agent or servant done on behalf of the principal or with the intention of serving his purposes. ISHWAR CHANDER SANTRA *v.* SUTESH CHANDER GIRI. **7 C. W. N. 126=30 C. 207.**

See to the same effect Contract Act IX of 1872, Ss 187 to 205, cols. 362 to 366.

122. *Bond securing future advances—Right to sue on.*

An obligee can sue on a mortgage bond executed by the defendant in his favour to secure advances, even when more than the sum secured by the bond has been realised by him privately. HARENDRA LAL ROY CHOWDRY *v.* TARINI CHARAN CHAKRAVARTY. **8 C. W. N., 667.**

123 S. 9—*S. 11.—Suit to have procession of idol carried along a public street—Customary route.*

The plaintiffs residents of a street, brought this suit against the Dharmkarta of a temple claiming the right of having the idol carried in procession in the customary route, and prayed for a declaration of their rights, for an injunction that future processions should take the alleged customary route and for damages.

Per Chief Justice.—That the plaintiffs had failed to establish a custom which absolutely precluded the defendant from the exercise of any discretion in the matter; and the right claimed by the plaintiff was not one

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on which a Civil Court could adjudicate.

Per Davies, J.—That the plaintiffs could sue in a Civil Court to establish the right they had set up and that they had established their claim. P. NAGIAH BATHUDU *v.* MUTHACHARRY.—**11 M. L J. 1901 P. 215.**

124. S. 9—*S 11—Jurisdiction of Civil Court —Suit to locate idol not based on claim to property—Ceremonies—Right to office.*

Suits as to religious rites and ceremonies, which involve no question of the right to property or to an office are not suits of a civil nature within the meaning of section 11 of the Civil Procedure Code and are therefore not cognizable by a Civil Court. 5 *Bom.*, 80 *approved.*

A worshipper of certain idols cannot therefore maintain a suit against the custodians of the idols to locate them in a certain temple instead of in another so long as his right to worship the idols is not denied. 21 *Cal.*, 463 *distinguished. M. L. J.*, 1900, *p.* 215 *referred to.* LOKE NATH MISRA *v.* DASARATHI TEWARI. **2 C. L. J. 590=32 C. 1072=10 C. W. N. 605.**

125. S. 9 *S. 11—Jurisdiction of Civil Court —Suit to establish right to perform religious ceremonies—Claim for imaginary damages.*

A claim confined to rights in religious ceremonies without a claim to any office or any emoluments is not cognizable by Civil Courts.

The plaintiffs' asking for imaginary damages on account of perquisites which they allege they were prevented from getting does not make the claim cognizable by Civil Court.

The whole of an ill defined community cannot be entitled to any particular office in a particular temple or to any emoluments or perquisites thereof.

Held, that the mere fact that the plaintiffs claimed the declaration they sought in the alternative under the terms of a *Razinamah* did not make the suit cognizable by the Civil Court for the *Razinamah* was entered into between the then heads of the rival sects of Vadagalais and Tengalais residing in Nagapatam to enable certain ceremonies to be performed in a certain temple as a temporary arrangement made with a view to prevent breach of the peace. SUBBARAYA MUDALIAR *v.* VEDANTACHARIAR. **14 M. L. J., 1904 p. 171=28 M. 23.**

Civil nature, suits of—

126. S. 9. *47, O. XXI R. 92=Ss. 11, 244 and 312—Public demands Recovery Act (VII of 1880 of B. C.) Sections 2 and 19—Suit to set a side sale—Civil suit—Misdescription in sale proclamation.*

Section 2 of Act VII of 1880 (B. C.), and Sections 244 and 312 of the Civil Procedure Code are no bar to a Civil suit for setting aside a sale held in enforcement of a certificate under Act VII of 1880 (B. C.) on the ground of the sale being vitiated by material irregularity leading to injury.

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The misdescription of property in the sale proclamation brings the case within the rule laid down in the case of *Ram Logan Ojha* v. *Bhowani Ojha* (14 *Cal.*, 9) when one property having been advertised for sale a different property is sold. 14 C. 1, 23 C. 641 overruled. RAM TARUK HAZRA *v.* MOSAHEB ALI KHAN. **6 C. W. N. 426 = 29 C. 94.**

127 s. 9—*s. 11.*

Held, that a suit for the rent of state land is not cognizable by the Civil Courts. 2 U. B. R. 1892—96 P. 634, 2 U. B. R. 1897—98 P. 25, 2 U. B. R. 1897—98 P. 41 (C. P. C.) referred to. MAUNG NYUN *v.* MAUNG PAW AND MAUNG KYWE, **U. B. R. 1902 P. 1, C. P.**

128 s. 9—*s. 11.*

In Revenue proceedings of a judicial nature a Revenue officer has inherent power to execute his own orders—A Civil Court has no jurisdiction in any matter which a Revenue officer is empowered under the Regulation to dispose of—s. 53 (1), Upper Burma Land and Revenue Regulation—A suit will not lie in a Civil Court to execute the orders of a Revenue officer, whether by restitution or otherwise, s. 583 C. P. C. MAUNG PO NWE *v.* MAUNG THA E. AND OTHERS, **U. B. R. 1903 P. 13, C. P.**

128 (a).—*Suits for costs*—See costs.

128 (b).—*Suits for damages*—See Torts and Damages.

128 (c).—*Suits to set aside decrees on ground of fraud*—See Decrees.

129 s. 9—*s. 11—Questions of ritual—Suit by dharmakartas against co-dharmakartas—jurisdiction.*

A suit by a dharmakarta of a temple against his co-dharmakartas for an injunction restraining them from changing the form of, or any way interfering with, the Tengalai namams in the temple and directing them to remove from the temple a copper image of Vedanta Desikar is one relating to the property of the temple vested in the trustees, and is cognizable by a Civil Court under s. 11, C. P. C.

Per Miller, J.—A departure from usage is not within the power of the trustees, and any trustee making such departure will be restrained by the civil courts.

Per Wallis, J.—A suit is not necessarily a suit of a civil nature so as to be cognizable by civil courts merely because the facts constituting the cause of action are alleged to amount a breach of trust. If such facts relate merely to religious rights and ceremonies, such questions may be determined by the Civil Courts provided any right to property or an office depends on them. KRISHNASAMI IYENGAR *v.* SINGARA CHARIAR. **2 M. L. T. 69 = 17 M. L. J. 1 = 30 M. 158.**

130. S. 9 *S. 11.—Special Acts—Jurisdiction to try cases under Special Acts.*

Where a special tribunal, out of the ordinary course, is appointed by an Act of Legislature to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, the jurisdiction of that tribunal to determine those questions is exclusive. It is an essential condition of those rights that they should be determined in the manner prescribed by the Act to which they owe their existence. BHAISHANKAR *v.* MUNICIPAL CORPORATION OF BOMBAY. **9 B. L. R 417.**

131. s. 9 *S. 11.—Fraud—Plaintiff pleading his own fraud—Civil Court's Jurisdiction.*

The plaintiff sued the defendant for a declaration that a mortgage-deed duly executed and registered by him in favour of the defendant was null and void on the ground that the consideration therein recited had not in fact passed and that it had been made solely with the intention of defrauding his minor brother.

The District Judge declined to go into the merits of the case and dismissed it only on the ground that in view of the statement of the appellant who pleaded his own fraud, the suit was not maintainable.

Held, that under section 11 of the Code of Civil Procedure, the suit as brought being clearly cognizable by the Civil Courts, the Lower Appellate Court should have tried the case on its merits. (20 Mad, 326 and 333; 19 Mad, 378; 18 Bom., 372; 23 Bom. 406 and 23 Cal., 460 and 962; referred to.) HANUMAN SINGH *v.* RADHE LAL. **8 O. C., 278.**

Suits Against Government.

132. s. 9 = *S. 11—Suit against Secretary of State—Defamation in Government resolution.*—See Act of State. 27. B. 189 = 5 B. L. R. 30 and 6. B. L. R. 133. Col. 42 to 47.

133. S. 9 = *S. 11.—Suit against Secretary of State for damages and mesne profits for the attachment of a wrong person's property as the accused's property under S. 88 Criminal Procedure Code is maintainable. 28. C. 540.*—See Act XVIII of 1850 No. 4. Col. 59, 60.

134 s. 9 = *s. 11—Suit against a magistrate for not paying adequate compensation—Epidemic Diseases Act (III of 1897), Section 4—Magistrate. Liability of—Protection to persons acting under the Act—Personal liability for omission to pay compensation—Magistrate's decision as to adequacy of compensation, whether final.*

Held, that the protection afforded by section 4 of the Epidemic Diseases Act to a person acting under it does not extend to an omission to pay adequate compensation under Rule 14.

Held, also, that a Magistrate who omits to pay adequate compensation as provided under Rule 14, is personally liable and that the defendant Chairman of the Calcutta Corporation was so liable when he acted as a Magistrate under the Act.

Held, further that the Magistrate's decision as to the adequacy of the compen-

sation offered was not final, such decision can be questioned in suit against the Magistrate. RAM LAUL MISTRY *v.* R. T. GREER. **8. C. W. N. 681.**

135. S. 9.=*S. 11.—Suit for grant made by a Government Officer on behalf of the crown is maintainable.—Darkhast rules—Powers of officers to make grants—Appeal—Validity of grants—Jurisdiction of Civil Court.*

The Civil Court has jurisdiction to decide whether a grant made under the *darkhast* rules is a valid one, and whether the grantee has acquired a valid title to the land as against the Crown. The plea on behalf of the Crown that the Civil Courts have no jurisdiction to take cognizance of orders passed by the Revenue officers under the *darkhast* rules is altogether untenable.—12 *Mad.*, 404, *followed.*

When a grantee has acquired title he has a right to possession, and it is perfectly immaterial whether the land is delivered to him by the Revenue officers, or without such delivery he enters in possession of the land. It is equally immaterial whether a *patta* is issued to him or not. If there was a valid contract binding upon the Crown, he is entitled to specific performance of the contract, and can claim the issue of a *patta*, if necessary.

A grant purporting to be made under the *darkhast* rules by an officer empowered to make such a grant, must be regarded as one made by a person authorised on that behalf, so as to give it the same validity as if it was made by the Governor-in-Council himself.

The only portion of the rules with which the Courts need concern themselves are those which define the officers *competent* to make assignments of land, the *extent* of their authority, including the description of lands which the said officers may, respectively, dispose of under the *darkhast* rules, and the *degree of control* by a *higher grade officer*, to which the exercise of such authority *is subject.*

The bulk of the *darkhast* rules, which are in the nature of instructions issued by the Government to the various officers concerned, as to the principles which should *guide them* in entertaining or rejecting petitions for grant of various descriptions of land, and determining to which of several competing applicants the grant should be made, if at all, and the *procedure* to be adopted by them, do not concern the Civil Courts—18 *Mad.*, 434, *referred to.*

The various officers specially empowered by the *darkhast* rules to dispose of Crown lands thereunder are really *agents* appointed by the Governor-in-Council in their official capacity by executive orders. The authority conferred under the *darkhast* rules upon the Board of Revenue the Collector, the Divisional Officer and the Tahsildar, including a Deputy Tahsildar, to dispose of various classes of Crown lands, either in the first instance, or on appeal made to them, not being conferred upon them by any statute or statutory rules, they can only be regarded as agents generally or specially appointed by the Governor-in-Council in that behalf, and their acts, within the scope of their respective authorities, are as binding upon the Crown as if they were done by the Governor-in-Council himself, and as between the applicants and the Governor-in-Council, the latter should be regarded as a principal represented, under the general law, by such officers as his agents.

By the law of agency at the Common law, there is this difference between individuals and the Government—the former are liable to the extent of the power they have apparently given to their agents, while the Government is liable to the extent of the power it has actually given to its officers, or, if they exceed that power when the Government in fact or in law directly or by implication ratifies the excess.—*8. M. I. A. 529, referred to.*

In cases in which the original application may be made to the Divisional Officer himself, an appeal will lie to the Collector, if the Divisional Officer be an Assistant or Deputy Collector; or to the Board of Revenue, if the Divisional Officer be the collector himself. The action of the officer to whom the appeal lies is final and binding upon Government, if his act be within the scope of his authority. Neither the Collector nor the Board of Revenue can set aside a grant made by the Divisional Officer on appeal.

When the proposal of an applicant is accepted by an officer duly authorised in that behalf by the *darkhast* rules, and the acceptance is communicated to the applicant, there is a valid contract and disposal of the land, unless the grant was procured by fraud, misrepresentation or material mistake as to any matter of fact essential to the agreement. The grant, therefore, cannot be annulled or revoked by the officer who made the grant, his successors in office, or even by the Governor-in-Council. THE SECRETARY OF STATE FOR INDIA *v.* KASTURI REDDI. **12 M. L. J. 1902 P. 453=26 M. 268.**

136. S. 9=*S. 11.—Suit against Public Officer. Negligence of—Secretary of State for India. Suit against—21 and 22 Vic. C. 106.*

The words "expenses, debts and liabilities lawfully contracted and incurred" in section 42 of Statute 21 and 22 Vic. C. 106 must be construed as debts lawfully contracted and expenses or liabilities incurred.

The expression "Government of India" as used in Statute 21 and 22 Vic. C. 106 points to its bearing the meaning not of the Governor-General in Council but of the superintendence, direction and control of the country.

The plaintiff sued the defendant. Secretary of State for India in Council, for damages owing to the negligence of a Chief

Sup: Govt. acts (V of 1899). *(Contd.)*

Constable. The defence was that the defendant was not liable.

Held, that the defence was valid since the Chief Constable had acted not in obedience to an order of the executive Government but in performance of a statutory power vested on him by the Legislative, the appointment of the Chief Constable was made not by the Bombay Government, but by an Officer clothed by the Legislature with a power in that behalf, the act of the Chief Constable was not in any sense productive of benefit to the revenues of the Bombay Government, nor was it in a transaction out of which profit could be derived; and there had been no ratification or adoption of the act.

Where the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment.

Before liability could be incurred by the Bombay Government on account of the Government of India as the result of the act or omission of the Chief Constable as to be chargeable on the revenues it was necessary to exclude those conditions which could afford a principal exemption from liability for the act of an agent. SHIVABHAJAN DURGA PRASAD *v.* SECRETARY OF STATE FOR INDIA. **S. C., 6 B., L. R., 65.**

See also Act XVIII of 1850, Cols. 58 to 60.

Suits relating to Easement.

137. S. 9=*S. 11—A suit to recover rent of a fishery lies in a Revenue Court. But where a lease transferred to the lessee the entire interest of the lessors in a tank and not only a right of fishery, a suit for rent of such a tank is cognizable by a Civil Court.*—See Act X of 1859 (Bengal) Sections 6 and 23. MAHANANDA CHAKRAVERTY *v.* MANGLA KEOTANI. **8 C. W. N., 804=31 C. 937.**

138 s. 9=S. 11—*Right to hold a Market.* Any person can lawfully hold a Market or haunt whenever and where ever he pleases, provided he does so on his own land and in such a manner as not to be a nuisance to the neighbouring land holders who have equal rights with him to the whole of their markets. **4 A. L. J. 728=A. W. N. 1907 P. 241.**

139. s. 9 *S. 11—Hereditary joshi, right to recover marriage fees from an intruder.*

Where a person claimed to be the hereditary *joshi* of a certain village and to recover from an intruder certain fees payable to the *joshi*, but paid to the intruder.

Held that the fact that emoluments are claimed makes the dispute one of Civil nature within the meaning of S. 11, and that, therefore, the *joshi's* suit to recover the fees is maintainable. (14 B 167 7 M 424 refd. to)—YESHWANT RAO *v.* BHASKAR RAO PATWARI.—**3 N. L. R. 47.**

140. s. 9=*S. 11—Hereditary offices and dignities—Suits for.*

No suit lies for the enforcement of Manpan dignities known in Berar, nor for the right of precedence at the Pola festival, a right first to lead one's bullock under an

Sup: Govt. acts (V of 1899) *(Contd.)*

arch, nor for a right to strike the first blow on a buffalo slaughtered at the Dasehra festival, nor for a right to receive cakes and fuel at the Holi festival, nor for a right to receive dues or small presents of money given by the bridal party on the marriage occasions, nor for the small gifts at Holi and the betel nuts at weddings as they are mere marks of respect and do not amount to emoluments—**3 N. L. R. 131.**

141. s. 9=*S. 11—Suit to establish mulraiyati right and for position of a mus-tagir—Suit cognizable by a civil court.*

A suit to establish a mul-raiyati right, which by a Government order was not granted, and also for the position of a mustagir, and to set aside the executive orders of the Commissioner is a suit which is cognizable by a civil court.—NAWAB SINGH *v.* CHARAN RANA.—**6 C. W. N. 411 at 413.**

142. s. 9=*S. 11.—Kamiana dues—Suit for Jurisdiction of Civil and Revenue Courts—Declaratory suit that the* kamiana *dues were not payable by plaintiffs.*

The plaintiffs sued for a declaratory decree to the effect that *kamiana* dues are recoverable only from the *kamins* who construct houses on the sites belonging to proprietors and get benefit from pasturage and *shamilat* lands, and that the plaintiffs who were the owners of their houses and cultivators were not liable to pay the said dues.

Held, that the suit was cognizable by Civil Court. SHEIKH MUHAMMAD *v.* HABIB KHAN. **113 P. L. R. 1905.**

143 s. 9=*S. 11.—Suit for maintenance of an illegitimate child. Although a Magistrate refused to grant it under Criminal Procedure Code (Act V of 1898), Section 488—Cause of action—Suit for maintenance.*

There is nothing in the Criminal Procedure Code indicating that if a Magistrate refuses to grant maintenance, his order would be conclusive so as to bar a civil suit. *18 All., 29, 20 W. R., 58* (Cr.) *distinguished.*

Under the Hindu Law as well as upon general principles, the father of an illegitimate child is bound to provide for its maintenance. *7 M. I. A., 18, 4 W. R.,* (P.C.) *132 referred to.* GHANA KANTA MOHANTA *v.* GERELI. **32 C. 479.**

Malicious prosecution, suit for damages for. See—Damages and Torts.

Marriage, suits relating to. See Marriage.

Municipality, suits against. See Municipalities.

Partition, suits relating to. See Partition and Jurisdiction of Civil and Revenue Courts—

Pasture rights of tenants, suit for—

144. s. 9=*S. 11—Easement—Pasturage rights—Landlord and Tenant—Legal origin—Presumption from enjoyment from time immemorial—English Law.*

Where the plaintiff's cultivators claimed pasturage rights against their *putnidars* on

Sup: Govt. acts (V of 1899) *(Contd.)*

the ground of enjoyment from time immemorial—

Held, that on proof of the fact of enjoyment from time immemorial a legal origin for the right claimed must be presumed. Such a right is not a right in gross.

A decree was passed in favour of the plaintiffs with the condition that it was not to prevent the defendants or their successors in title from cultivating or executing improvements upon the lands in question so long as sufficient pasturage was left for the plaintiffs and other persons entitled to the right of pasturage claimed with liberty to the parties from time to time, in case of difference, to apply to Court as they might be advised. (1) BHOLA NATH (2) DIGAMBUR NANDI (3) KESHUB CHUNDER CHATTERJI (4) MODHU SUDAN GOSWAMI (5) BENI MADHUB KARAK (6) GANGADHUR MUNDUL (7) BROJO MOHUN DEY *v.* THE MIDNAPUR ZAMINDARY Co. LD. **8 C. W. N. 425 = 14 M. L. J. 1904 P. 152 = 31 C. 503 P. C.**

Pensions suits relating to. See Pensions Act XXIII of 1871 cols. 139 to 146 Public thoroughfares suits for.

145. S. 9 = *S. 11*—

In the case of a private right of way the question as to whether the plaintiff has suffered or not a special damage is immaterial. **6 C. W. N. 1907.**

146. S. 9. *O. I. R. (1) 8—S. 11 & 30—Dedicator of a road to public—His rights—Right of suit—Representatives of a community—Public way—Right of owner of soil—Improvements—Damages—Minor's liability for tort committed by his manager—Injunction.*

The plaintiff No. 1 was the owner of a hill on the top of which there were certain shrines built by the Sitamhari sect of Jains. There was a road which ran up the hill in question for the convenience of the pilgrims resorting to the said shrines. The road was dedicated for the use of the public. The plaintiff No. 1 in consideration of certain shares of offerings received at the shrines, covenanted to keep the road up the hill in repair. The road in question was very steep at certain points. He authorised certain persons representing a sect of the Jains to construct a flight of steps. When some of the steps were constructed, the defendants removed a number of them and opposed further construction. The plaintiff No. 1, owner of the hill, together with others, who were permitted by him to improve the road, sued for damages and asked for an injunction against the defendants restraining them from demolishing the remaining steps, and from offering opposition to the construction of the stairs on the road in question, which had not yet been built. The suit was decreed. It was contended that this being really a suit on behalf of a sect of the Jains, the suit could not proceed without special permission from the Court being obtained under section 30 of the

Sup: Govt. acts (V of 1899) *(Contd.)*

Civil Procedure Code.

Held, that plaintiff No. 1 being the owner of the soil over which the road ran, the public having only a right of way and nothing more, was, as owner of the soil, entitled to exercise all rights so as not to interfere with the right of way, which existed in the public. He was entitled to make any improvement in the road for the convenience of the public, and he might have authorised any body to make such improvement and the suit could therefore proceed.

It was further contended that the road being a public road the plaintiffs had no right to sue without proving some special damage.

Held, that the objection did not apply to the plaintiff No. 1; for he did not sue as a member of the public, but as the owner of the soil and the person who was bound to keep the road in repair and in order, and the contention was invalid.

The defendant No. 1 was a minor and defendant No. 2 manager of his estate. The plaintiffs alleged that defendant No. 3 acted under the orders of defendant No. 2.

Held, that as a minor cannot be held liable for a tort committed by a person, who happens to be his manager for the time being or by other persons acting under such manager's order, where the act is not an act in connection with management of his estate, the claim for damages against defendant No. 2 was not valid, but injunction could legally be granted against him also.—MAHARAJ BAHADUR SING *v.* PARESH NATH SINGH.—**31 C. 839.**

147.—*Registration Act. Suits under.*—See Registration Act 1 of 1877 Cols. 497, 498.

148.—*Religious rights and ceremonies. Suits relating to.*

149 S. 9 = *S. 11 Processions Religeous, Light to use public road.*

The right to conduct religious processions in the public streets is a right inherent in every person, provided he does not thereby invade the rights of property enjoyed by others, or cause a public nuisance or interfere with the ordinary use of the streets by the public, and subject to such directions or prohibitions as may be issued by the Magistrate to prevent obstructions to the thoroughfare or breaches of the public peace.

Every member of the public, and every sect, has a right to use the public streets in a lawful manner, and it "lies on those who would restrain him in its exercise to show some 'law' or 'custom having the force of law' depriving him of the privilege." SADA GOPA CHARIAR *v.* A. RAMA RAO. **26 M. 376**

150 S. 9 *Explanation = S. 11 Explanation. Suit of civil nature—Jurisdiction of Civil Courts—Right of burial—Right to recite prayers before burial—Declaration of right to recite prayers—Order of Magistrate under S. 147, Criminal Procedure Code.*

In suits relating to ritual or religious

Sup. Govt. acts (V of 1899) *(Contd.)*

observance only, the Civil Courts in India have no jurisdiction. But Courts of Justice are bound to enquire into questions of religion or ritual when such an enquiry is material for the determination of civil rights in dispute between the parties. When the matter is of a mixed spiritual and temporal character, Civil Courts will have jurisdiction to enquire into the spiritual matter, when it is so intrinsically connected with the temporal matter as to be inseparable from it.

The plaintiffs sued for a declaration of their right to bury their dead within the precincts of a certain mosque in a particular manner, namely, that the relatives of the deceased or their delegates utter certain prayers over the body before the interment. The defendant, who claimed to be entitled to the office of Labbai, asserted an exclusive right in himself to utter the prayer. The Magistrate passed an order under S. 147, Criminal Procedure Code, restraining plaintiffs from employing their own priests for performing the funeral ceremonies until they should obtain the order of a competent court entitling them to do so.

Held, that the suit was cognizable by a Civil Court.

Held, also the right of burial was a civil right, that the right to recite prayers formed part of the right of burial and could not be split up from the latter and that after the order of the Magistrate, a decision as to the respective rights of parties became imperative. MEERA SAHIB *v.* MEERA SAHIB. **16 M. L. J. 471=1 M. L. T. 423=30 M. 15.**

151—*Religious Endowments Act (XX of 1863)—Civil Procedure Code (Act XIV of 1882), s. 11—Jurisdiction of Court—Manavala Mahamuni shrine in the Devarajaswami Temple—Right to conduct worship—Religious ceremonies—Processions—Usage—Proof—Discontinuance—Res-judicata.*

The plaintiffs, Vadagalais and Dharmakartas of the Devaraja Swami Temple sued the defendants, Tengalais and Archakas and Parichraks of the Manavala Mahamuni shrine and prayed "that it be declared that defendants Nos. 2 to 6 are not entitled to any right to carry the idol of Manavala Mahamuni in procession either in the *prakaram* of Sri Devaraja Swami or outside the *prakaram* during the Tirunakshatram Othsavam or otherwise and that defendants Nos. 2 to 6 be restrained from carrying the said idol in procession either during the approaching Tirunakshatram Othsawam to be held from the 21st instant or at any other time."

Held, that it being admitted that the plaintiffs were the Dharmakartas of the temple and that as such all the rights and duties connected with the management of the temple and the shrines connected therewith devolved on them, they were entitled to make all arrangements for putting up and taking down pandals in Manavala Mahamuni shrine and the defendants were not entitled to act independently of the plaintiffs in the matter of putting up or taking down such pandals. A declaration was accordingly made and the defendants were restrained from interfering with the plaintiffs in making such arrangements independently of the plaintiffs if they considered it advisable to do so.

That no declaration could be made as to the carrying of the idol of Manavala Mahamuni in procession either inside or outside the *prakaram* of Sri Devaraja Swami during the Tirunakshatram, for the question as to the processions did not arise between the parties to the case. The persons mainly interested in these processions and other ceremonials were the worshippers at the shrine of Manavala Mahamuni and it was impossible to hold that the defendants in any way represented these worshippers. If the worshippers or any of them felt aggrieved by the manner in which the processions connected with this shrine or the idol are carried out by the Dharmakartas they had their remedy under Act XX of 1863.

That a Civil Court cannot adjudicate as to the rights, processions, ceremonies, etc., to which any shrine or idol may be entitled.

The question of usage as to worship and the discontinuance of such usage discussed. VANAMAMALAI BHASHYAKAR *v.* KRISHNASWAMI THATHACHARIAR. KRISHNASWAMI THATHACHARIAR *v.* NARASIMHA THATHACHARIAR. **16 M. L. J. 150.**

152. S. 11 *Explanation—Civil suit—Suit of civil nature—No claim to office or emoluments—Claim to recite certain texts—Mere matter of ritual or religious ceremony—Claim for imaginary damages—Jurisdiction of Civil Courts.*

Where a plaintiff's claim is not to any office or emoluments, but is confined to rights in religious ceremonies, the same is not cognizable by the Civil Courts under S. 11 Expl., C. P. C. Even the addition of a claim for damages which is purely imaginary does not bring it within the cognizance of the Civil Courts. Where the Vadagalais sued for a declaration of their right to recite certain sacred texts in a temple either after or apart from the Tengalais either under a usage or under a razinama which was only a temporary arrangement and asked for damages which were purely imaginary in respect of perquisites which they alleged they had been prevented from getting.

Held the suit is not cognizable by the civil courts.—SUBBARAYA MUDALIAR *v.* VEDANTACHARIAR.—**14 M. L. J. 171=28 M. 23.**

152 (a) S. 10—*Section 12—Suit for cancellation of putni—Subsequent suit for rent—Interest on arrears of rent—Bengal Tenancy Act (VIII of 1885) Sections 61 and 67.*

The plaintiff brought a suit for cancellation of a putni lease and for mesne profits,

Sup: Govt. acts (V of 1899) (*Contd.*)

He subsequently brought the present suit for arrears of rent in a double capacity, namely his own right and as a shebait. He asked for a decree for rent without prejudice to his right to prosecute the other suit. The plaintiff's name was registered as a shebait under the Land Registration Act. He also claimed interest on the arrears of rent. It was contended for the defendant, that the suit was barred under section 12 of the Civil Procedure Code, that the suit was bad for plaintiff's name was not registered under the Land Registration Act in the double capacity in which he brought this suit and that the plaintiff had no claim to interest, the rent having been offered to, and refused by, the Am Mukhtar of the plaintiff. The defendant had not made the deposit of the rent due in Court.

Held, that the contentions had no force. But the plaintiff was not entitled to execute the decree in this suit till the first suit was finally decided. RAJA RANSGIT SINGH *v.* BHAGABUTTY CHARAN ROY. **7 C. W. N. 720.**

152. (b) S. 10=*S. 12—Jurisdiction of British Court, not ousted by pendency of a prior suit in Muscat Court of Political Agent.*

The Court of the Political Agent at Muscat is a Court beyond the limits of British India, and it is not established by the Governor-General in Council. But it is established by Her Majesty's order in Council. Hence, the jurisdiction of the British Indian Court is not ousted by a prior suit pending in the Muscat Court, by reason of S. 12, C. P. C. RAHIMTULLAH MUKHI RAMZAN *v.* DAMODHAR DHARAMSI. **1 S. L. R. 166.**

152. (c) S. 10 *& 11=S. 12 and 13*—Res judicata—*Rent suit—Mesne profits—Suit.*

A purchased a tenure at a sale for arrears of rent, and afterwards served a notice upon B, an under-tenure holder under S. 167 of the Bengal Tenancy Act. A then sued to eject B, and to recover mesne profits. The Court made a decree for ejectment and allowed mesne profits from the date of the service of notice under S. 167. B preferred an appeal. During its pendency, A sued B for rent for the period between the date of his purchase and the date of the service of notice:

Held, (1) that the suit was not barred under S. 12 of the Civ. Pro. Code (*a*).

(2) that the suit was not barred under S. 13, Civ. Pro Code, as A could not join claims for rent and mesne profits in the previous suit. (7 C. W. N. 720 followed.) NAFFAR CHANDER PAL CHOWDHURY *v.* MUNSHI MAHOMED KAYUN. **8 C. L. J. 303.**

152 (d) S. 10, 11, *115=s. 12, 13, 622—Revision—Practice—Dismissal of suit correct though ground erroneous.*

The procedure under both s. 12 and 13 of the Civil Procedure Code is the same; and where a second suit is instituted for the same relief, such that the matter in issue in it is also directly and substantially in issue in a previously instituted suit between the same parties, the proper procedure is to dismiss the second suit and not merely to stay it pending the decision of the earlier suit.

Sup: Govt. acts (V of 1899) (*Contd.*)

The second suit was instituted in the Munsif's Court, while the first had been instituted in the Subordinate Judge's Court. The second suit was transferred to the Court of the Subordinate Judge, and the Sub-Judge dismissed both of them together on the merits. On appeal the District Judge, held that s. 12 C. P. C., was a bar to the second suit and treated the whole proceeding before the Subordinate Judge as a nullified and dismissed the appeal.

Held, that the District Judge had jurisdiction to hear the appeal against the decision of the Subordinate Judge and should have done so.

Inasmuch as the dismissal of the appeal by the District Judge was, in substance, correct, though he had proceeded on a wrong ground, His Lordship refused to interfere in revision. VENKAPPACHARI *v.* MANJUNATHA. **2 M. L. T. 40=16 M. L. J. 526.**

153. S. 11=*S. 13*—Res-judicata—*Mortgage—Redemption.*

To maintain the plea of *res-judicata* it must appear from inspection of the record that the person whose interest it is sought to bind was in some way a party to the suit. A mere intention on the part of one of the parties that it should be for his benefit is not enough to support the plea.

A mortgagor of an undivided share may redeem the entirety, at any rate if the mortgagee does not object, and may be compelled to do so if required by the mortgagee. *Chaudhri* AHMAD BAKHSH *v. Seth* RAGHUBAR DAYAL. **15 M. L. J., 1905, p. 407=7 B. L. R., 912=10 N. W. C., 115=2 A. L. J. 813=9. O. C. 7=28. A. 1=32 I. A. 229 (P. C.).**

154. S. 11=*S. 13.—Former proceedings must be put in evidence to support the plea of* res-judicata—*Probate and Administration Act (V of 1881), Sections 4, 12, 59, 88, 90—Probate Effect of—Muhammadan Law—Will of entire estate*—Res-judicata—*Evidence—Former proceedings to be put in evidence.*

A Muhammadan testator has not an unlimited power of disposition by Will, he can only deal with one-third of his property, the remaining two-thirds pass to his heirs whatever the terms of the Will may be. Thus, the executor, when he has realised the estate, is a bare trustee for the heirs as to two thirds, and an active trustee as to one-third for the purposes of the Will.

When after probate is granted of a Will, made by a Muhammadan a claim is made by the heirs adversely to the Will there is no estoppel against the claim.

An invalid release of rights in property by a Muhammadan previous to his Will is not validated beyond one-third share in it by confirmation of the release by Will.

The defendant contended that the trial of the claim or at least of some of the

Sup: Govt. acts (V of 1899) (*Contd.*)

issues involved in the case was barred by *res-judicata* by reason of the grant of probate to him before judgment was given in the case.

Their Lordships of the Privy Council being satisfied that the defendant had no case on the merits declined to give effect to the contention on the ground that the probate proceedings were not put in evidence in the case. *Mirza* KURRATULAIN BAHADUR *v. Nawab* NUZHIT-UL-DOWLA ABBAS HOSSEIN KHAN. **7 B. L R. 876 =9 W. N C. 938=1 C. L. J. 591=2 A. L. J. 758=15 M. L. J. 336=35 I. A. 244 P. C.=33 C. 16 (P. C.).**

155. S. 11=*S. 13—Charge holder—Unpaid Vendor—Personal decree*—This section is not applicable to T. P. A. S. 90 A. W. N. 1905 P. 144—*See Transfer of Property Act IV of 1882. S. 90, 100—No 5 91 Col: 606.*

156. S. 11=*S. 13—Construction of Statutes. S 11=S. 13 if exhaustive.*

Under section 13 of the Civil Procedure Code a decree in a previous suit cannot be pleaded as *res-judicata* in a subsequent suit, unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue but also the subsequent suit itself, in which the issue is subsequntly raised. Section 13 goes beyond the law laid down in *Duchess of Kingston's Case*, 2 *Smith's Leading Cases*, 10th edition, page 713. The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction. GOKAL MANDAR *v.* PUDMANUND. **6 C. W. N. 825 at 829.=29. C. 707.**

157. S. 11=*S. 13— Finality of order not appealed against though wrongly passed. Rent Recovery Act, (Mad. Act VIII of 1865), S. 10, 41—Landlord and Tenant—Incumbrances by tenant and subsequent ejectment—Effect of ejectment on mesne incumbrances.*

The ejectment of a tenant, under s. 10 or 14 of the Rent Recovery Act operates not only as a determination of the tenant's right of occupancy, but also as an extinguishment of all mesne incumbrances and subordinate interests created by the tenant. A tenant gave a usufructuary mortgage over his land and covenanted to repay the amount. About two years thereafter, the *shrotriemdar* obtained a decree against the tenant directing him to accept *patta* as settled by the judgment. On his failure to do so, the tenant was ejected. The mortgagee now sued the tenant and the *shrotriemdar*, claiming a personal decree as against the tenant and the sale of the mortgaged property as against the *shrotriemdar*, in whose possession it was.

Held, that the mortgagee was not entitled to an order for the sale of the mortgaged property. A previous order though wrongly passed becomes final if it is not

Sup: Govt. acts (V of 1899) (*Contd.*)

appealed against and its propriety can not be questioned in a subsequent suit.—EKAMBARA AYYAR *v.* MEENATCHI AMMAL, **27 M. 401.**

158. S. 11=*S. 13 Inconsistent decisions—Last operates as a bar.*

In the case of conflicting decisions regarding the subject matter of a suit in dispute between the parties to the suit or their predecessors in interest, the latest of those decisions would override the earliest decisions and operate as *res-judicata.*—MALLU MAL *v.* JHAMMAN LAL. **1. A. L. J. 416.**

159. S. 11=*S. 13.—Non-appealability of an order is no test of res judicata.* See S. 11, 102 (S. 13 and 586)—RAJA SUNADHARI APPA RAO *v.* RAMA CHANDRADA. **B. M. L. J. 23=27. M. 63.**

But this ruling was overruled by 16 M. L. J.=29 M. 195 (F. B.) see next case.

160 S. 11=*S. 13* Res-Judicata—*Competent Court—Prior decision in a case in which second appeal did not lie does no operate as* res-judicata *in a subsequent suit in which second appeal is competent.*

Held, by the Full Bench, that a decision by a Munsif in a case in which second appeal did not lie cannot operate as *res judicata* in a subsequent suit in which a second appeal is competent. AVANASI GOUNDEN *v.* NACHAMMAL. **16 M. L. J., 1906, p. 41.=28. B. 338=29. M. 195. F. B.**

161 S. 11 and 47=*S. 13 and 244—Application adjourned after notice—Right to apply questioned—Sections* 232 *and* 295.

An application for execution by the transferee of a decree must be made to the Court that passed the decree and not to the Court to which it has been sent for execution.

When the transferee applied to the Court to which the decree was sent for execution for rateable distribution of the assets which might be realized by sale of the property of the judgment debtor at the instance of another decree-holder and the Court ordered the application to be put up with the case of that other decree-holder—

Held, (1) that the order was appealable under section 244 (47) of the Civil Procedure Code.

(2) That the order did not operate as *res judica.a* as against the judgment-debtor who had not appeared to oppose the application on the date fixed for its hearing and

(3) That the Court had no jurisdiction to entertain the application. 16 *All.*, 485, 27 *Cal.* 488 *referred to.* TAMESAR PRASAD *v.* THAKAR PRASAD. **W. N. A. 1903 p. 99.=25. A. 443.**

162. S. 11=*S. 13*—Res-judicata—*Findings necessary to support appellate decree—Dismissal of previous suit for non joinder—Possession under decree subsequently reversed—Adverse possession of equity of redemption.*

Sup: Govt. acts (V of 1899). *(Contd.)*

Held, that the judgment passed on appeal in a previous case operated as *res-judicata* as regards findings of fact contained in the judgment of the original Court, though they were not referred to in the judgment of the appellate Court, for they were necessary to make the appellate decree possible only on such findings.

Article 93 of the Limitation Act does not apply when the suit is substantially for possession of property, though the plaintiff avers that an instrument relied on by the defendant is a forgery. 16 *M.* 311, 16 *B.* 186, *followed.*

Quære.—Whether a bare equity of redemption is capable of adverse possession under Article 144, Schedule II of the Limitation Act? NARAYANAN CHETTY *v.* KANNAMMAI ACHI.—**28 M. 338.**

163 S. 11=*S. 13—See Contract Act IX of 1872 S. 130 No 332 C. 354.*—**27 B. 148.**

164. S. 11=*S. 13—Decision in a suit for one Fasli how far binding in a suit for subsequent Fasli.*—Mohini *arrangement Government by—Temple to receive assessment—Effect of arrangement*—Res-judicata—*Certainty of estoppel.*

Where in lieu of *Mohini* allowance payable to a temple by the Government the liability of the temple to pay assessment on certain lands was released, and for the balance, the Government directed the first crop assessment payable on certain lands by defendant's ancestors to be paid to the temple and the defendants ancestors executed an undertaking to Government to pay such assessment to the temple, and the trustees of the temple also executed *muchilika* to Government agreeing to receive the assessment in satisfaction of their claims for *Mohini*, the claim of the temple for such assessment was not based upon any contract between the temple and the choultry irrespective of any possession by the latter of lands. It was a claim to enforce the liability upon property as by the arrangement the lands, the revenue of which was assigned to the temple, became *inam* lands vested in the latter who became entitled to the *melwaram* on such lands.

In a former suit the temple sued the defendant for the *melwaram.* The defendant contended that he was not liable as he was not in possession of so much of the lands as was believed to have been in the possession of the defendant's ancestor at the time of the arrangement. The plaintiff's claim was decreed by the Munsif on the ground that the defendant should seek his remedy from Government and the Sub-Judge confirmed this decree upon the ground that the defendant was precluded from raising his contention by reason of the payments made by his family for a long time upon the whole extent. In second appeal, the High Court held that they "saw no reason to differ from the Courts below."

In a second suit by the trustees for the *melwaram* due for different faslis the same contention was raised but the plaintiff pleaded

Sup: Govt. acts (V of 1899) *(Contd.)*

that it was *res-judicata* by the former decision.

Held, (1) That in order to sustain a plea of *res-judicata* what was relied upon as estoppel must be certain.

(2) That where the first Court based its decision upon one ground and the second Court upon different and inconsistent ground and the third Court simply affirmed the decision of both the Courts, the decision was uncertain and it would be impossible to say what exactly was decided.

(3.) That the decision in the former litigation was not *res-judicata* and the defendant was entitled to raise his contention.

(4) That even apart from this, a decision in a suit for *melwaram* of one fasli would not estop the defendant who was sued for *melwaram* for subsequent faslis from contending that he was not in possession of the lands in respect of which the *melwaram* was claimed and that as such he was not liable although he might have raised the same contention in the suit for the previous fasli and the *melwaram* was decreed against him and although the defendant might not allege that the lands had gone out of his possession subsequent to the previous suit.

A payment made to the temple for a long series of years upon the footing that the defendant and his family had the same extent of lands as they were supposed to possess at the time of the arrangement would not bar the defendant and his family from showing that they had not such extent even at the time of the original arrangement VYTHILINGA MUDALIAR *v.* RAMACHENDRA NAICKER. **14 M. L. J. 379.**

165 S. 11=*s. 13*—Res-judicata—*Finally decided—Limitation Act (XV of 1877), Schedule II, Article 131—Adverse possession—Rent—Non-payment for twelve years.*

Mere non-payment of rent for a period of twelve years prior to suit is not enough to bar the landlord's right to collect the rent. There should be a refusal of the landlord's enjoyment of his right for twelve years prior to suit.

In a previous suit the plaintiff claimed kuttubadi for eleven *faslis* from 1295 to 1305. The Court, after stating that "the defence was *inter alia*, that the suit was barred by limitation, and the question is the only one which need be considered in the case," gave a finding in the affirmative, basing its conclusion upon the single circumstance that the plaintiff had not proved that he had collected any kattubadi within 12 years prior to the date of the suit.

Held, that the dismissal of the previous suit did not operate as a bar to the present suit for kattubadi for subsequent *faslis*. That it was neither competent nor proper for Court to depart from the unequivocal statement in the judgment as to what was decided and, because such decision would, by itself, be unsound with reference to the reason assigned for it, to substitute something else quite different, in order to make it seem right so as to enable one of the parties there-

Sup: Govt. acts (V of 1909) *(Contd.)*

to to found a plea of *res-judicata* thereon.—JALASUTRAM LAKSHMINARAYANA *v.* ZEMINDAR OF VALLUR, 16 M. L. T. 35 =29 M. 42.

166. S. 11—*S. 13—Estoppel—Attachment of property given for maintenance—C. P. C. S. 266 (b)=S. 60.*

A Hindu female, as guardian of her minor grandsons, borrowed money from the appellant, who brought a suit impleading her in it and got a decree. In execution of the decree, he sought to attach and sell the right of the female over certain lands which had been given her for her maintenance for life and which she had no right to alienate. The defendant objected that she was not personally liable and that her maintenance right over the land was not liable to be attached and sold in execution of the decree. The executing court held that she was personally liable and on the petition for execution wrote "attach" The property was attached and sold and was purchased by the appellant. But at the time of confirmation of the sale, the court accepted the objection of the defendant that her maintenance right was not liable to attachment and set aside the sale.

Held, (1) that under s. 266 (*b*) of the Civil Procedure Code, the interest of the judgment-debtor was liable to be attached and sold in execution of the decree; (2) that the order on the petition for execution was uncertain and did not estop the judgment-debtor from raising, before the confirmation of the sale, that the property was not liable to attachment; and (3) that estoppel by judgment is not confined to the judgment but extends to all facts invovled in it as necessary steps or as the ground work upon which it must have been founded—(14 M. L. J. 379 *referred* to.) MUNISAMI NAIDU *v.* AMMANI AMMAL, 15 M. L. J. 7.

167 S. 11—*S. 13*—Res-judicata—*Execution of decree—Sale—Order allowing sale—Estoppel.*

The decree did not contain any direction for sale. But subsequent to the passing of the decree, there were applications by the decree-holder for sale in execution of the decree, and in spite of the judgment-debtor's objections, sale was ordered the decree having been construed as allowing sale.

Held, that the orders so construing the decree estopped the judgment-debtor from raising any contention inconsistent with those orders. ATMAKURU NARASAMMA *v.* ATMAKURU VENKATA NARASAYYA CHETTY. 15. M. L. J. 418.

168 S. 11—*S. 13.—Court of competent jurisdiction.*

The defendants in this case sued in the Revenue Court to set aside a mortgage executed by one Jumma, an occupancy tenant, in favor of the present plaintiff The present plaintiff then denied the ownership of the defendants. The Court found the issue as to ownerships in favor of the then plaintiffs and decreed their claim. Plaintiff brought this suit in the Civil Court for a declaration that the land was his property.

Held, that the present suit was not barred by section 13 of the Civil Procedure Code. The former suit was exclusively triable by the Revenue Court under section 77 (3) (*h*) of the Punjab Tenancy Act, for the proper trial of such a suit the Court had to decide incidentally every point, *e. g.*, that relating to the right of ownership of the then plaintiffs in the disputed land which was challenged, which required to be disposed of before the main question before the Court could be taken up, but the decision on such a point was not binding on the Civil Court, the Revenue Court not being competent to try the present suit. — 8. *W. R.* 175 (*F. B.*) 11 *Cal.*, 301 *P. C. followed.* SULTAN HABIB-ULLAH-KHAN *v.* MOHABAT KHAN. P. R. 63 of 1901.

169 S. 11—*S. 13 Civil Procedure Code (Act XIV of 1882), Section 13—Res-judicata—Order returning plaint for presentation to proper Court—Punjab Tenancy Act (XVI of 1887), Section 77 (3), (l), (h)—Suit for possession by landlord against transferee from occupancy tenant and trespasser.*

The land in suit was held by one H. S., an occupancy tenant, under section 6 of the Punjab Tenancy Act. On his death it was inherited by his widow, who got her brother, J. R., entered as occupancy tenant of one-half, while the other half continued to be recorded in her own name, and remained in her possession. On her death her half was mutated in the proprietors names, but J. R. held possession of the whole. The proprietors brought a suit for his dispossession in the Court of the District Judge, but as J. R. was recorded occupancy tenant of one-half the plaint was returned, and the plaintiffs, acting on the suggestion of the District Judge, sued in the Revenue Court for a declaration that J. R. was not such a tenant under section 77 (3) *(d)* of the Punjab Tenancy Act, and obtained a decree. They obtained possession also through the same Court, though there was no decree for it; but on review, possession was restored to J. R. The plaintiffs then brought in the Civil Court the present suit for possession of the whole, reciting all the above facts. J. R. pleaded *inter alia* that the Civil Court had no jurisdiction, and the suit was dismissed on the ground of *res judicata* under the previous order of the District Judge.

Held, by *Chatterji*, *Johnstone* and *Rattigan*, JJ., that the question of jurisdiction was not *res judicata*, and that the claim in respect of one-half of the land, *viz.*, that held by the widow of H. S. at the time of her death, which was mutated in plaintiff's names, was cognizable by the Civil Court.

Per Chatterji and Johnstone, JJ. That the claim regarding the half, recorded in J. R.'s name, could be tried in the Revenue Court, and the Civil Court had no jurisdiction to entertain it.

Sup: Govt. acts (V of 1909) (*Contd.*)

Per Rattigan, J.—That the whole claim was cognizable by the Civil Court. MULA *v.* GANDU. **92. P. R. 1902=16. P. L. R. 1903**

170. S. 11—*S. 13—Custom—Alienation—Gift—Sale—Female estate—Necessity*—Res-judicata—*Civil Procedure Code (Act XIV of 1882), Section 13—Limitation Act (XV of 1877), Schedule II, Article 91—Suit for possession—Adverse possession.*

Ghulam Ali and Ghulam Nabi were two brothers possessed of a joint estate. Ghulam Ali died, leaving a widow *Mussammat* Mehr-un-Nissa, and Ghulam Nabi took over the whole estate. In 1868 he died, and the whole was entered in the name of the widow aforesaid. Ghulam Nabi had left a daughter, *Mussammat* Bibi Saheba, and in 1870 half of the estate was mutated in her favour, half remaining with her aunt. In 1889 *Mussammat* Bibi Saheba gifted her half to her son, Muhammad Said.

Plaintiffs, who were related to Ghulam Nabi in the 8th degree sued for a usual declaration, but their suit was dismissed.

On the 8th June 1897 Muhammad Said having died, and the land having reverted to *Mussammat* Bibi Saheba, his mother, she sold it for Rs. 1,500 to one Ram Singh and died. Plaintiffs sued for possession, on the grounds that they were the next heirs; that *Mussammat* Bibi Saheba had no power to alienate except for "necessity," and that there was no "necessity." On pleadings the following points arose for decision:—

(*a*).—Was the suit barred by Section 13, Civil Procedure Code?

(*b*).—Did *Mussammat* Bibi Saheba succeed to an absolute ownership?

(*c*).—If not, then what was the effect of her gift to her son, and the subsequent reversion of the land to herself?

(*d*).—Was there any time-bar in consequence of plaintiffs not succeeding in setting aside the gift to Muhammad Said within three or six years?

(*e*).—Was there any time-bar on account of adverse possession by *Mussammat* Bibi Saheba?

(*f*).—Did consideration pass, and was there "necessity?"

Held (*a*).—that upon the findings in the previous suit the present suit was not barred by *res-judicata*.

(*b*).—The *Mussammat* Bibi Saheba took a limited estate, and did not succeed to an absolute ownership.

(*c*).—That *Mussammat* Bibi Saheba could not give more than she had herself. Her gift *as a gift* could have no effect beyond her own lifetime. When Muhammad Said died in her lifetime the gift became as if it had never been effected. Her gift to her son and the reversion to her on the son's death made no change in the nature of the property.

(*d*).—That Article 91 of the Second Schedule of the Limitation Act was not applicable to the case. The gift was plainly a thing which the plaintiffs could ignore, it being presumably of no effect after the death of the donor, and of no effect against plaintiffs at any time.

(*e*).—That *Mussammat* Bibi Saheba did not hold the property adversely to plaintiffs, the first time she plainly showed by an overt act that she intended to hold adversely to plaintiffs was in 1889, when she made a gift to her son, and in 1891 she claimed full ownership. That being less than twelve years before the institution of the present suit, there was no time-bar on account of adverse possession; and

(*f*).—That no necessity had been established. MAHAMMAD BAKHSH *v.* RAM SINGH. **140 P. L. R. 1902.**

171. S. 11—*S. 13*—Res-judicata—*Rival suits—Same judgment in both suits—One appeal sufficient.*

When two suits are filed by two persons in respect of the same subject-matter, *e.g.* pre-emption, against the same defendant and they are impleaded in each other's suit and the same issues are fixed in each and the suits are heard together and disposed of by one judgment and decree, it is not necessary for the party against whom the decree is passed to file an appeal in each case. It is sufficient for enabling the Court of appeal to give a binding decision with respect to any matter common to the cases if that party appeals in his own suit, though such matter has been decided adversely to him in the other suit also. The adverse decision in the other suit not appealed against does not preclude the Court of appeal from entering into the question in each party's appeal. P. R., 83 of 1888, 10 All., 123, 16 Cal., 233, P. R., 23 of 1897 31 of 1898, 8 of 1904, S. C., 101 P. L. R., 1903 *referred to*. JUGAL KISHORE *v. Mussammat* CHAMMO. **151 P. L. R 1905.**

172. S. 11—*S. 13*—Res-judicata—*Rent suit—Question of title.*

In the previous suit the plaintiffs asked for a decree for rent against the defendant on the ground of the latter holding certain pieces of land measuring 7 *bighas* at the rate of Rs. 7 per annum. The plaintiffs alleged that the defendant was in occupation of the lands in suit as a tenant paying a seperate *jama* of Rs. 7, though he held another *jama* of other pieces of land at Rs. 33 and odd per annum, that the defendant had relinquished the land and that he subsequently obtained a re-settlement. The defendant denied that the land in suit had ever been held by him at a *jama* of Rs. 7. He also denied the surrender of the land and the allegation of re-settlement. The Court held that the allegation of the plaintiffs that the defendant had obtained a re-settlement was false and that the relationship of landlord and tenant did not exist. The Court also decided the question whether the land in suit was included

in the holding of Rs. 33 and odd against the plaintiffs. Having lost the suit for rent the plaintiffs instituted the present suit for recovery of possession of the land which they alleged had been held by the defendant at the *jama* of Rs. 7. They based their cause of action on denial of tenancy by the defendant and their title as landlords and surrender by the defendant. The defendant raised the same plea that the land in suit was part of his holding of Rs. 33 and odd and also contended that the Court was incompetent on the principles of *res-judicata* to try the question whether the land was part of the holding of Rs. 33 and odd.

Held, that the suit was not barred by *res-judicata*.

The decisions on the question of *res-judicata* when the previous suit was one for recovery of rent may be classed under two heads. The first class of cases is when the defendant, the alleged tenant, sets up his own rights to the land and denies the relationship of landlord and tenant, denying the plaintiff's title to the land and the substantial issue raised is—does the land covered by the suit belong to the plaintiff or the defendant. The decision in the suit operates as a bar to a subsequent adjudication of the plaintiff's title, for the title of the plaintiff is directly and substantially in issue in the former suit. The second class of cases is where the defendant either sets up the title of a third person, and denies the relationship of landlord and tenant, or where the defendant pleads that he is not either in occupation of the land, or that the tenancy which existed had expired.

In this class of cases the only issue is :—Did the relationship of landlord and tenant exist between the parties during the years covered by the suit ? And the decision does not bar the subsequent suit, for the question of title in the previous suit was no more than subsidiary to the main question. 21 *W. R.*, 349, 15 *Cal.*, 756, 25 *Cal.*, 136, 24 *Cal.*, 569, 11 *Cal.*, 301, 3 *W. N.*, *Cal*, 266, s c, 26 *Cal.*, 428 *referred to*.—SAHADEB DHALI *v.* RAM RUDRA HALDAR.—**10 C. W. N. 820.**

173. S 11—*S. 13—Res Judicata—Decision erroneous in law over-ruled by a later decision.*

In this case the plaintiffs respondents, superior proprietors of a village, sued the defendant appelants who were *birt-holders* under a decree of the Settlement Court, according to which the appellants were bound to pay as rent to the respondants ⅗ths of the *nikasi* of the village. The plaintiffs asserted that they were entitled to ⅗ths of the *nikasi* of each year, while the defendants contended that they were not bound to pay more than ⅗ ths of the *nikasi* assumed by the Settlement Officer for the purpose of assessing Government Revenue, that is, ⅗ths of double the amount of Government Revenue. In a previous case between the parties, it was decided that the rent payable by the appellants depended upon the *nikasi* of each year and had not been fixed for the term of a settlement. The appellants contended that the decision was not binding upon them, first, because the point now in issue was not then definitely decided, and secondly, because that decision was based on Rent Act Ruling No. 62 which was over-ruled, by a later decision of the judicial Commissioner's Court.

Held, that the previous decision operated as *res judicata*, and that a decision *inter partes*, if, in other respects, it fulfilled the requirements of S. 13 of the Code, could not be avoided by showing that it was erroneous in law. (32 C. 749 diss, 26 M. 104, 15 A. 327, 50 C. 181 referred to). HUDDAR *v.* MUSSAMMAT SHAHZADA KHANAM, **9 O. C. 243 (B).**

174 S. 11—*S. 13*—Res-judicata—*Erroneous opinion on a point of law how far conclusive.*

An erroneous opinion on a point of law may be between the parties to it, but not further ,—a sufficient *res-judicata* to preclude them from re-agitating it.

The conflict between the cases *8 B. L. R., 367, and 12 Bom., 411, indicated.* WAMAN HARI DESHPANDE *v.* HARI VITHAL PARULEKAR, **8 B. L. R. 932.**

175. S. 11 –*S. 13.*—Res-judicata—*First suit in a Subordinate Court—Second suit in a superior Court but triable by Subordinate Court—Different courses of appeal.*

S. 13 (s. 11), Civil Procedure Code, cannot be so sued as to bind the superior Courts by decision of inferior Courts, which were not, and could not have been, considered on the merits by the superior Courts ; and a decision by an officer presiding in a Court passed in the exercise of a certain jurisdiction cannot be *res-judicata* in a subsequent case, triable by that officer, but not in the exercise of the same jurisdiction, but under what might be called a superior jurisdiction.

Where an earlier suit was tried by a subordinate Judge of the first class, which was also triable by a single Judge of the Chief Court, a subsequent suit before a single Judge of the Chief Court, on the same issue, which suit could be entertained by the subordinate Judge also, would be barred by the earlier suit, although, the course of appeal would be different in the two cases. (27 P. R., 1879, 157 P. R 1889, (F. B), 20 P. R., 1891, (F. B.) refd. to.] GIRDHAR LAL *v.* DEOKI NANDAN, **III P. R., 1907.**

176 S. 11—*S. 13—Second suit not barred by first where decree reserved rights to sue.*—

In a suit by an auction purchaser for recovery of lands, the decree directed the dismissal of the suit on the ground of non-production of the sale certificate, but reserved the right of the plaintiff to bring a fresh suit on obtaining the sale-certificate. In a second suit by the plaintiff for recovery of the same property on production of the sale-certificate, *held*, the first suit did not operate as *res judicata*. MURUGAPPA ASARI *v.* SANTHIAMMAL, **18 M. L. J. 198.**

Sup: Govt. acts (V of 1909) *(Contd.)*

177. S. 11—*S. 13—Decision on a preliminary point—Remand for trial on other issues—Suit dismissed for default of parties.*

In the first suit for rent between the same parties the Collector on appeal held that a certain lease was inoperative and remanded the case of trial. It was then dismissed for default.

Held in a subsequent suit for rent that the finding, although it was not embodied in the decree, operated as *res judicata* inasmuch as it was the basis of the Collector's order. SHEIKH ALAM *v.* PARAMANAND. **5 A. L. J. 48.**

178. S. 11—*S. 13.*—Res-judicata—*Construction of Mokurrari grant—Revision of rent, if in perpetuity—Non-realization of rent for many years, effect of—Landlord and tenant.*

A *sanad* ran thus: "This *sanad* is granted to Shah Pir Mahomed Saheb, as regards the remission of Rs. 250 being the (whole) amount of *mokurrari* rent of *mouzah* Kaler, and according to this *sanad* the Shah Saheb as well as his heirs shall get acquittances year after year from my *cutchery*."

Held, that there was no maintenance grant in perpetuity to the lessee or donee and his descendants from generation to generation, nor was there even a maintenance grant to the donee and his heirs, but that there was a maintenance allowance granted to the donee and his heirs then living. (14 C. 296 P. C. 28 C. 720 P. C. distinguished).

Per Stephen, J.—Where in a previous litigation the question was whether the heirs of the grantee were entitled to claim the remission of rent and the same question, that is, as to a permanent remission of rent, is raised in a subsequent litigation by the transferees from the representatives of the original grantee, the decision in the former litigation does not amount to *res judicata.*

A claim for *batta* being a claim in excess of rent is not enforceable at law.

Per Mookerjee, J.—The Revenue Courts are Courts of limited jurisdiction, and notwithstanding the decision of the Collectorate Court, a suit may be brought in the ordinary Civil Court to establish the character of the land in suit, that is whether it is rent-free or rent-paying; in other words, the Revenue Court and the Civil Court are not Courts of concurrent or equal jurisdiction for the purposes of a suit to declare finally, whether the land is rent-free or liable to pay rent.

A decision of the Revenue Court may be evidence, but it is by no means conclusive upon the issue whether the land is rent-free or rent-paying. (24 W. R. 154, 15 W. R. 30, P. C., 19 W. R. 322, 25 W. R. 139, 26 A. 163, refd.)

A maintenance grant is *prima facie* for the life of the grantee. (23 A. 191, refd.)

But the presumption may be rebutted, either by the express provisions of the grant, or where the terms of the original grant are unknown, by long course of conduct of the parties concerned. (4 C. L. J., 309, refd.)

Sup: Govt. acts (V of 1909) *(Contd.)*

When the relation of landlord and tenant exists between two persons in respect of any property, the mere non-payment of rent, though for many years, is not sufficient to show that the relationship of landlord and tenant has ceased. (4 C. 314, 24 W. R. 386, 7 B. 40, refd.) RAMESH'R KOER *alias* DULPHIN SAHEBA *v.* GOBARDHAN LAL, **7. C. L. J., 202.**

179. S. 11—*S. 13—Res-judicata—Question of title decided in former suit by revenue court—Former suit instituted wrongly in revenue court—Appeal to the Civil Court—Suit to be deemed as instituted in right Court.*

In a suit for an annuity for certain years, the defendants denied the title of the plaintiffs. In a previous suit in the revenue Court between the same parties for arrears of revenue of certain other years, it was decided, upon the admission of the defendant, that he was liable.

Held, that the decision of the revenue court operated as *res-judicata* upon the question of the title and the defendant was estopped from re-opening the question in the present suit and the plaintiffs were entitled to receive the amount of the annuity.—DWARKA DAS *v.* AKHAY SINGH,—**5 A. L. J. 407.**

180. S. 11—*S. 13—Applicability of. to S. 20 of the Dekhan Agriculturist's Relief Act.*—See Act XVII of 1879 Dekhan Agriculturists Relief Act—BAI DIVALI *v.* GIRDHAR GOVINDRAM PATEL.—**10 B. L. R. 577.**

181. S. 11—*S. 13—Dismissal of previous suit based on account—Subsequent execution of a cheque for part of the amount*—See Res-judicata—MAX MINK *v.* SHANKAR DAS.—**116 P. W. R. 1908.**

182. S. 11—*S. 13—Mere filing of an appeal—Effect—Appeal dismissed on ground of limitation alone—Effect—Pendency of proceedings by way of appeal*—See Resjudicata.—RAM CHANDRA *v.* NARAIN.—**4 N. L. R. 93**

183. S. 11—*S. 13—Suit dismissed on an alternative ground, whether* res judicata.

A decision in a former suit will operate as *res-judicata* notwithstanding the fact that the previous suit was decided on an alternative ground of decision.—(24 C. 900 followed 17 A. 174 dist).—MALLISHERI ILEATH YASUDEVAN NAMBUDIN *v.* KOYOOR CATHATH KANNAN NAMBIAR, —**4 M. L. T. 90.**

184. S. 11—*S. 13.*—Res judicata—*Mortgage—Redemption suits.*

Held, by the Full Bench, following the principle of *stare decisis* that it is open to a mortgagor who has brought a suit for redemption and obtained a decree to bring a second suit for redemption. DHANPAT MAL *v.* JHAGGAR SINGH. **164 P. L. R. 1908 (F. B.).**

185. S. 11—*S. 13.*—Resjudicata—*Cross appeals from one decree—Appeal from one of the appellate decrees but not from the other.*

If an issue decided against a party is embodied in two decrees and that party

Sup: Govt. acts (V of 1909) *(Contd.)*

appeals from one of them only, the other decree on becoming final operates as *res judicata* and precludes the original and appellate Courts from deciding that issue again. 10 A. 123, S. A. No. 208 of 1907 foll. 29 M. 333, 16 C. 233, 33 C. 1101, 29 A. 730 dissent. ABDUL BASIT *v.* ASHFAQ HUSAIN. **A. W. N. (1908), 211=4 M. L. T. 172.**

186. S. 11—*S. 13—Suit for increase of rent for increased area*—Res-judicata. See Act VIII of 1885 (Bengal Tenancy). MAHARAJA RADHA KISHORE MANIKYA BAHADUR *v.* UMED ALI. **12 C. W. N. 904.**

187 S. 11, *47, O. XXI R. 60 and R. 99= s. 13, 244, 280 and 331—Execution proceedings*—Res-judicata.

One M. M. had a decree for money against four persons, of whom R. R. and J. R. were two. The decree was against each of the four for one-fourth of the total sum decreed. R. R. having died, leaving J. R., co-judgment-debtor, as his heir, M. M. applied for execution as regards R. R.'s one-fourth by attachment of his share in certain house property. J. R. objected to the attachment, and his appeal against the order rejecting the application was dismissed. On revision the Chief Court remanded the case for enquiry on the merits and disposal according to law. The original Court executing the decree on the date fixed for evidence on the decree-holder not appearing when the case was called passed two orders, first, in the execution case, to the effect that the decree-holder being absent, the file is consigned to the record-room; and, secondly, in the objection case to the effect that the decree-holder is absent, and under S. 331, Civil Procedure Code, the decree-holder is a *quasi* plaintiff, and the objector a *quasi*-defendant; and that, therefore, in the absence of the decree holder the objection must be allowed, and the property released. The decree-holder did not attempt to have these orders set aside, but subsequently applied again for execution attaching the same property. J. R. again objected, urging that the decree holder had finally lost his right of executing the decree against that property, because of the previous order passed in the objection case. The execution Court disallowed the objection. On appeal the Divisional Judge held that the previous order was a bar against a subsequent application for execution of the decree by attachment of the property then released. The decree-holder appealed to the Chief Court.

Held, (I).—That the order in the execution case was not a bar to further execution.

II.—That the order passed in the objection case could not legally be passed under Section 331, Civil Procedure Code. That section only relates to cases in which a decree for possession is in question and resistance or obstruction is offered to the officer charged with the execution of the warrant by a person who is not the judgment-debtor.

Sup: Govt. acts (V of 1909) *(Contd.)*

III.—That Section 244 (*c*) was applicable to the case, and the objection must be deemed to have been allowed under that section. J. R., the objector, being a judgment-debtor, Section 278 was not applicable. Where the heir and representative of a deceased judgment-debtor being himself a judgment-debtor under the same decree objects to the attachment of the property of the deceased man, on the ground that the objector has a lien upon it, the matter falls within the scope of section 244 (c).

IV.—That taking the order as one under Section 244 (*c*), the acceptance of the objection and release of the property in the absence of the decree-holder without any evidence being taken from the objector amounted to nothing more than a dismissal for default of the execution application.

V.—That the decree-holder was entitled again to apply for execution against the same property, and the first Court was right in declining to treat the matter *res-judicata*. MAGHAR MAL *v.* JOTI RAM. **20 P. L. R., 1908=90 P. R., 1902.**

188. S. 11.—*S. 13.*—Resjudicata—Kabuliyat—*Illegal cesses. Agreement to pay—Bengal Tenancy Act (VIII of 1885), Sections 67, 74 and 179.*

The plaintiff instituted a suit for rent in which he sought to recover certain cesses on the ground that the defendant had in his *kabuliyat* agreed to pay them. The defendant denied his liability to pay any cesses on the ground that in a previous suit between him and the plaintiff it was decided that these cesses could not legally be recovered.

Held, that the right to these cesses was barred by the rule of *res-judicata* RAJA PADMANAND SINGH BAHADUR *v.* RADHE SINGH. **9. C. W. N. 469.**

189. S. 11.—*S. 13.—Res-judicata—Execution proceedings.*

A judgment debtor is not precluded from raising the plea of limitation to an application for execution although the same plea was raised when a previous application for execution had been made and the application was dismissed for default and the order dismissing the application had disallowed the plea of limitation. *8 Cal., 51, S. C. L. R. 8 I. A. 123, distinguished,* BHOLA NATH DASS *v.* PRAFULLA NATH **5. C. W. N. 80=28 C. 122.**

190. S. 11.—*S. 13.*—Res-judicata—*Execution proceedings.*

The Court ought to facilitate enquiries which are necessary for the purpose of carrying out decrees passed by it, and to accept with readiness any information which shows that the litigants have disregarded any part of the Court's decree, e. g., a part which directed them to hand over to the Court's officer money recovered by them.

When an application for the above mentioned purpose was refused by a Subordinate Judge on the ground that the par-

Sup: Govt. acts (V of 1909) (*Contd.*)

ties were precluded by a similar application made by another person—

Held, that the order of dismissal was wrong. HARI NARAYAN GOKHALE *v.* MORO NARAYAN GOKHALE. **4. B. L. R. 960.**

191. S. 11.—*S. 13.—Mesne profits—Execution of decree.*

Held, that the practice has always been to treat applications to determine mesne profits as applications for execution of the decrees and that the striking off of such applications does not finally decide them, or prevent the decree-holder from making a further application for the determination of mesne profits. 9 M. I. A. 324, 19 Cal, 132 24 Cal. 173, referred to. RAM KISHORE GHOSE *v.* GOPI KANT SHAHA. **23 C. 242**

192. S. 11—*S. 13—Execution of decree—Mortgage—Decree against undefined share of judgment-debtor—Sale of the share without objection—Subsequent suit against the purchaser.*

A mortgage-decree was passed against the rights and interests of the judgment-debtors in a 10-*biswa* share in a certain village. The judgment debtors died before the decree was executed. The decree-holders estimating the rights and interests of a judgment-debtor to be 5 *biswas* 16 *biswansis* got it sold after notice of application to sell was given to the heir of the judgment-debtors. About 10 years after the sale the heir of the judgment-debtors brought a suit against the auction-purchaser for recovery of 1 *biswa* 11 *biswansis* alleging that it was his property and could not have been sold.

Held, that the suit must be dismissed for the plaintiff ought to have objected in the execution-proceedings that the share of the judgment-debtors was wrongly estimated.—*19 All., 480, distinguished. 25 Bom., 337, referred to.* ANNU *v.* DEBI DAS. **W. N. A. 1903, p. 203 = 26 A. 152.**

193. S. 11—*S. 13—Civil Procedure Code (Act XIV of 1882), Sections 13, 287*—Res judicata—*Execution of decree—Decree for sale of property not liable to attachment or sale —Objection not raised in original suit but raised against application for execution—Estoppal—Landlord and tenant—Occupancy holding—Sale in execution of decree.*

The decree-holders obtained a decree upon a compromise for payment of a certain sum of money and, in default for the sale of certain properties.

Amongst the properties specified as liable to sale under the decree were a number of fields described as held by the judgment-debtor on a permanent tenure *(istimrari patta).*

Default having been made, the decree-holders (appellants) applied for execution of the decree by sale of the property mentioned therein. The judgment-debtor objected that certain lands, the sale of which was asked for, were occupancy holdings and that the prayer for the sale of these lands was illegal. Both the executing and the first appellate Courts sustained the objection and disallowed the decree-holders' application for the sale of these lands. On appeal to the High Court

Held, that the judgment-debtor was not justified in raising the objection at this stage of the suit, for the objection could have been validly raised in the original suit in which the decree was passed. That the decree and the sale would not bind third parties. W. N. All. 1892 p. 5 *followed.*

Per Burkitt, J.—According to section 287 of the Civil Procedure Code, it is the duty of the execution Court, should it have reason to believe that property prayed for to be sold, is an occupancy holding, to enter that fact in the proclamation of sale as a warning to the intending purchasers. BASDEO PRASAD *v.* JUTHAN RAM. **W. N. A., 1905, p. 133 = 2 A. L. J. 401—27. A. 634 (F. B).**

194. S. 11—*S. 13*—Res-judicata—*Execution proceedings.*

A decree-holder applied to the Munsiff for execution of a decree by attaching property belonging to the judgment-debtor, but the Munsiff dismissed the application for execution holding that owing to certain insolvency proceedings, he was incompetent to entertain any application for execution of the decree. His order became final as no appeal was taken from it.

A further application was made to the same Munsiff for the execution of the same decree, but it was rejected by the Munsiff as barred by limitation.

Held, that the application was barred by section 13 of the Civil Procedure Code as *res-judicata.*—NABI MUHAMMAD *v.* JWALA PRASAD.—**W. N., A., 1904, p. 197 1 A. L. J. 592 = 27 A. 143.**

195. S. 11—*S. 13—Civil Procedure—13—*

Orders in execution proceedings are governed by principles analogous to those of *resjudicata* and are binding, if not appealed against, in subsequent proceedings in the same Court 3 A. 173, U. B. R. 1897-01 11, 252, 8 C. 51, 81 A. 123, 6 A. 269, 11 I. A. 37, 20 C. 551, 3, A. 141, 11, I. A. 181 referred to.—IBRAHIM BAMBALA *v.* IMAM DIN.—**U. B. R. 1907 P. 1 C. P.**

196. S. 11—*S. 13—Resjudicata in execution proceedings—Limitation—Notice of prior barred application—No further steps—Second application within time.*

A notice under S. 248 of the Code of Civil Procedure was issued upon an application for execution, which was clearly time barred as being more than three years beyond the date of the decree, and nothing further was done till a second application was made for execution of the decree. The second application made within three years from the date of the first, but the judgment-debtor raised the objection that the execution had become time-barred when the first application was made:

Held, that the judgment-debtor's objection was valid and that the mere fact that a

Sup: Govt. acts (V of 1909) *(Contd.)*

notice had been issued upon the first application which was clearly time-barred could not have the effect of reviving the decree.—KAMMAL SINGH *v.* LARAILI.—**2 A. L. J. 67.**

197 S. 11—*s. 13—Execution of decree—Limitation—Res-judicata—Decree more than twelve years old—Order disallowing objection as to limitation.*

During the execution of a decree the judgment-debtor objected that as the decree was more than twelve years old, the application to execute the decree should not be granted. The objection was disallowed. He subsequently made the same objection.

Held, that the order disallowing the objection was final and binding on the parties; the judgment-debtor had no other remedy but to appeal against it and he could not subsequently raise the same objection. *24 All., 282, 24 Mad., 669 followed.* MUHAMMAD HUSAIN *v.* MUZAFFAR HUSAIN KHAN. **A. W. N. 1905 P. 237.**

198 S. II—*S. 13 and S. 257 A—Execution of decree—Agreement varying or satisfying decree—Sanction of Court.*

The Court passing or executing the decree cannot vary it or add to it even if both the parties agree to such variation or addition, except as provided in s. 206 and para 2 of section 210 of the Civil Procedure Code.

An agreement of the kind contemplated by para 2 of section 257 A, of the Civil Procedure Code, which adjusts the decree, will be perfectly valid as the basis for a suit, even if it has not received the sanction of the court provided it does not secure to the decree holder either directly or indirectly payment of any sum in excess of the amount due or to accrue due under the decree.

The object of section 257 A, Civil Procedure Code, is to debar a decree-holder from using the process of Court, though lawfully, as an instrument of oppression and entering into unconscionable bargains with the judgment-debtor in consideration of his postponing the process of execution or otherwise agreeing for the satisfaction of the decree. An agreement entered into without sanction of Court providing for payment of any sum in excess of the decree amount, is "void" not only for the purposes of execution of the decree but for the purposes of a suit also. Such an agreement, if sanctioned by the Court, cannot be regarded as incorporated into the decree; but can be enforced by a separate suit: and where it gives time for satisfaction of the judgment under the first para of section 257 A, Civil Procedure Code, it can only operate to stay the execution under section 244, Civil Procedure Code, for the stipulated period.

When a payment is made in persuance of an agreement sanctioned by Court, it can be recognised by the executing Court only if it be duly certified.

A judgment debtor is precluded when orders are passed after notice to him from subsequently raising the contention that the decree was barred by limitation and the attachment effected made after notice to him and payment made to decree-holder were illegal acts of the Court.

An attachment made after notice to the judgment-debtor is not discharged by the mere fact of the application for execution being subsequently dismissed for default of prosecution.

Where an application for execution of decree is with-drawn after the determination of one of the preliminary questions arising in the case such determination does not operate as *res-judicata* in subsequent proceedings and no appeal lies to get it reversed.

Where an execution petition was filed but execution was stopped in pursuance of an arrangement which was sanctioned by Court—

Held, that the petition was not an application made to take some step in aid of the execution of the decree. VENKATAGIRI IYER *v.* SADAGOPACHARIAR, **14 M. L. J. 359.**

199. S. 11—*S. 13—Execution of decree—*Resjudicata—*Decision that an application is not barred is binding on judgment-debtor in subsequent proceedings.*

When a previous application for execution was held to be not barred by limitation after the judgment-debtor had notice of that application, the judgment-debtor cannot, on a subsequent application for execution, raise the objection that the previous application was barred.—LAKSHMANAN CHETTI *v.* KUTTAYAN CHETTI.—**24 M., 669.**

200. S. 11—*S. 13—Execution of Decree.*—Res-judicata—*Limitation.*

Although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet if an order for execution is made by a competent Court, having jurisdiction to try whether such execution is barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid. An application, for execution of a decree, was struck off on the 15th of January 1894. The next application for execution was not made until the 29th of May 1897. Notice of this application was served on the judgment-debtors, and they filed objections, but on the day fixed for hearing failed to support them, and they were dismissed. The application for execution was, however, ultimately struck off by reason of the non-payment of process fees by the decree-holders.

Held that it was not open to the judgment-debtors on a subsequent application for execution being made to plead limitation in respect to the application of the 29th of May 1897, as a bar to the execution of the decree. *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry* (L. R., 8 I. A., 123), *Behari Lal* v. *Abdul Majid* (All. Weekly Notes, 1897, p. 29), *Lakshmanan Chetti* v. *Kuttayan Chetti*, (I. L. R., 24 Mad. 669), *Bholanath Dass* v. *Prafulla Nath Kundu Chowdhry*, (I. L. R., 18 Cal. 122) and *Dhonkal Singh* v. *Phakkar Singh* (I. L.

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R., 15 All. 84), referred to. *Tileshar Rai* v. *Parbati*, (I. L. R., 15 All. 198) and *Onkar Singh* v. *Mohan Kuar*, (All. Weekly Notes, 1898, p. 96), distinguished.—SHEORAJ SINGH *v.* KAMESHAR NATH. **A. W. N. 1902 P. 63=24 A. 282.**

201. S. 11—*S. 13.—Transfer of Property Act (IV of 1882), Section 90—Mortgage—Execution of decree—Sale of property other than that mortgaged ordered—Sale not invalid for want of order under Section 90 of Transfer of Property Act.*

When an application by the decree-holder for sale of property other than that mortgaged has been made and execution granted after notice to the judgment-debtor, the latter cannot raise objection to the sale on the ground that in the absence of an order absolute under section 90 of the Transfer of Property Act sale of property other than that mortgaged is invalid. LAKSHMI AMMAL *v.* SUBRAMANIA PILLAI. **14 M. L. J., 103.**

202. S. 11—*S. 13.—See Transfer of Property Act IV of 1882, s. 101, No. 716, col. 719.*—**31 C. 370.**

203. S. 11—*S. 13.—Objection to sale proclamation*—See C. P. C., O. XXI, Rules 66, 70—S. 287. **8 C. W. N., 257.**

204. S. 11.—*S. 13*—Res-judicata—*Execution proceedings.*

The principle of *res-judicata* applies to prevent parties raising a second time in the same suit, or in the same execution proceedings, an issue which, in that suit or in the execution proceedings in the suit, had been previously determined. The principle of *res-judicata* does not depend for its application upon the question whether the decision which is to be used as an estoppel, was a right decision or a wrong decision in law or on facts. The defendant-respondent cannot avoid the application of the principle of *res-judicata* by saying that he did not appear at the trial of the suit. The plaintiff, who has got an *ex-parte* decree on proof of his title, or on failure of the defendant to prove a defence, the *onus* of proving which was on him, cannot be deprived of the full benefit of the decree which he has obtained by the fact that the defendant did not appear in Court to protect his own interest. BEHARI LAL *v.* MAJID ALI. **24 A. 138.**

205. S 11—*S. 13—Execution of decree*—Res-judicata—*Decision that decree was executable binding on judgment-debtor in subsequent proceedings.*

Where on a previous application for execution it was held that the decree was executable, the judgment-debtor cannot on a subsequent application for execution raise the objection that the decree was not enforceable—when the judgment-debtor had notice of the previous application but did not contest it. SUBBARAMA AYYAR *v.* NAGAMMAL. **11 M. L. J., 432=24 M. 683.**

205 s. II—*S. 13*—Res judicata—*Execution proceedings.*

Sup: Govt. acts (V of 1909) *(Contd.)*

An order passed in execution proceedings against a judgment-debtor as to the rate of interest after notice to him is binding on him and cannot be re-opened in subsequent proceedings. ALAYAKKAMMAL *v.* ARUNACHALA CHETTY, **12 M. L. J. 67.**

206 s. II—*S. 13*—Res judicata—*Execution of decree—Sale—Order allowing sale—Estoppel.*

The decree did not contain any direction for sale. But subsequent to the passing of the decree, there were applications by the decree-holder, for sale in execution of the decree, and in spite of the judgment-debtor's objections, sale was ordered, the decree having been construed as allowing sale.

Held, that the orders so construing the decree estopped the judgment debtor from raising any contention inconsistent with those orders. ATMAKURU NARASAMMA *v.* ATMAKURU VENKATA NARASAYYA CHETTY, **15 M. L. J. 418.**

207. s. II—*S. 13 - Execution of decree—Objections not raised*—Res judicata.

Where in answer to a claim whether in a suit or an application for execution of decree the defendant or judgment-debtor ought to raise certain defences or objections and has an opportunity of raising them, but does not do so, the decision of the Court adverse to him must be taken as an adjudication upon any defence not so raised just as much as if he had expressly raised them. *13 All., 564; 8 Cal., 51: W. N., 1898, P. 164, referred to.* GHULAM MUHAMMAD *v.* NARAIN DAS, **W. N. A., 1901, P. 32.**

208 s. 11—*S. 13 - Execution of decree*—Res judicata—*Application struck off.*

The dismissal of an application in execution proceedings will operate as *Res judicata* when such dismissal is consequent upon an adjudication of the right litigated between the parties.

The fact that the dismissal of the decree-holder's application was consequent not only upon the adjudication of the right litigated but also upon the ground that in execution proceedings he could not seek for relief by way of declaration as in a regular suit cannot entitle the parties to re-open in further execution proceedings the question of right thus adjudicated upon.

An order merely striking a petition off the files is legally inoperative as a disposal of the petition.

209 S 11 and 48—*S. 13 and 230 Execution of decree—Amendment of application—Application for execution by arrest of judgment-debtor—Amendment of previous application by seeking execution against property—Fresh application—Twelve years rule—Order passed without notice*—Res-judicata.

An application was made on the 30th July 1903 to execute a decree for money passed on the 30th July 1891 by arresting the first plaintiff, one of the judgment-debtors who were all members of the same *tarwad*. In March 1904, the decree-holder applied to amend his previous application for execution by inserting a prayer for the

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attachment of *tarwad* properties. It was granted but without notice to the other judgment-debtors. The properties of the *tarwad* were accordingly attached and their sale was ordered.

Held, that the application of March 1904 to amend and to attach the *tarwad* properties must be treated as a fresh application, and as it was made more than 12 years after the date of the decree, it was barred under section 230 (S. 48) of the Civil Procedure Code.

That as the order for sale of the *tarwad* properties was passed without notice, it did not opperate as *res-judicata*, and execution against these could not be proceeded with. CHERATHI AMMA *v.* RAMAN NAIR. **15 M. L. J. 243.**

210. S. 11.—*S. 13*—Ex-parte *order appeal*—Res-judicata—*Reversal of decree—Restitution Interest, Claim for, on the amount to be recovered—Notice not specifying claim.*

A decree which had been obtained against the appellant by the respondents was reversed and the appellant applied to the Subordinate Court for restitution of the amount which had been collected from him under the decree so reversed, claiming at the same time interest thereon at 12 per cent. per annum. Respondents not having appeared on the day fixed, an *ex-parte* order granting the interest at the rate claimed was passed in favour of the appellant, and execution was ordered by arrest of the judgment-debtor but process-fee not having been paid no further action was taken. The appellant moved the Court again in the same matter, and the respondents appeared and objected to the grant of interest at 12 per cent. The Subordinate Judge decided the matter in favour of the appellant, but on appeal the District Judge reduced the interest to 6 per cent. On further appeal to the High Court it was contended that the question of interest having been decided by the Subordinate Judge on the first application of the appellant the matter was *res-judicata* and the order of the District Judge was wrong. It was also contended that no appeal lay to the District Judge.

Held, that as the order of the Subordinate Judge decided the only question of dispute between parties, it was appealable. The original order did not operate as *res-judicata* so as to debar the opposite party from subsequently applying for the reduction in the rate of interest, for the notice of the first application to the respondents did not show that interest was claimed by the appellant, (11 B. 537 *referred*). NARAYANA PATTAR *v.* GOPALA-KRISHENA PATTAR. **M. L. J., 1905. p. 247.—28. 355.**

211. S. 11—*S. 13*—Res-judicata—*Execution of decree—Limitation Act (XV of 1877). Schedule II, Article* 180—*Execution of decree—Decree of High Court*—"*Revivor*."

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An order passed upon application filed for transmission of a decree passed by a Chartered High Court to another Court for execution, after notice under section 248 of the Civil Procedure Code has been served on the judgment debtor, wherein a person was treated as a decree-holder and which allowed execution to issue as prayed in the application, amounts to a revivor of the decree whithin the meaning of article 180 of the second Schedule to the Limitation Act. (24 Cal., 241: 30 Cal., 979, 7 Mad., 540; referred to) and the judgment-debtor can not on a subsequent application object that the person is not a decree-holder. UMRAO SINGH *v.* LACHMI NARAIN. **A. W. N. 1904. P. 51=26. A. 361.**

212. S. 11—*S. 13*—Res judicata—*Execution proceedings.*

The Court ought to facilitate enquiries which are necessary for the purpose of carrying out decrees passed by it, and to accept with readiness any information which shows that the litigants have disregarded any part of the Court's decree, e. g., a part which directed them to hand over to the Court's officer money recovered by them.

When an application for the above mentioned purpose was refused by a Subordinate Judge on the ground that the parties were precluded by a similar application made by another person—

Held, that the order of dismissal was wrong and the principal of *res-judicata* had been too strictly applied. HIRA NARAYAN GOKHALE *v.* MORO NARAYAN GOKHALE. **4. B. L. R. 930.**

213. S. 11—*S. 13—Execution of decree—Procedure*—Res-judicata.

The Chapter VII of the Civil Procedure Code (dealing with consequences of non-appearance of parties) does not apply to execution proceedings.

When an application for execution is dismissed for default of prosecution, an application to restore the original application cannot be entertained. The decree-holder should file a fresh application for execution.

Orders passed in execution department are binding on parties, even if invalid, if they are passed after notice to them and no steps are taken to set the orders aside by appeal or otherwise. DULO RAM *v.* PALA MAL. **139 P. L. R. 1905.**

214. S. 11—*O IX R 9, O. XXVI R. 13, 14—S 13, 103, 396—Execution of decree—Partition suit—Preliminary consent decree, not given effect to—Fresh suit for partition.*

The plaintiff in 1890 brought a suit for partition. The suit was compromised, and it was settled that the plots 1, 2 and 3 were to be divided in a certain manner. An *Ameen* was appointed to effect the partition, but he did not partition the disputed plots. Subsequently the parties did not appear and the execution proceedings then pending were

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dismissed for default on the 19th June 1894.

The present suit was instituted on the 24th January 1903 for partition of plots 1, 2 and 3.

Held, that the suit is not barred under sections 13 and 103 (S. 11, O. IX R. 9) Civil Procedure Code. There was no final decree passed in the previous suit. The decree that was passed on the compromise was a preliminary one which never reached the stage of a final decree under section 396 (O. XXVI R. 13 and 14) Civil Procedure Code.

That section 103 (O. IX R. 9) Civil Procedure Code has no application to execution proceedings and the previous suit was not dismissed under section 103 (O. IX R. 9).

When a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent for the parties or any of them, if they still continue to be interested in the joint property, to bring another suit for a declaration of a right to partition in case their right to partition is called in question at a time when by reason of limitation or otherwise, they cannot put into effect the decree first obtained. 13 *All.*, 313 *followed.* 3 *Bom.*, *L. R*, 94 *distinguished.* MADAN MOHAN MONDUL *v.* BAIKANTA NATH MONDUL. **10 C. W. N., 839.**

215. S. 11.—*S. 13*—Ex-parte *decree*—Res-judicata.

In this case the person against whom the plea was taken the decree passed in previous suit was *ex-parte.*

Held, that an *ex-parte* decree may not be *res-judicata.* ASHUTOSH ROY *v.* ABDOOL. **28 C. 676, at 679.**

See also S. 11, 24 A. 138 supra.

216. S. 11.—*S. 13—Suit or issue*—Res-judicata.

This section bars a second trial not only of a suit but also of an issue. The subject matter of both the suits need not be the same for the purposes of this section. CHANDI PRASAD *v.* MAHARAJA MAHENDRO SINGH. **23 A. 5, at P. 8.**

217 s. 11—*S. 13*—Res-judicata—*Matter directly and substantially in issue—Question of law—Trustee—Power to appoint another trustee—Trusts Act (II of 1882), Section 73.*

An adjudication upon a point of law though binding upon the parties in any future suit *quoad* the same subject matter is not conclusive even between the same parties when the subject-matter of the second suit is quite different. 5 *Mad.*, 304, 11 *Mad.*, 393, 22 *Bom.*, 669, 26 *Bom.*, 30 *followed*; 27 *Cal.*, 318, *referred to.*

When section 73 of the Trusts Act is not applicable a trustee as such has no power to appoint any person as trustee either in his own place or to act jointly along with him in the absence of a power under the instrument creating the trust or by virtue of some statutory provision. GOPU KOLANDAVELU CHETTY *v.* SAMI ROYAR. **15 M. L. J. 1905, P. 466 = 28 M. 517.**

Sup: Govt. acts (V of 1908) (*Contd.*)

218. s. 13—*O. XXI R. 58, O. XXI R. 63, 13, 278-283—Limitation Act (XV of 1877), Sch. II, Art. 11—Contract Act (IX of 1872), Section 69—Attachment. Objection against—Dismissal of Objection—Declaratory suit—Limitation—Payment of decretal debt after expiry of limitation period for declaratory suit* Re-judicata—*Question of law. Erroneous decision on—Voluntary payment—Mortgage—Payment by mortgagee—Right against owner.*

In July 1890, the father of the plaintiffs mortgaged certain lands to certain parties whose interest afterwards vested in the defendants. In July 1895, he executed and registered a sale-deed by which he purported to sell the lands in question to the plaintiffs. In a suit against him the lands were attached. The plaintiffs preferred a claim to the attached property. The claim was rejected by an order, dated 22nd February 1896, made under section 283 of the Civil Procedure Code. In July 1898, the father purported to sell the lands to the defendants. In October 1898, when the property was put up for sale in pursuance of the attachment, the defendant No. 1 paid off the amount due and the attachment was raised. The plaintiffs brought the present suit to redeem the lands. The order, dated the 22nd February 1896, rejecting the plaintiffs' claim to raise the attachment ran "The sale seems to be collusive, claim rejected." Prior to this suit the plaintiffs had unsuccessfully sued for redemption of other lands covered by the same sale deed, it having been held that the suit was barred by limitation of one year. It was pleaded by the defendants that the present suit was also barred by limitation for not having been brought whithin one year from the date of the order rejecting the claim. The plea was disallowed on the ground that the order had not been passed after investigation.

Held, that the claim must be held to have been rejected after investigation and the defendants' plea in the previous suit was wrongly disallowed, but the question being a mixed question of law and fact the matter was *res-judicata* and the plaintiffs' suit though barred must consequently be held as not barred, and that they were entitled to redeem. That the bar by limitation on the expiry of one year after the order rejecting the claim was not removed by the payment of the decretal debt.

Held, also that the plaintiffs could not claim from the owner the amount paid by them to raise the attachment, for the money was paid by the plaintiffs to clear their own title to the property under attachment and must be considered as a voluntary payment and not a payment for or on behalf of the owner.

That a prior erroneous decision on a question of law cannot have the force of *res-judicata*, but where the prior decision was as to a mixed question of law and fact it will operate as a bar. KAYYANA CHIT-

Sup: Govt. acts (V of 1908) *(Contd.)*

TEMMA *v.* DOOSY GAVARAMMA. **16 M. L. J. 136 = 29 M. 225.**

219 S. 11—*S. 13*—Res judicata—*Question of law—Decision in former suit based on overruled case—Bengal Tenancy Act (VIII of 1885), sections 67, 179—Landlord and Tenant—Interest on rent.*

The plaintiff brought a suit for rent against the defendants who were permanent tenure-holders in a permanently settled area. Under their *kabuliyat* they had contracted to pay interest on arrears at the rate of twenty-four per cent. per annum.

In a previous suit between the same parties the Court basing its decision upon *26 Cal., 130, S. C., 3 C. W. N., 36,* had made a decree in favour of the pliantiff, but with interest on the arrears at the rate of twelve per cent. per annum only. Before the present suit was filed the ruling relied on was overruled by *29 Cal., 674* (F. B.), *S. C., 5 C. W. N., 438* (F. B.)

The lower Court disallowed the higher rate of interest holding that the question was *res-judicata.*

On appeal to the High Court—

Held, that section 67 of the Bengal Tenancy Act does not control section 179, and the erroneous decision in the former suit did not operate as *res-judicata,* and that the contract for payment of interest at higher rate was enforceable. *5 Mad., 304, 22 Bom., 669 distinguished.* ALIMUNNISSA CHOWDHRANI *v.* SHAMA CHARAN ROY. **9 W. N. C. 466 = 32 C. 749.**

See Contra Narain Mahto v. *Tekait Brojo Behary Singh. 9 C. W. N. 472.*

220. S. 11.—*S. 13—The decision of a law question is as well a* res-judicata *as a decison of matters of fact.*

During a litigation for pre-emption with a third party, the defendants who had instituted that suit agreed with the plaintiffs that the latter should act as the agents of the former and file in the Chief Court an appeal at their own expense and on success they would be given half of the land in dispute in consideration of the same. The plaintiffs pursuant to the agreement filed the appeal which was successful. Immediately after the result of the appeal the defendants sued the plaintiffs for the cancellation of the aforesaid agreement alleging that it was without consideration and unenforceable in law. All the issues in the case were decided against the Defendants and they did not appeal against that decision.

The plaintiffs now sued for half the land on the basis of the aforesaid agreement. The defendants raised the plea of law and procedure against this suit. The first court held that this question was barred by virtue of the first suit and decreed the plaintiffs claim The devisional judge, however, held in appeal that it being purely a law question could not operate as a resjudicata and accepted the appeal.

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Held that the judgment which was passed in the previous suit and decided a mixed question of Law and fact operated to bar the present suit. As between the same parties the aforesaid agreement has once been held to be a valid one. The same question between the same parties could not subsequently be re-opened in a second suit. Mr. Justice Rattigan discussed the Law and made observations on the point whether a decision on a pure question of Law could, if at all, serve as a res-judicata, and if so how far—15. A. 327, 22. B. 669, 28. C. 318, 28. C. 323, 32. C. 749, 10. C. 1087, I. C. W. N. 687, 5. M. 304, 14. M. 312, 11. M. 393, 28. M. 517, 26. M. 104, 55. P. R. 1896, 92. P. R. 1902 (F. B.) *referred to.* MUAZAM SHAH *v.* ALAM KHAN, **44. P. R. 1908.**

221. S. 11—*S. 13—Question of Law—Decision erroneous in law over ruled by a latter decision 9. O. C. 243. supra.*

222. S. 11—*S. 13—Question of Law—Erroneous opinion on a point of Law—8. B. L. R. 932 = 31. B. 128 supra.*

223. S. 11—*S. 13—Matter of Law or fact.*

The question whether a kabuliyat is binding on a party to the suit is a question of fact for the purpose of res-judicata —WOOMESH CHANDRA MAITRA *v.* BARADA DAS MAILTRA. **28 C. 17 at 20.**

224. S. 11 = *S. 13.*

In the previous suit the plaintiff claimed *inter alia* rent in respect of betel-nuts for the year 1897-98, and in the plaint it was stated that the defendants were liable to pay *thal* (rent) according to practice He did not specifically allege that *according to practice* he was entitled to rent in respect of the particular kinds of grains and fruits mentioned in the plaint not only for the year 1897-98 but for every year, nor did he state that the rates mentioned in the plaint were the rates prescribed by practice and therefore applicable to all years The claim was decreed.

Held, that a subsequent claim for *thal* for the year 1898-99 was not res-judicata.—22 Bom., 669 and 5 Mad., 304, *referred to* VISHNU VASUDEV JUVEKAR *v.* RAMLING BHIKLING. **3 B. L. R. 450.**

225 S. 11—*S. 13.*

A suit for compensation was brought in the Court of *Munsif* at Goas in 1868 by the plaintiff (*putnidar*) against the defendant's predecessors (*durputnidars*) upon the basis of a *durputni kabuliyat,* which stipulated that the *durputnidars* would deliver certain articles to the plaintiff's landlord, or in default they would compensate the plaintiff for any damage she might sustain. The Court (which had no jurisdiction to try suits for rent) gave a decree to the plaintiff for damages which she had sustained for the *durputnidars'* default. In a subsequent suit brought by the same plaintiff against the same defendants in the Court of *Munsif* at Moorshidabad for

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arrears of rent, as well as for compensation for breach of the aforesaid contract, it was contended on behalf of the defendants that the decision in the previous suit, so far as compensation was concerned, could not operate as *res-judicata*.

Held, that, although the Court of *Munsif* at Goas was not competent in 1868 to entertain a suit for arrears of rent, it was competent to entertain a suit for compensation for breach of contract, and as the previous suit was not a suit for arrears of rent nor was the claim in the subsequent suit, so far as it related to the amount of compensation under the stipulation, a claim for arrears of rent, so the decision in the previous suit was a decision of a competent Court, and it would operate as *res-judicata*.

Held, also, that on the previous suit a particular stipulation contained in a particular *kabuliat* having been held to be valid as between the parties, it was not open to the Court subsequently to try the issue, whether that particular stipulation was valid or not, the question being a mixed question of law and fact.

A decision in a previous suit on a question of law, even if erroneous, would operate as *res-judicata* in a subsequent suit. 5 *Mad.*, 304. *dissented from.* BISHNU PRIYA CHOWDHURANI *v.* BHABA SUNDARI DEBYA, **28 C. 318.**

226. s. 11—*S. 13—Matter directly and substantially in issue—Suit by lessee from grantee—Plea of resumption by Zamindar found against him—Subsequent suit by Zamindar.*

Where in a prior suit between defendants—lessees and the Zamindar, the Zamindar pleaded that he had resumed the lands, but the suit was decided against the Zemindar on the ground that there was no resumption in fact,

Held, that in a subsequent suit by the Zamindar for possession of the lands on the ground that he had a right to resume the land, the question of the right to resumption was involved indirectly in the former suit, though not adjudicated upon and the Zamindar not having established his right to resume in the prior suit, his present suit is barred by *res-judicata* to the extent of the right of the lessees to be in possession. SRI RAJA SOBHANADRI APPA RAO BAHADUR *v.* SRI RAJAH VENKATA NARASIMHA APPA RAO BAHADUR. **26 M. 403, at 410**

227. s. 11.—*S. 13—Matter directly and substantially in issue*—Res-judicata.

Held, that a subsequent suit to establish title to, and recover possession of, the disputed land was not barred by *res-judicata* by reason of the dismissal of a previous suit for rent in which the defendant had denied the title of the plaintiff. 26 Cal. 428, followed, 15 Cal., 756 refrd to. NITTA NUNDA SARKAR *v.* RAM NARAIN DAS. **6 W. N. C. 63.**

228. s. 11—*S. 13—Matter directly and substantially in issue—Issue.*

Sup: Govt acts (V of 1908). *(Contd.)*

The expression will include not only the cause of action on which the suit is based, but also all matters which are, or ought to be, put in issue for the determination of the cause of action, RAMASWAMI AYYAR *v.* VYTHINATHA AYYAR. **13 M. L. J., 448=26 M. 760, at 769.**

229. s. 11—*S. 13.—Matter directly and substantially in issue.*

After the death of one K, a Mohammadan one of his four sons sued his three brothers and six sisters for partition and possession of a ¼ share of the deceased's property. He alleged that firstly by virtue of an award against all the defendants (as they had made a reference) he should get his share, and in default thereof he should under the custom be given a fourth share of inheritance as daughters were not heirs and failing that he must get his share in accordance with the Mohammadan Law. The first court held the award good against all the brothers but rejected it against the daughters holding that they were not free agents to the reference. But it held that the custom excluded the daughters and therefore their consent to the reference was not required and it decreed the plaintiffs claim according to the award.

The plaintiff prayed for no declaration against the daughters nor did the decree give any against them, nor had they any property in their possession, nor were they ordered to surrender any. After this four of the six daughters brought separate suits for their shares under the Mohammadan Law, the defendants set up *res-judicata* as the previous decision excluded the daughters from inheritance by custom and that by their not appealling it had become final.

Held, that the suit was not based by any rule of *res-judicata*. The former suit proceeded on the basis of the award which bound the brothers who had all the property in dispute in their possession, and the issue relating to the daughter's right was unnecessary for that decision which proceeded on the award and bound the brothers who held the property, and the daughter's rights were not in question in the claim upon the award, but the Court after holding the award binding on the brothers itself raised the question gratuitously and therefore its finding could not operate as *res-judicata*.

Held, further that a party who pleads *res-judicata* must prove it, and the Court is to see whether the point was necessary for the decision of the case upon the ground upon which the final decision rested and was directly in issue in the former litigation between the parties.

The case 96 P. R. 1895 relating to the causes of action in the alternative and 157 P. R. 188, 7 A 603. 23 P. R. 1897, 31 P. R., 1898, 20 P. R. 1891, 15 B. 104, 25 C 571, 27 C. 78, 9 B. 75, 9 C. 439 and 21 A. 117 were referred to and discussed. The case 41 P. R. 1899 in which it was held that a question of jurisdiction taken by the court sued Moto

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and not put in issue was not *res-judicata* was referred to; and 39 P. R. 1900, 85 P. R., 1905, 25 C. 571, 28 C. 78, 13 B. 25, 23 P. R. 1905, 121 P. R. 1880, 140 P. R. 1890, 16 C. 173, 92 P. R. 1902, 19 P. R. 95 were also discussed at length. RAJAB-UN-NISSA *v* HABIB BAKHSH. **57 P. R 1907.**

230. S 11.—*S. 13—Question directly and substantially in issue—Omission to raise ground of defence in former suit.*

H, an Oudh *taluqdar*, executed a deed of gift in 1859 by which he purported to give to *R.*, (the only son of his elder son who was dead) the whole *taluq* with the exception of a few villages. In 1871 a suit brought by *H* against *R*, to have it declared that notwithstanding the deed of gift the proprietary right in the *taluq* was vested in him was settled by a compromise, by the terms of which various portions of the *taluq* were to be held for life by *H, R* and *D* the mother of *R*, and on the expiration of those three lives *L* (the younger son of *H*) and his heirs were to succeed to the whole of the estate. This compromise was embodied in a decree of Court. In 1876 *H* and *L* brought a suit against *R* and his wife to cancel a deed conveying a portion of the *taluq* to the latter as being in excess of the powers of alienation given to *R* by the compromise of 1871. The defendants in that suit did not contest the validity of the compromise, but upheld the alienation as valid, and asserted that *L* had no such interest in the property as entitled him to sue, and issues were raised on those points. The Court held that *L* was "a certain remainder-man under the terms of the agreement," that he "or his representatives will certainly inherit the estate sometime or other," and that he was entitled to sue, that the alienation was void as against *H* as being in excess of the power reserved by the compromise to *R*, who was held only entitled to alienate for his life; but that no right had yet accrued to *H* and *L* to disturb the possession of *R's* wife. In 1889 after the deaths of *H, D*. and *L*, a portion of the *taluq* was attached by creditors of *R* and sold in execution of decree without limit of title. In a suit brought by the son of *L* in 1896 against *R*, his judgment creditors, and the purchaser at the sale to have it declared that the plaintiff was entitled as the immediate reversioner to an absolute estate in the portion sold on the death of *R*, and that after *R's* death the sale would be inoperative as against him, the defendant *R* set up the defence that he had by virtue of the deed of gift of 1859 an absolute title which was not displaced by the effect of the compromise and the decree embodying it.

Held, by the Judicial Committee (confirming the decision of the Judicial Commissioners of Oudh) that the decision in the suit of 1876, as having established between *R* and *L* (the father and predecessor in title of the plaintiff) that *R* had only a life interest in the *taluq*, and that *L* (and therefore also the plaintiff as his heir) had a vested interest in remainder, was *res-judicata* in the present suit. RAMPAL *v*. RAM PRASAD SINGH. **1 C. L. J. 46=2 A. L. J. 237=32. I. A. 17 (P. C.)=27. A. 37.**

231. S. 11—*S. 13—Matter directly and substantially in issue—Different causes of action—Custom—Hindu Law—Succession of Daughters and Collaterals—Duty of mortgagee to keep account of rents and profits—Interest.*

A person suing for possession of land as mortgagee need not put forward in the suit his claim to succeed to the property as a reversioner, and his omission to do so does not prejudice his right in any way, and S. 13 (S. 11) of the Code does not apply to such cases.

Held, that the parties to the suit who were Sarsut Brahmans of Gopalpura village of Amritsar District, though owned land for generations, were governed by Hindu Law, and not by custom, and that daughter's sons excluded near collaterals according to Hindu Law.

In a suit for redemption, the Chief Court held that interest and profits realized by the mortgagee balanced each other, where the mortgagee had failed to keep accounts of the profits realized from the mortgaged property. AMIN CHAND *v*. TIRATH RAM. **95 P. L. R. 1908.**

232. S. 11—*S. 13—See Specific Relief Act I of 1877, S. 42 No. 102, col. 425—5 C. W. N., 445.*

233. S. 11.—*S. 13—Matter directly and substantially in issue—Finally decided—Dismissal of suit for default—Limitation Act (XV of 1877), Schedule II, Articles 49, 116.*

The plaintiff sued the defendant for accounts on the allegation that the plaintiff was the owner of a business of which the defendant was the Honorary Secretary, that the defendant had acknowledged the plaintiff's title by executing a release by which certain mutual agreements were entered into between them with regard to the accounts of the business. It was pleaded for the defendant that the release was a *benami* one and the suit was barred by limitation under article 49 of the Limitation Act. Previously the present defendant had sued the present plaintiff for a declaration that the release was a *benami* one, but the suit was dismissed in default of appearance of the present defendant, then plaintiff in the case after his evidence was partially recorded.

Held, that the suit was governed by article 116 and not 49 of the second schedule of the Limitation act and was not barred by limitation; that the question as to the release being *benami* was barred by *resjudicata*. ROMA NATH DAS *v*. MOHESH CHUNDER PAL **9 C. W. N., 679. P. 688.**

234. S. 11—*S. 13*—Res-judicata—Kabuliat—*Illegal cesses. Agreement to pay—Bengal*

Sup: Govt. acts (V of 1908). (*Contd.*)

Tenancy Act (VIII of 1885) Section 67, 74 and 179.

The plaintiff instituted a suit for rent in which he sought to recover certain cesses on the ground that the defendant had in his *kabuliat* agreed to pay them. The defendant denied his liability to pay any cesses on the ground that in a previous suit between him and the plaintiff it was decided that these cesses could not legally be recovered.

Held, that the right to these cesses was barred by the rule of *res-judicata*. RAJA PADMANAND SINGH BAHADUR *v.* RADHE SINGH. **9 C. W. N., 469.**

235 s. 11—*S. 13*—Res-judicata—*Rent suit —Question of title.*

In the previous suit the plaintiffs asked for a decree for rent against the defendant on the ground of the latter holding certain pieces of land measuring 7 *bighas* at the rate of Rs. 7 per annum. The plaintiffs alleged that the defendant was in occupation of the lands in suit as a tenant paying a seperate *jama* of Rs. 7 though he held another *jama* of other pieces of land at Rs. 33 and odd per annum, that the defendant had relinquished the land and that he subsequently obtained a re-settlement. The defendant denied that the land in suit had ever been held by him at a *jama* of Rs. 7. He also denied the surrender of the land and the allegation of re-settlement. The Court held that the allegation of the plaintiffs that the defendant had obtained a re-settlement was false and that the relationship of landlord and tenant did not exist. The Court also decided the question whether the land in suit was included in the holding of Rs. 33 and odd against the plaintiffs. Having lost the suit for rent the plaintiffs instituted the present suit for recovery of possession of the land which they alleged had been held by the defendant at the *jama* of Rs. 7. They based their cause of action on denial of tenancy by the defendant and their title as landlords and surrender by the defendant. The defendant raised the same plea that the land in suit was part of his holding of Rs. 33 and odd and also contended that the Court was incompetent on the principles of *res-judicata* to try the question whether the land was part of the holding of Rs. 33 and odd.

Held, that the suit was not barred by *res-judicata.*

The decisions on the question of *res-judicata* when the previous suit was one for recovery of rent may be classed under two heads. The first class of cases is when the defendant, the alleged tenant, sets up his own rights to the land and denies the relationship of landlord and tenant, denying the plaintiff's title to the land and the substantial issue raised is—does the land covered by the suit belong to the plaintiff or the defendant. The dicision in the suit operates as a bar to a subsequent adjudication of the plaintiff's title, for the title of the plaintiff is directly and substantially in issue in the former suit. The second class of cases is where the defendant either sets up the title of a third person, and denies the relationship of landlord and tenant, or where the defendant pleads that he is not either in occupation of the land, or that the tenancy which existed had expired.

In this class of cases the only issue is:—Did the relationship of landlord and tenant exist between the parties during the years covered by the suit? And the decision does not bar the subsequent suit, for the question of title in the previous suit was no more than subsidiary to the main question. *21 W. R., 349, 15 Cal., 756, 25 Cal., 136, 24 Cal., 569, 11 Cal., 301, 3 W. N., Cal., 266,* s. c., *26 Cal., 428 referred to.* SAHADEB DHALI *v.* RAM RUDRA HALDAR. **10 C. W. N. 820.**

236. s. 11—*S. 13—Matter Directly and substantially in issue the same, though the subject matters different.*

For the application of the principle of *res-judicata*, it is not nesessary to shew that the subject matter of the former suit was the same as that of the subsequent suit in which it is sought to be applied, but that the question, the trial of which is sought to be barred in the subsequent suit, was directly and substantially in issue in the former suit subject to the specified qualifications. SITANATH MIDDA *v.* BASUDEB MIDDA. **2 C. L. J. 540.**

237. s. 11—*S. 13—Matter in issue or subject matter, criterion of* Res-judicata.

It is the matter in issue in the suit and not the subject-matter of the suit that forms the essential test of *res-judicata.*

In the previous suit the plaintiff who was assignee of the Government Revenue, instituted a claim for arrears of Government Revenue in respect of *Khata* No. 47 in *Mouza* F., and also for interest due on the arrears. The issue whether the defendant was liable to pay interest on arrears of assigned land-revenue was heard and determined, and the final determination was that the defendant was liable. In the present suit claim was for arrears due on account of *Khata* No. 29. The same matter, namely, whether the defendant was liable to pay interest upon arrears of Government Revenue was put in issue. The title under which the plaintiff claimed the arrears of Revenue, whether they accrued due out of *Khata* No. 29 or *Khata* No. 47, was one and the same title.

Held, that the decision as to interest in the previous suit operated as *res-judicata* in regard to the interest claimed in the present suit. 2 Q. B. D., 574 (1891; [illegible], 264; 10 Mad., 494; 11 All., 148; [illegible], *referred to.* CHANDI PRASAD *v.* MAHARAJA MAHENDRA SINGH A. W. N., **1901, p. 177 24 A. 112 at 113.**

238 s. 11—*S. 13—Directly in issue—Points to be necessarily decided, though no actual decision expressed—Res judicata.*

It is necessary to decide the nature of a tenancy before settling the rent, so where a Settlement officer fixes the rent he must be

Sup: Govt. acts (V of 1908) *(Contd.)*

deemed to have decided the nature of the tenancy and the same question cannot be raised again between the same parties.—DURGA CHARAN LAL *v.* BASIR MANDAL. **6 C. W. N. 239.**

239 S. 11—*S. 13—Res-judicata—Decision of a material issue—Mortgage—Interest recoverable up to date of realization.*

The first suit was brought for a partition of the family property and a mortgagee of the property was impleaded as a defendant for the express purpose of obtaining a decree that the mortgage was not binding on the son of the mortgagor. The entire debt was held binding on him.

Held, that in a subsequent suit by the mortgagee the son was bound by the decree in the previous suit to pay the amount then found due. 8 *Mad.*, 83, *followed*

A mortgagee is *prima facie* entitled to claim interest not merely up to the date fixed for payment but also up to the date of realization. 26 *Cal.*, 39 and 21 *All.*, 361, *followed* KRISHNASWAMI AIYANGAR *v.* SRINIVASA AIYANGAR **M. L. J. 1901 p. 7.**

240. S. 11.—*S. 13*—Res-judicata—*Order of reference to Chambers passed by consent of Parties—Subsequent claim for damages not allowed.*

When in a suit for dissolution of partnership with the consent of parties an order of reference to Chambers was made, in order that the accounts of the partnership might be taken.

Held, that the order of reference to Chambers was an adjudication by consent on the question of the right of the plaintiff in that suit to a decree for dissolution and, on the alleged right of the defendants in that suit to damages for dissolution before the expiry of the term fixed and the parties were not at liberty to go behind that order in a fresh suit. A fresh suit filed by the defendants was dismissed as barred. NAGASAWMY AIYAR *v.* RAMAIYAR. **12. M. L. J. 445.**

241. S. 11.—*S. 13—See Transfer of Property Act IV of 1882, S. 68, No 385, Col: 625—6. B. L. R. 258.*

242. S. 11.—*S. 13—Directly and substantially in issue—Suit on a surety bond against a cash-keeper and the surety for defalcation dismissed on preliminary points—Suit on the debt due no Bar.*

Where *A* was employed by *B* as his cash-keeper and *A* and his father *R* executed a bond to *R* as surety for the proper delivery of monies received by *A* for *B*, and *B* afterwards took two others as partners and on defalcation by *A* after the two partners, came in, *B* and his partners sued *A* and *R* on their surety bond and the suit was dismissed because under S. 260 of the Contract Act the surety bond was discharged.

Held, such dismissal could not affect any cause of action based on the debt against *A* and *R*. NEEL KOMUL MOOKERJEE *v.* BIPRO DASS MOOKERJEE. **28 C. 597, P. 607.**

Sup: Govt. acts (V of 1908) *(Contd.)*

243. S. 11—*S. 13—Rent Recovery Act (VIII of 1865), Sections 7, 8 and 9—Limitation Act (XV of 1877), Schedule II, Articles 110 and 116—Landlord and Tenant—Rent. Suit for—Necessity of tender of* patta—Res-judicata—*Limitation.*

Under Section 9 of the Rent Recovery Act a landlord can maintain a suit for the recovery of rent though there has been no exchange of *patta* and *muchilika* provided he had tendered such a *patta* as the tenant was bound to accept.

Where prior to the institution of a previous suit for arrears of rent the landlord had tendered to the tenant a permanent *patta* fixing the rent at the rate claimed in the present suit and it was decided in that suit that the tenant was bound to accept that *patta*, and that accordingly he should accept it and execute a *muchilika*—

Held, that the decision operated as *res-judicata*, and the present suit was not open to the objection that no *pattas* and *muchilikas* had been exchanged for the *fasli* for which rent was claimed in the present suit.

A registered *patta* tendered, but which has been refused, cannot be regarded as, or operates as, a contract entered into between the parties within the meaning of Article 116 of the second schedule of the Limitation Act. Suit based on such a *patta* is governed by Article 110. RAMA KRISHNA CHETTIAR *v.* APPA ROW. **13 M. L. J., 485.**

244. S. 11—*S. 13*—Res-judicata—*Point not decided in prior suit—Letters Patent, article 15—Appeal jurisdiction to hear merits of the case generally.*

When an appeal is heard by a Bench of two judges who do not concur in varying or reversing the decree appealed against and the decree is affirmed in accordance with the provisions of section 575, an appeal lies under Article 15 of the Letters Patent 10 *Cal.*, 814, *followed.*

On the hearing of such appeal the merits of the case may be dealt with and the appeal is not confined to the point on which the judges of the Division Bench differed in opinion—*1 All., 181, 4 B. L. R., A. C. 86, referred to 20 All., 258, distinguished.*

Held, that a reasonable compromise assented to by all the adult members of the family was binding on the family.

Held, that a decision awarding maintenance does not preclude fresh decision in a subsequent suit that the right to receive maintenance was lost by subsequent events which had not happened at the time of the prior suit. KUNNHUNNI *v.* SRIVALLABHAN. **M. L. J. 1901 p. 10.**

245. S. 11—*S. 13—Decision on question of law—Same subject-matter in issue in subsequent suit.*

B executed a bond to A promising to pay the amount due under a decree in certain insalments, without obtaining the permission of the Court under S. 257A of the Civil Procedure Code. A sued B on the bond for two instalments. The suit was

Sup: Govt. acts (V of 1908) *(Contd.)*

dismissed on the ground that the bond was invalid for want of permission under S. 257A of the Civil Procedure Code. Some time after, a second suit was brought, on the basis of the same bond, for some more instalments. The defence was that the judgment operated as *res-judicata*, on the question of the validity of the bond.

Held the second suit was barred by the rule of *res-judicata* even though the decision in the first suit might be erroneous, the validity of same bond being in issue between the parties in both suits and the other conditions, as regards *res-judicata*, having been satisfied in the case. It is not every decision of a question of law between the parties, which is binding upon them in a subsequent suit, but a previous decision of a question of law, which affects the subject-matter of the subsequent suit or creates a legal relation between the parties or defines the status of either of them is as binding upon them as a previous decision of a question of fact, if the other requirements of the rule of *res-judicata* are satisfied. (15A 327, 22 B. 669, 10 C. 1087, 15 C. 756 P. C. 28 C. 318, 1 C. W. N. 687 15 M. 403, 11 M. 393 refd. to 5 M 304 *dissented).* M. MOHAMMAD BHADUR *v.* RAM PERSHAD. **8 O. C. 37.**

246 S. 11—*S. 13—Matter directly and substantially in issue—Bengal Tenancy Act (VIII of 1885), S. 69, applicability of—Rent, deposit of—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 2 (a)—Onus—Notice, service of by post, presumption—Rent due to—Joint Hindu family—Claim joint and indivisible—*

S. 13 does not preclude a court from trying an issue whether the rent of the holding is payable entirely in cash or partly in cash and partly in kind, as it was not directly and substantially in issue in a previous litigation between the same parties, where the substantial relief sought was a declaration that the appraisement made by the Collector under S. 69 of the Bengal Tenancy Act was invalid. MIR TAPURAH HUSSAIN *v.* GOPI NARAIN. **7 C. L. J 251.**

247. S. 11.—*S. 13*—Res-judicata—*Competent Court—Prior decision in a case in which second appeal did not lie does not operate as* res-judicata *in a subsequent suit in which second appeal is competent.*

Held, by the Full Bench, that a decision by a Munsif in a case in which second appeal did not lie cannot operate as *res-judicata* in a subsequent suit in which a second appeal is competent. AVANASI GOUNDEN *v.* NACHIAMMAL **16 M. L. J. 41=1. M. L. T. 25=29. M. 195.**

248. S. 11.—*S. 13*—Res judicata—*Matter directly and substantially in issue—Finally decided—Claiming under the same title—Same parties—Suit by reversioners against widow for declaration that alienation by her in favor of her daughters was invalid—Daughters not made parties—Decision not binding on daughters.*

Some of the reversioners to the estate of a childless male proprietor sued for a declaration that the alienation made by his widow in favor of one of his sons-in-law was invalid as against their reversionary rights.

Held, that the decision in the suit as to the question of succession which arose on the widow's death, was not binding on the daughters of the proprietor who were no parties to it, for the question whether the reversioners had a preferential right was neither in issue nor judicially determined by the Court. The matter now in issue was not such as ought to have been made ground of defence in the former suit. *24 Cal., 711, 28 Cal., 17, followed. 29 P. R., 1895: 149 P. R., 1882: 1 All., 282; 11 Cal., 186, referred to.* BHARI *v.* PIR BAKHSH. **76. P. L. R. 1907=107. P. R. 1906.**

249 S. 11—*s. 13—Directly and substantially in issue—Issue raised but not decided—No Res-judicata.*

In the previous suit the plaintiff claimed in the first place, the winding up of a partnership business, the defendant being regarded as a co-partner in the business, which was being managed by him; in the second place, for an account being taken from the defendant, he being regarded as the managing partner: and in the third place, for the recovery of such sums of money as might upon the taking of an account from the defendant be found due to the plaintiff. The suit was dismissed, the Court having held that the plaintiff and defendant were not partners, and also that one of the terms of the contract between the parties was not, that which the plaintiff alleged, namely, that the defendant should take over, at the time of the dissolution of the partnership business, all the outstandings: plaintiff's request at the conclusion of the trial, that an account might be decreed against the defendant, he being treated as a servant which he alleged himself to be was rejected.

Held, that a subsequent suit for an account and for recovery of such sum of money as upon the taking of such account may be found due to the plaintiff from the defendant, the latter being regarded as the plaintiff's servant, was not barred but the decision as to the term of the contract could not be questioned in the subsequent suit. UMESH CHUNDER DEY *v.* SHARBESSUR CHUNDER. **5 W. N. C., P. 304.**

250 S. 11.—*S. 13*—Res-judicata—*Suit for arrears of rent—Denial of tenancy—Jurisdiction—Revenue Court.*

A sued B for arrears of rent who denied his tenancy. Formerly his suit for arrears of rent against the defendant had been dismissed on the same plea. The Lower Appellate Court placed the *onus* of proof on the defendant to show that he was not a tenant.

Held, that when the plaintiff sets up a tenancy which the defendant denies, the burden lies on the plaintiff to prove the

Sup: Govt. acts (V of 1908) *(Contd.)*

tenancy and the amount of rent payable by the defendant.

Held, also, that the matter directly and substantially in issue in this case, was directly and substantially in issue in the former suit between the same parties, litigating under the same title in a court of jurisdiction competent to try the present suit and was th refore, *res-judicata* as far as the Revenue Court was concerned. PRAG *v.* RAM ADHIN, **3 O. C. 65.**

251. S. 11.—*S. 13—Question directly and substantially in issue—Omitting in the former suit to raise a ground of defence.*

H., an Oudh Talukdar, executed a deed of gift in 1859, by which he purported to give to R. (the only son of his elder son who was dead) the whole *Taluk* with the exception of a few villages. In 1871, a suit brought by H. against R. to have it declared that notwithstanding the deed of gift the proprietary right in the *Taluk* was vested in him, was settled by a compromise by the terms of which various portions of the *Taluk* were to be held for life by H., R. and D. the mother of R., and on the expiration of those three lives L. (the younger son of H.) and his heirs were to succeed to the whole of the estate. This compromise was embodied in a decree of Court. In 1876, H. and L brought a suit against R. and his wife to cancel a deed conveying a portion of the *Taluk* to the latter as being in excess of the powers of alienation given to R. by the compromise of 1871. The defendants in that suit did not contest the validity of the compromise, but upheld the alienation as valid, and asserted that L. had no such interest in the property as entitled him to sue, and issues were raised on those points. The Court held that L was "a cetain remainder man under the terms of the agreement," that he "or his respresentatives will certainly inherit the estate sometime or other," and that he was entitled to sue; that the alienation was void as against H. as being in excess of the power reserved by the compromise to R. who was held only entitled to alienate for his life; but that no right had yet accrued to H. and L. to distrub the possession of R.'s wife. In 1889 after the deaths of H., D and L., a portion of the *Taluk* was attached by creditors of R. and sold in execution of decree without limits of title. In a suit brought by the son of L. in 1896 against R., his judgment-creditors and the purchaser at the sale to have it declared that the plaintiff was entitled as the immediate reversioner to an absolute estate in the portion sold on the death of R., and that after R.'s death the sale would be inoperative as against him, the defendant R. set up the defence that he had by virtue of the deed of gift of 1859 an absolute title which was not displaced by the effect of the compromise and the decree embodying it.

Held, by the Judicial Committee (confirming the decision of the Judicial Commissioners of Oudh) that the decision in the suit of 1876, as having established between R. and L. (the father and predecessors of title of the plaintiff) that R. had only a life interest in the *Taluk,* and that L. (and therefore also the plaintiff as his heir) had a vested interest in remainder, was *res-judicata* in the present suit. RAM PAL SINGH *v.* RAM GHULAM SINGH, RAM PAL SINGH *v.* RAM PRASAD SINGH. **27 A. 37 = 32 I. A. 17 = 2 A. L. J. 237 = 1 C. L. J., 46.**

252. *Issue not decided though raised.*

Where genuineness and validity of certain documents was put in question but the point was left undecided, held that no *res-judicata* arose in the case. **4. O. C. 408.**

See to the same effect 2. O. C. 250.

253. S. 11—*S. 13—Decision reserving right to sue against on the same matter.*

Upon an application under S. 373 O. XXIII. R. 1 an order was made "let the plaintiff's claim be dismissed with costs, and let notice be given to the apposite party; the plaintiff has liberty to institute a fresh suit" held the order was one of withdrawal with liberty to bring a fresh suit, and not a decree dismissing the suit. It could create no *res-judicata.* **1. O. C. 97.**

254. S. 11—*S. 13.*

If the former suit went off on a preliminary ground not calling for adjudication on any other grounds of defence whether raised or not, those grounds remain undecided. ABDULLA KHAN *v.* KHANMIA. **10 B. L. R., 380 = 32 B. 315.** *See S. 11 Ex. IV.*

255. S. 11.—*S. 13—Refusal to consider issues.*

Where the court refused to consider a question at all, there is no adjudication of it, and so the matter is not really *res-judicata.* **3 O. C. 273 (275).**

256. S. 11.—*S. 13—Reservation of right to sue again on same matter.*

A decree which reserves to plaintiff the liberty of bringing a fresh suit in respect of the same matter cannot operate as *res-judicata.* **18 M. L. J., 198.**

257. S. 11—*S. 13—Matter directly and substantially in issue*—Res-judicata *between co-defendants.*

A decision does not operate as *res-judicata* between co-defendants unless it is established that there was a conflict of interest amongst the defendants that the adjudication between the defendants was necessary to give the appropriate relief to the plaintiffs and that the judgment did define the real rights and obligations of the defendants *inter se* 31 C. 95 and 5 C. L. J., 611, referred to, GHURPHENKI *v.* PURMESHAR DAYAL DUBEY. **5 C. L. J. 653 = 34 C. 223.**

258. S. 11.—*S. 13.*

Where an appeal impeaching the Lower Court's decision on more than one point is disposed of so as to leave some points undecided, the Lower Court's decision of the points left undecided would not operate as a *res-judicata.* **4 N. L. R., 98.**

259. S. 11—*S. 13—Finally decided*—Res judicata.

Sup: Govt. acts (V of 1908) *(Contd.)*

Where in a previous suit by the plaintiff for possession of certain mortgaged lands the first Court found that there had been no default in payment of interest, a condition precedent to the plaintiff's right to possession, and that full consideration had not been paid, and, on appeal the Divisional Judge held that there had been no default in payment of interest, and dismissed the appeal *in limine*, but also remarked in the judgment that the plea of consideration (want of consideration) for the mortgage did not seem sound—

Held, that the trial of the question regarding the alleged failure to pay consideration was not barred by *res-judicata*. SULTANI *v.* HAKIM RAI, **10 P. L. R. 1902.**

260. S. 11—*S. 13.*

The decision of an issue in one or two suits tried together and decided by the same judgment which is not appealed against can not operate as *res-judicata*, so far as the same issue is concerned, in the appeal preferred against the decision in the other suit. **4 C L. J. 149 = 33 C. 1001.**

261. S. 11.—*S. 13—Judgment, interparties in a previous suit—Recognition of claim—Evidence Act (I of 1872), S. 13—Possession, suit for.*

The respondents sued the appellants for possession of some lands in a certain village, alleging that they had acquired title to the land in suit as well as the other land of the village by adverse possession. The respondents filed a judgment in a suit brought by their father for a declaration of his title to the lands of that village, the title being based upon mortgages alleged to have become irredeemable. The decision was that he was entitled to 22 bighas being the share of one M. The rest of the claim was dismissed. In the course of that judgment the Court recorded an opinion that the then plaintiff was proved to be in possession of the whole of the land in suit, but dismissed the claim except as to M.'s share on the ground that the plaintiff, though in possession, had not proved his title. The first Court found against the respondents and dismissed their suit. The Lower Appellate Court accepted their appeal and decreed the claim. The defendants appealed to the Judicial Commissioner.

Held, that the question of possession of the land with regard to which the suit was dismissed could not be held to be *res-judicata*. A bare expression of opinion in a judgment as to the fact of possession which was not given effect to by the decree is not admissible in proof of possession either at the date of the judgment or at any other time. Such an opinion is not a recognition of a right within the meaning of section 13 of the Evidence Act. —KARIMA BIBI *v.* SRI GOVIND, **7 O. C., 122.**

262 S. 11—*S. 13—Matter directly and substantially in issue—Issue determined only incidentally.*

Sup: Govt. acts (V of 1908) *(Contd.)*

The incidental determination of the question of the title in Small Cause suits does not operate as *res-judicata* and prevent the same question being litigated afresh in a competent Court, **A. W. N. 1907 P. 218 = 4. A. L. J. 517.**

263. S. 11—*S. 13*—Res-judicata—*Court competent to try the the subsequent suit.*

An incidental decision on a question of title given in a suit for rent does not constitute a *res-judicata* on a question of title to the property itself, when the Court which came to that decision had no jurisdiction to try the subsequent suit. JIWAM DAS *v.* UMAR. **P. R. 54 of 1904**

264. S. 11—*S. 13 and 43—Splitting of claims*—Res-judicata—*Hindu Law—Succession—Adoptive step-mother—Decision of unnecessary.*—Res-judicata.

S and *Y* were divided Hindu brothers, *Y* in conjunction with his senior wife and to the exclusion of his junior wife defendant No. 1 adopted *V*, one of the sons of *S*. On *V*'s death defendant No. 1, widow of *Y*, adoptive step-mother of *V*, took possession of the estate left by *V* and made certain alienations. *Y* had, on the date of adoption, made a settlement of some of his properties upon the first defendant for life with remainder to her daughter. Defendant No. 1 alienated these properties also.

S sued defendant No. 1 and the alienees for a declaration that he was the next reversionary heir after the death of the first defendant, and that the alienations were not binding on him after the lifetime of the first defendant. *S* alleged that the settlement was not binding on *V*, the adopted son of *Y*, and consequently on him. It was decided that the settlement was binding on *V*, and the plaintiff had no cause of action as regards the properties comprised in the deed of settlement, and as regards other properties left by *V*, plaintiff was declared as the next reversioner after the first defendant.

The present suit was filed by other sons of *S*, brothers of *V*, after the death of *S*, for possession of properties left by *V*, but no claim was made with regard to properties comprised in the deed of settlement. They alleged that on *V*'s death his estate devolved on their father, *S*, and not on the adoptive stepmother of *V*, defendant No. 1, and that the decree in the previous suit was passed under a mistake of law. It was also alleged by them that a decree declaring a plaintiff as the next reversioner cannot be legally passed. The plaintiffs did not impugn the decree passed in the previous suit as having been obtained by fraud or collusion, or delivered by a Court not competent to deliver it.

It was contended for the defendants that the present suit was barred under section 43 and 13 of the Civil Procedure Code by reason of the decree passed in the previous suit.

Held, (1) that section 43 of the Civil Procedure Code was not applicable to the case.

Sup: Govt acts (V of 1908) *(Contd.)*

Section 43 only requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action on which the suit is based, and not that every suit should include every claim or every cause of action which the plaintiff may have against the defendant in respect of the object-matter of the suit—8 *Mad.*, 520, *at p.* 524; 21 *Mad.*, 153 *at pp.* 157 *and* 161, *referred to.*

(2), That the suit was barred under section 13 of the Civil Procedure Code.

The operation of a decree as *res-judicata*, so far, at any rate, as the object-matter of a direct adjudication is concerned can in no way be affected, in the absence of fraud or collusion by the fact that the suit was the result of a mistake of law, or that the decree proceeded on such mistake. The remedy, *if any*, in such a case can only be by way of review and certainly not by a separate suit for relief on the ground of mistake. Article 96 the Limitation Act cannot be relied upon as sanctioning such a suit.

Section 13 operated as bar notwithstanding that a decree declaring that *S* was the reversionary heir could not legally be passed under section 42 of the Specific Relief Act, KAVERI AMMALL *v.* SASTRI RAMIER. **M. L. J. 1903, p. 58=26 M. 104.**

265 s. 11—*S. 13—Directly and substantially in issue—S. 13, 204, 562 and 574—Judgment. Contents of—Dismissal of suit on some of the issues—Jurisdiction of Court to determine other issues—Remand order.*

The plaintiff brought the present suit for the ejectment of the defendants on notice to quit. The main issue in the case related to the validity of the plaintiff's lease and the character of the holding of the defendants. The Court of first instance held that the plaintiff's lease was not valid. It also held that the defendants had a permanent right and could not be ejected on a notice to quit. It accordingly dismissed the suit. The lower appellate Court affirmed the decision on all points. The High Court held that the plaintiff's lease was valid.

Per Rampini, J.—That the case should be remanded for the determination of the nature of the defendants' tenancy inasmuch as the lower Courts had no jurisdiction to determine such issues after having held on the first issue that the suit was not maintainable.

Per Maclean, C. J.. and Mitra, J.—That the lower Courts had jurisdiction and very properly exercised that jurisdiction in deciding all the issues, and it was not necessary to remand the suit there being the finding of fact that the defendants' rights were permanent. ISMAIL KHAN MAHOMED *v.* HARI CHARAN PAL. **9 W. N. C. 60.**

266 s. 11—*s. 13—Ss. 13 and 43—Proceedings for partition of abadi site in village—Suit for possession of houses based on partition—Subsequent suit for partition of houses. Different causes of Action.*

In the previous suit the plaintiffs being under misapprehension that partition proceedings conducted by the Revenue Court included both the *abadi* land and the houses standing therein sued for possession of the houses and the claim was rejected. They brought the present suit in the Civil Court for their share of the houses by partition.

Held, that the suit was neither barred by section 13 nor by section 43 of the Civil Procedure Code. BALBHADDAR NATH *v.* RAM LAL. **A. W. N., 1904. p. 89=26. A. 501.**

267 s. 11=*S. 13—Matter directly and substantially in issue—Cause of action—Hindu Law—Partition—Joint family property—Suit for partition dismissed for default—Fresh suit for partition maintainable.*

The plaintiff filed a suit for partition, but it was dismissed for default. On a fresh suit instituted by him—

Held, that the right to enforce partition is a legal incident of a joint tenancy, and so long as such tenancy subsists, so long may any of the joint tenants apply to the Court for partition of the joint property, and that the fresh suit was not barred. BISHESHAR DAS *v.* RAM PRASAD. **3. A. L. J., 379.=28. A. 627. A. W. N. 1906. p. 142.**

268. s. 11—*S. 13.—Where obligation is joint and several, a decree against one promisor no bar to a suit against another—Civil Procedure Code (Act XIV of 1882), Sections 28 and 43—Causes of action. Splitting of—Multifariousness.*

The first suit was brought by the plaintiffs for the recovery of some land not claimed in the present suit, which was in the possession of the defendant, and the same was decreed to them. The present suit was brought for the recovery, from the defendant herein, of the land which was different from the land, subject-matter of the former suit. The plaintiff's ground of title in both the suits was one and the same, *i e.*, as the heirs of their father they were entitled to succeed to both the properties on the death of their mother, the defendants in both the cases having respectively come into possession of the land under separate alienations made by the matter in favour of each on a different occasion.

Held, that the present suit was not barred by Section 43 of the Civil Procedure Code. Though the ground of title was one and the same in both the suits, and the cause of action in respect of both arose at the same time, *viz.*, the date of the mother's death, yet the persons who wrongfully withheld the land were quite different, and there was no manner of combination or privity between them in respect of the lands which they severally withheld.

The words cause of action mean every fact which it is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have a right to traverse, and have no relation whatever to the defence, but refer entirely to the grounds

Sup: Govt. acts (V of 1908) *(Contd.)*

set forth in the plaint as the cause of action.

Whether the action is based only upon one cause of action or not will depend upon the frame of the plaint in a suit for ejectment and not upon the answers to the suit, which may be set up by the different defendants. Even if the plaint is not based upon one and the same cause of action, yet, if the relief that is claimed severally against the different defendants be in respect of the same matter, Section 28, Civil Procedure Code, will save it from the objection of multifariousness. 1 Agra High Court Reports, Part III, p. 109; 14 M. I. A., 187. *followed.* GANGI *v.* RAMA SWAMI. **M. L. J. 1902, p. 103 = 25 M. 736.**

269. S. 11.—*S. 13—Matter directly and substantially in issue—Cause of action—Perpetual injunction.*

Held, that the plaintiffs having already obtained a decree for a perpetual injunction cannot get another decree to the same effect against the same defendants.

When a Court issues an order to a party in a suit for abstention from any particular act, and when the person to whom the order has been issued disobeys that order he is guilty of contempt of Court, and the Court can take proceedings to enforce its authority notwithstanding anything contained in Article 179 of Schedule II of the Limitation Act. RAM SARAN *v.* CHATAR SINGH. **W. N. A. 1901, p. 142 = 23 A. 465.**

270 s. 11—*S. 13—Matter directly and substantially in issue—" Issue" Revenue—Court—Decision as to propriety of patta or title of landlord.*

The decision of a Revenue Court as to the propriety of a particular condition in a patta or as to title of the landlord is *res judicata* between the parties in subsequent suits in the same Courts, when such decision does not proceed on any consideration peculiar to the particular fasli, unless it be that subsequent events have arisen to determine the landlord's title or render the condition in a patta applicable. NATESA GRAMANI *v.* VENKATRAMA REDDI, **17 M. L. J. 518; 31 M. = 2 M. L. T. 455.**

271 s. 11—*S. 13—Matter directly and substantially in issue—Cause of action—Erroneous decision.*

An erroneous decision on a pure question of law, in a previous suit for rent does not operate as *res judicata* in a subsequent suit for rent between the same parties, where the cause of action in the subsequent suit is not identical with the cause of action in the previous suit. **1 C. L. J. 176 = 9 C. W. N. 460 = 32 C. 749.**

272. s. 11—*S. 13—Matter directly and substantially in issue—Cause of action.*

Where the obligation between promisors is joint and several, a decree obtained against one of them without being satisfied is no bar to a suit against another. In such a case, there exists a cause of action against each severally. But the amount can be realized only once, and the satisfaction in whole or in part of the decree against any one will operate as a satisfaction in whole or in part of the cause of action against each of the other debtors, and, if any decree has been obtained against any of them as a satisfaction in whole or in part of such judgment debt also. **27 M. 243 Act 252 = 14. M. L. J. 84 F. B.**

273 s. 11—*S. 13—Matter directly and substantially in issue—Cause of action.*

The first suit by lessor against the lesee was for possession. The 2nd suit for possession was based on plaintiff's title. In the first suit, the title was not adjudicated upon.

Held the 1st suit did not bar the 2nd suit. **2 N. L. R. 94.**

274. s. 11—*S. 13—Matter directly and substantially in issue—Cause of action.*

Where plaintiff's former suit against the defendant for rent was dismissed on the ground that the relation of landlord and tenant did not subsist between them, and the plaintiff afterwards sued to eject the defendants; held that the plaintiff had no option but to treat the defendant as tresspasser and to sue him for ejectment, as otherwise the plaintiff would be met by the plea of *res-judicata.* **34 C 922.**

275. S. 11.—*S. 13—Matter directly and substantially in issue—Cause of action—Former suit—Rent suit.*

A tenant whose defence that the landlord was entitled to rent in respect of a lesser area of land than was stated in his claim was dismissed on the merits in a previous rent suit is precluded from raising the same defence in a subsequent rent suit by the rule of *res-judicata.* UPENDRA KUMAR CHAKRAVARTI *v* SHAM LAL MONDOL. **11 C. W. N. 1100 = 34 C. 1020.**

276. s. 11—*s. 13—Matter directly and substantially in issue—Cause of action.*

Where the former suit A *versus* B on the basis of ownership of the land by virture of purchase was dismissed and a subsequent suit A *versus* B was instituted for possession of the same land not as an owner but as heir to the last male owner.

Held, that the former suit did not bar the subsequent suit. **96 P. W. R., 1907 = 55 P. R. 1907 = 65 P. L. R, 1908.**

277. S. 11—*S. 13—Matter directly and substantially in issue—Cause of action.*

A suit A *versus* B for rent of one Fasli would not estop B in a subsequent suit for rent of subsequent Faslis from contending that he was not in possession of the lands whereof the rent is claimed; and that he was not liable for the same although he might have raised the same contention in the suit for the previous Fasli for which a decree had been passed against him, and although the defendant might not allege that the land had gone out of his possession subsequent to the previous suit. **14 M. L. J., 379.**

Sup: Govt. acts (V of 1908) *(Contd.)*

278. S. 11.—*S. 13—Matter directly and substantially in issue—Cause of action.*

Held, that, although the Court of *Munsif* at Goas was not competent in 1868 to entertain a suit for arrears of rent, it was competent to entertain a suit for compensation for breach of contract, and, as the previous suit was not a suit for arrears of rent, nor was the claim in the subsequent suit, so far as it related to the amount of compensation under the stipulation, a claim for arrears of rent, so the decision in the previous suit was a decision of a competent Court, and it would operate as *res-judicata.*

Held, also, that on the previous suit a particular stipulation contained in a particular *kabuliat* having been held to be valid as between the parties, it was not open to the Court subsequently to try the issue, whether that particular stipulation was valid or not, the question being a mixed question of law and fact.

A decision in a previous suit on a question of law, even if erroneous, would operate as *res-judicata* in a subsequent suit. *5 Mad.* 304, *dissented from* BISHNU PRIYA CHOWDHURANI *v.* BHABA SUNDARI DEBYA, **28 C. 318.** MOHESH CHANDRA DASS *v.* JAMIR-UD-DIN MOLLAH. **28 C. 324 = W. N. C., 1901, P. 509.**

279. S. 11—*S. 13 and 43—Matter directly and sustantially in issue—Cause of action—Splitting the cause of action—Specific Relief Act I of (1877), Section 27—Specific performance of contract of sale—Conveyance by vendor to third parties after agreement of sale with plaintiff—Parties.*

The plaintiff sued defendants Nos. 3 to 7 for specific performance of an agreement of sale of the property in dispute, and obtained a decree against them for the enforcement of the said contract. The defendants had, previous to the suit, transferred the property in dispute to third parties. The plaintiff impleaded the transferees also as defendants, but subseqently withdrew the case as against them. After obtaining the decree the plaintiff was resisted by the transferees from taking possession of the property. On his filing a suit for possession it was contended, on behalf of the transferees, that the suit was barred by the provisions of Sections 13 and 43 of the Civil Procedure Code.

Held, that the suit was not barred under Sections 13 and 43 of C. P. C.

The cause of action in the previous suit for specific performance of the contract of sale was the refusal of defendants Nos. 3 to 7 to execute a deed of sale in accordance with the agreement which they had entered into.

The cause of action against the principal defendants in the subsequent case was their resistance to the plaintiff's taking possession of the property conveyed to him.

The plaintiff was not bound to have included in the previous suit his claim for recovery of possession as against the principal defendants. According to Section 27 of the Specific Relief Act, it was sufficient that the specific performance of the contract was enforced against the defendants Nos. 3 to 7 only. ABDUL MAJID *v.* BOIDA NATH DHUR. **6. C. W. N. 314.**

280. S. 2, 11. 47—*S. 2, 13, 244 (C)—Matter directly and substantially in issue—Cause of action*—Res-judicata—*Decree for redemption not executed—Second suit for redemption barred.*

The predecessor in title of the plaintiff brought a suit against some of the present defendants and others to redeem a mortgage. He obtained a decree directing that on payment by him into Court of a certain sum, on or before a certain date, the defendants should re-transfer the said property to him, and that if such payment be not made, the property should be sold. The plaintiff did not pay within the prescribed period, and the defendants did not apply for an order for sale. The plaintiff on making payment after the date fixed was unsuccessful in his attempt to redeem and recover possession, and filed the present suit to redeem the same mortgage. It was contended that the suit was barred.

Per Chief Justice—In such a case though the right subsists the remedy is barred by *res-judicata.*

Per Davies, J.—No second or further suit lies in a case where there has once been a suit for redemption, and a decree, whether preliminary or final, has been obtained.

Per Bhashyam Ayangar, J.—The present suit for redemption of the very same mortgage, for the redemption of which a decree has already been made, is barred as *res-judicata* by section 13, Civil Procedure Code, and is also barred by section 244, notwithstanding that no order absolute for sale has been passed in the former suit.—*I. L. R., VI Mad., 119; VII Mad., 423; VIII Mad., 478; XV Mad., 366; XXI Mad., 18 overruled.* VEDAPURATTI *v.* VALLABHA VALIA RAJA, **M. L. J. 1902. p. 128. = 25. M. 300.**

281. s. 11—*S. 13 and 43—Matter directly and substantially in issue—Cause of action—Redemption*—Res-judicata—*Splitting of claims—Suit on distinct mortgages.*

Held, by the Full Bench, that a previous suit on an alleged mortgage dismissed on the ground that the plaintiff had failed to prove the mortgage set up by him does not bar a subsequent suit based on an alleged mortgage of different date, though the property concerned in both the suits is identical. THRIKAIKAT MADATHIL RAMAN *v.* THIRUTHIYIL KRISHNEN NAIR. **M. L. J., 1906, p. 48 (F. B.) = 29 M. 153 (F. B.).**

282. s. 11—*S. 13—Matter directly and substantially in issue—Redemption—Cause of action.*

A sued B for redemption praying that

redemption be allowed after investigation. The Settlement Court passed a decree in his favour in the following terms:—

"Ordered that the plaintiffs claims be decreed against the defendant on condition paying from his own pocket ~~Rs~~ 775/- in the month of *jeth* in default of the fulfilment of either of these conditions the decree shall be incapable of execution and the order for redemption shall be deemed not to have been passed." A second suit was brought by A to redeem the mortgage. The defendant pleaded "that sections 13 and 244 C. P. C. barred the suit as a decree had been obtained in a previous suit.

Held that the decree was not intended to grant consequential relief, but was intended to be merely declaratory, and that the suit was consequently not barred by the provisions of sections 13 and 244 C. P. C. and was maintainable. GUR PERSHAD *v.* RATAN SINGH. **6 O. C. 329.**

283. S. 11 *and 47—S. 13 and 244—Matter directly and substantially in issue—Cause of action—Redemp'ion suit—Declaratory decree—Second redemption suit.*

Held, that where a settlement Court decree did not fix a time within which the mortgage money was to be paid the decree was merely a declaratory decree and incapable of execution and in such a case a subsequent suit for redemption was not barred 1 O. C. 289 and 6 O. C. 239, 10 B. 461 (P. C.) referred to. RAJA PARTAB BAHADUR SINGH *v.* RAJA SURAT SINGH. **8 O. C. 361.**

284. S. 11—*S. 13—Matter directly and substantially in issue.—First suit for redemption—Decree not providing for foreclosure on non-payment by decree holder—2nd suit for redemption*—Res-judicata.

A mortgaged his share to B in 1871. Subsequently he sold his share to C who sued for re-demption in 1881 and obtained a decree against B on payment of a certain sum. The decree did not provide for foreclosure. An application for execution of the decree was dismissed in 1866 as being time barred.

Held, that a 2nd suit for redemption was not maintainable. RAM DAYAL *v.* RAJA RAMPAL SINGH. **6 O. C. 367.**

285 S. 11—*S. 13—Parties—Unnecessary party.*

Held, that a suit against a person is not barred by reason of a prior suit against him when he was not a necessary party to the prior suit and no relief was prayed in that suit against him. RAM DAS VITHALDAS *v.* VAZIR SAHEB. **3 B. L. R. 179 = 25 B. 589.**

286 S. II—*S. 13—Same parties*—Res-judicata—*Competent Court—Prior decision in a case in which second appeal did not lie does not operate as* res-judicata *in a subsequent suit in which second appeal is competent.*

Held, by the Full Bench, that a decision by a munsif in a case in which second appeal did not lie cannot operate as *res-judicata* in a subsequent suit in which a

second appeal is competent. AVANASI GOUNDEN *v.* NACHIAMMAL. **I M. L. J. 25 = 16 M. L. J. 41 = 29 M. 195.**

287. S. II—*s. 13—Parties since when* res-judicata *operates.*

The doctrine of *res-judicata* so far as it relates to prohibiting the retrial of an issue must refer not to the date of the commencement of the litigation but to the time when the Judge is called upon to decide the issue.—*11 All., 148, followed.* GURURAJAMMAH *v.* VENKATAKRISHNAMA CHETTI. **24 M., 350.**

288. S. II—*S. 13*—Res-judicata—*Mortgage—Redemption.*

To maintain the plea of *res-judicata* it must appear from inspection of the record that the person whose interest it is sought to bind was in some way a party to the suit. A mere intention on the part of one of the parties that it should be for his benefit is not enough to support the plea.

A mortgagor of an undivided share may redeem the entirety, at any rate, if the mortgagee does not object, and may be compelled to do so if required by the mortgagee. CHAUDHRI AHMED BAKSH *v.* SETH RAGHUBER DYAL. **10 C. W. N. 115 = 2 A. L. J. 813 = 2 C. L. J. 413 = 32 J. A. 229 = 15 M. L. J. 408 = 7 B. L. R. 912 (P. C.) = 9 O. C. 7 = 28 A. 1.**

289. S. 11—*S. 13—Parties.*

A decision may be *res-judicata* between the parties on the same side, the mere circumstance of the persons having been formally arrayed on the same side in a suit being immaterial if a matter has been actively in issue between them, and if as to that matter they had an active controversy against each other, they will be estopped by the decision in that matter. AZIZ-UN-NISA *v.* MUKIM-UN-NISA AND OTHERS. **4 O. C. 108.**

290. S. 11—*S. 13—Parties—Co-defendants—*Pro forma *defendants.*

A judgment to operate as *res-judicata* between co-defendants must define the real rights and obligations of the defendants *inter se*, and there must be a conflict of interests among the defendants.

18 *All.*, 65; 8 *All.*, 91; 18 *Mad*, 374, *followed*, 11 *Bom.*; 216 *and* 12 *Cal.*, 580, *referred to.* BALAMBHAT *v.* NARAYAN BHAT. **25 B. 74.**

291. S. 11.—*S. 13—See Evidence Act I of 1872, Ss. 11, 13, 43, No. 17, col. 153.*—**9 C. W. N., 403.**

292. S. 11.—*S. 13—The parties should be interested in the subject matter of the suit.*—See S. 11, Ex. IV. GOVINDASAMI SOLINGA THEVAN *v.* GOPALASAMI SIVAJI. **14 M. L. J. 1904. P. 281.**

293. S. 11.—*S. 13—Parties*—Res-judicata—*Co-defendants.*

A decree in favor of a plaintiff in a suit cannot be taken to have decided the rights *inter se* between the defendants, unless for the purpose of giving relief to the plaintiff it was necessary to adjudicate and the court by that decree did adjudicate upon the rights

Sup: Govt. acts (V of 1908) *(Contd.)*

as between the defendants; where there is such an adjudication it becomes binding upon the defendants and constitutes *res-judicata* in a subsequent suit between them

11 *Bom.*, 216 *and* 22 *Bom.*, 245, *referred to.*

A decree for redemption of mortgaged property free from encumbrances operates in a duly constituted suit to determine the rights as between the mortgagee and his sub-mortgagee. BALWANTRAO BABAJI *v.* NARAYANSHET MULSHEL **6. B. L. R. 97.**

294. S. 11—*S. 13—Between Parties—Co-defendants*—Res-judicata —- *Marshalling between purchasers—Contribution—Equity—Transfer of Property Act* (*IV of 1882*), *Sections 56, 81 and 82.*

In his plaint the plaintiff alleged that the predecessors in interest of the defendants 2nd party, on the 15th October 1881, mortgaged their share in four properties *D*, *K*, *L* and *C* to one of the defendants fourth party, for Rs. 8,000, that out of the mortgaged properties the first two were purchased on the 12th January 1888 by the defendants first party, and the remaining two were purchased by the plaintiff at an execution sale on the 9th July 1888, that subsequently the mortgagee, the defendant fourth party, having obtained a decree on his mortgage on the 26th April 1892, caused the sale of the last two properties on 23rd May 1893, and the defendants first party purchased the same for Rs. 21,000, and this sale had the effect of discharging the entire mortgage-debt, that as the sum of Rs. 21,000, realised by the sale of the plaintiff's property went to satisfy the mortgage on all the four porperties, he was entitled to contribution from the defendants first party. It was contended for the defendants that the plaintiff was not entitled to contribution and the suit was barred by Section 13 of the Civil Procedure Code and section 82 of the Transfer of Property Act.

Held, that the contentious were not valid. Section 13 of the Civil Procedure Code did not bar the present claim as the question determined by the decree in the former suit was in what order should the mortgage property be sold and it was determined that plaintiff's property should be sold first. It was not necessary for the Court to determine the first suit whether in the event of such sale satisfying the whole of the mortgage-debt the plaintiff was entitled to any contribution from the defendants first party.

Section 13 of the Civil Procedure Code does not preclude the decision upon any issue from operating as *res-judicata* merely because the issue is raised as between co-defendants, if the matter involved was directly and substantially in issue in a former suit and the other necessary conditions are satisfied.

Held, also, that though the rule of marshalling under Section 81 of the Transfer of Property Act is limited to the case of mortgagees, and does not apply to the case of purchasers of mortgaged properties subject to prior incumbrances yet upon reason and equity it can be applied in the case of subsequent purchasers also. Though the defendant first party bought without notice of the prior mortgages the plaintiff as a purchaser for value was entitled to claim contribution for the sale of his property resulted in the satisfaction of the mortgage-debt completely.

That though as between the mortgagor and the purchaser from the mortgagor property in the hands of the mortgagor should be sold first without giving the mortgagor any claim for contribution, yet when all the properties have passed to the purchasers for value, there is no reason for holding that later purchasers should not be entitled to contribution as the earlier ones.

That the purchasers were liable to contribute to the mortgage-debt in proportion to the values of the properties purchased by them. MANGNI RAM *v.* SYED MUHAMMAD MEHDI HOSSEIN KHAN. **8 C. W. N. 30 =31 C. 95 at 100.**

295. S. 11—*S. 13*—Res-judicata *between defendants—Transfer of Property Act, 1883, Section 118—Exchange.*

The plaintiff sued defendants Nos. 1 to 6 for a declaration of his title to certain property and for confirmation of his possession therein. The Court gave a declaration in favor of the plaintiff as to a certain share of the property claimed, and also as to another share in favor of some of the defendants.

Held that the declaration in favor of the defendants was superfluous and would not be binding on other defendants.

When an owner of a certain property gives it to certain persons who are jointly with him owners of another property and receives that property in exchange the transaction is an exchange within the meaning of Section 118 of the Transfer of Property Act and not a partition. It can only be effected by a registered deed. 25 Cal., 210, *distinguished.* MUSSAMMAT CHATRI KOER *v.* KHOBDARI RAI. **5 W. N. C., 724.**

296. S. 11—*S. 13—Parties*—Res-judicata *between co-defendants.*

A judgment-debtor (yajaman of an Aliasantana family) sued the other members of his family impleading in the suit the judgment-creditor as party defendant for a declaration that the decree was binding on the family properties. The suit was dismissed.

Held, that the decision was *res-judicata* in a subsequent suit under S. 283, C. P. C. between the other members of the family and the judgment-creditor. It was open to the judgment creditor to have appealed against the dismissal of the prior suit, and even if it were not so, that cannot have any effect upon the question of *res-judicata*.

Sup: Govt. acts (V of 1908) (Contd.)

Semble:—It is open to the junior members of an Aliasantana family to institute a separate suit for a declaration that the judgment-debtor did not represent the family when the debt was incurred. YUSUF SAHIB *v.* DURGI. **17 M. L. J. 260 = 2. M. L. J. 368 = 30. M. 447**

297. S. 11—*S. 13*—Res-judicata—*Co-defendants.*

An adjudication in a previous suit operates as *res-judicata* between co-defendants, only when the matter was in issue between them *inter se.* MUHAMMAD KUNI ROWTHAN *v.* VISVANATHAIYAR. *S. C.*, **M. L. J.. 1902. p. 471 = 26 M. 337.**

298. S. 11—*S. 13 —Parties*—Resjudicata *between co-defendants.*

Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication, and, in such a case, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants. But, for this effect to arise, there must be a conflict of interest amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se.* Without necessity, the judgment wil not be *res-judicata.* 18A 65, 22A 386, 11B 216, 25B 74, 12C 580, 8 C. W. 30, 6 C. D. 42, 3 Har's Rep. 627, 15 M. 264 26 M. 337 *Refd. to.)*.—NGA THET THA *v.* MI KYE GYI. **U. B. R. (1907), C. P. 5.**

299. S. 11—*S. 13—Parties—Res-judicata—Minor defendant—Neglect of guardian ad litem.*

The plaintiff sued the defendant under the guardianship *ad litem* of his mother. No order constituting her such was passed by the Court. She filed written statement but did not enter appearance afterwards and the case was decreed *ex parte.* An appeal by a person said to be a relation of the defendant was rejected.

Held, that the minor defendant was not bound by the decree passed against him for he was not properly represented in the previous suit. *22 Cal., p. 8 and P. R. 35 of 1898, followed*- MANGAL *v.* BUTA, **4. P. L. R, 1901.**

300 S. 11—*S. 13—Parties—Between Codefendants in active opposition —Res judicata in subsequent suit between such defendants.*

An adjudication between co-defendants in a previous suit on a point actively contested between them, operates as *res-judicata* in a subsequent suit between them, in which they are arrayed as plaintiff and defendant. *22 Mad., 323 followed ; 18 Mad, 374 distinguished.* KANDIYIL CHERIYA CHANDU *v.* THE ZAMORIN OF CALICUT. **29. M. 515.**

301 S. 11—*S. 13 Parties—Res judicata*—

The plaintiffs in a previous suit against the defendants obtained a decree to the following effect : "A decree be and hereby is given that the plaintiffs are entitled to an injunction restraining defendants using the new doors as a way to the plaintiffs' lane, and also restraining the defendants from using the *parnalas*—A, B, C, and D, shown in plan in the judgment—for any purposes except rain-water. It is further ordered that if after this they continue using any *parnala* for escape of water from the privy, the plaintiffs can claim to have such *parnala* closed."

The plaintiffs subsequently brought a fresh suit against the defendants for closing the door and one of the *parnalas*, and a decree was passed in their favour. It was contended for the defendant that the suit was not maintainable.

Held (1) that the suit was not barred by any rule of law, and (2) that the questions in dispute must be regarded as *res-judicata.* *Mussammat* JANNO *v.* RAFIK KHAN **49 P. L. R., 1903 = 12 P. R 1903.**

302. S. 11—*S. 13—Between co-defendants and co-plaintiffs, without necessity, the judgment will not be* res-judicata. **5 C. L. J. 611.**

303. S 11—*S. 13 —Co-defendants and co-plaintiffs*—Res-judicata.

But for this effect to arise, there must be a conflict of interests among the defendants and a judgment defining the real rights and obligations of the defendants *intersc.* **26 A. 442 (F. B).** *See to the same effect Nos. 289 to 300 supra.*

304. S. 11—*S. 13*—Res-judicata *between co-defendants.*

Decision as to point pleaded by one defendant is *res-judicata* between them. **9 O. C. 125.**

305. s. 11.—*S. 13—Co-defendants* Res-judicata.

Where the rights of the defendants *intersc* were not finally decided in the first suit for arrears of maintenance, a subsequent suit by one of them against his co-defendants for contribution towards the amount decreed in the first suit is not barred. **2 O. C. 303**

306. s. 11.—*S. 13.*—Res-judicata *between co-defendants.*

In order that a judgment may operate as *res-judicata* amongst defendants there must be a conflict of interests and a judgment defining the rights of the defendants *inlerse.* In such a case one defendant has a right of appeal against another defendant. 6 C. P. L. R. 87, 9 B. 216, 25 B. 74, 22 A. 386, 18 B. 520, 25 C. 565, referred to. MUL CHAND DAULAT *v.* MUL CHAND KHUB CHAND. **16 C. P. L. R. 1903 P. 42**

307. S. 11—*S. 13*—Res-judicata—Pro-forma *defendants*

In a previous suit the plaintiff sued for redemption of a mortgage on the allegation that the mortgage was satisfied by payment of one-half of the mortgage money to *N.* and *M.* and the other half to the present defendants. The present defendants were added as defendants to that suit on *N.* and *M.* pleading that they were entitled to receive the whole of the mortgaged money The Court accepted the plea o *N.* and *M.*. and dismissed the suit. The plaintiff brought the present suit to recover from the defendants the money he had paid them towards satisfaction of the mortgage.

Sup: Govt. acts (V of 1908). (Contd.)

Held, that the previous decision could not operate as *res-judicata* in the present suit for there was in the former suit no matter in issue between the parties to the present suit. *12 Cal., 580 approved.*. MALHI KUNWAR *v.* IMAM-UD-DIN. **A. W. N. 1904 P. 162=1 A. L. J. 363=27, A. 59.**

308. S. 11—*S. 13*—Res-judicata—*Party to suit—Hindu idols.*

It is a settled rule of Hindu Law that an idol is a juridical person who can take and hold property and that when a suit is instituted in the name of an idol by the Shebait, the idol must be regarded as a party to the suit and not the individual Shebait, who merely represents it and acts for it as its agent. TULSIDAS, MAHANTA *v.* BEJOY KISHORE SHOME. **6 C. W. N. 178.**

309. S. 11—*S. 13—Parties—Title—Regulation (XI of 1825), Sections 4 and 5—Alluvion and diluvion—Auction purchaser at revenue sale, whether successor in interest of defaulting proprietor—Accretion by gradual alluvion distinguished from sudden dereliction—Auction purchaser. Title of*—Res-judicata.

An auction purchaser of a *taluk* at a sale for arrears of Government revenue is entitled to recover all lands included in *taluk* at the time of its settlement as well as all lands which had subsequently accreted thereto by alluvion.

Where land had in fact become dry not naturally by accretion through gradual alluvion but by the dereliction of the river by reason of the diversion of its water through the artificial channel—

Held that the mere fact that an accretion of some lands had commenced before the excavation of the channel would not give the riparian owner a title to the rest of the lands, if it were found that they were not formed by alluvion.

The auction purchaser at a revenue sale of an entire estate cannot be considered to be the successor in interest of the defaulting proprietor so as to be bound by a judgment passed in a suit previous to the sale to which the defaulting proprietor was a party. KANTA PROSHAD HAJARI *v.* ABDUL JAMIR SADAGAR. **8. C. W. N. 676.**

310. S. 11—*S. 13—Parties—Title—Religious sects—Tengalai and Vadagalai.*

Where a decision was passed by the Sudder Court in 1840 in a suit between the Vadagalais of a certain village and the Tengalais (a rival sect) of the same village prohibiting public worship of a certain deity by the latter, the same was held not to operate as bar by *res-judicata* in a subsequent suit in 1893 between the Vadagalais and Tengalais of the same village for prohibiting the Tengalais from doing any public worship to the same deity by way of carrying their deity in the village streets. SADAGOPACHARIAR *v.* RAMA RAO. **23 M. 376 at 384.**

Sup: Govt. acts (V of 1908) (Contd.)

311. S. 11—*S. 13—Title*—Lis pendens—*Auction sale in execution of decree.*

The rule of *lis pendens* applies to Court sales.

Attachment of property only prevents alienation, it does not confer title. It does not affect rights that existed before it was made. BYRAMJI JAMSETJI *v.* CHUNI LAL LAL CHAND, **5 B. L. R. 21 27. B. 266.**

312. S. 11.—*S. 13—Limitation Act, 1877, Section 3, Schedule II Article 118—Parties—Suit against qualified heirs—Bar against reversioners.*

The plaintiffs, daughter's son of S. P., brought a suit in November 1893 to set aside an adoption of the fourth defendant by the widow of S. P. At the date of adoption besides the widow there were two daughters of S. P., the second and third defendants, the latter being the mother of the plaintiff. That these two daughters were aware of the claim made by the fourth defendant, as the alleged adopted son since March 1886 was not disputed; and if they had brought a similar suit after six years from March 1886, it would undoubtedly have been barred under Section 118 of the II Schedule of the Limitation Act.

Held, that in cases like this, daughters as immediate reversioners must be taken to represent the inheritance, and that a remote reversioner such as the plaintiff is a person claiming through or from the daughters within the meaning of section 3 of the Limitation Act. AYYADORAI PILLAI *v.* SOLAI AMMAL. **24 M., 405.**

See also 5 B. L. R. 885.

313. S. 11—*S. 13—'Parties'—Decree obtained against former administrator and executed in an illegal way—No fraud or collusion.*

A decree obtained and execution had against the former administrator are binding upon his successor and the estate, so long as that decree and the sale consequent upon it were not the result of fraud or collusion. BAI MEHER BAI *v.* MAGANCHAND. **6. B. L. R. 858; 29 B. 96.**

314 S. 11—*S. 13—Parties—Claim by widow for the benefit of the estate—Decree against her binding on next heir.*

A compromise was arrived at between *B*, the adopted son, and *J.*, his adoptive mother under which *B.* gave *J.* during her lifetime full power to enjoy possession of certain properties mentioned therein which formed portion of the estate of the deceased husband of *J.* Some alluvial lands formed on the border of one of these properties, were taken possession of by *J.* as reformation *in-situ* of part of the properties. The plaintiff, a neighbouring Zamindar, claimed these lands as accretion and obtained a decree for possession with mesne profits and costs against *J.* Whilst the decree was in execution, *J.* died and the plaintiff decree-holder sought to make *D.* to whom the estate had passed as *B's* widow, a party to

Sup: Govt. acts (V of 1908) *(Contd.)*

the suit in the place of *J.* and liable for the mesne profits and costs decreed against *J.*

Held that having regard to the position occupied by *J.* under the compromise-deed executed in her favour by *B.* at that time she must be regarded as acting on behalf of the estate and could be rightly impleaded as prayed for by the plaintiff, decree-holder. She was not claiming any personal advantage on her own account and although it was held in the suit brought against her that she had acted unlawfully in claiming the lands as reformations *in situ* to property held by her under the compromise-deed, still she acted on behalf of the estate and for the protection of the interests of that estate. 6 *Cal.*, 479, *referred to.* DINAMONI CHAUDHURANI *v.* ELAHUDAD KHAN. **7 C. W. N.. 678.**

315 s. 11—*S. 13—Parties—Hindu Law—Widow—Reversioner—Decree against widow—Liability of reversioner—Fair trial.*

A reversioner succeeding to an estate after the death of the widow of the former owner will be bound by a decree obtained against the widow, provided that there was a fair trial of the suit in which the decree was passed. *9 Moo. I. A. 543, 21 Cal., 8 followed.* MADAN MOHAN LAL *v.* AKBARYAR KHAN **2 A. L. J.. 843 = A. W. N. 1905, P. 270 = 28. A. 241.**

316 s. 11—*S. 13—Title—Presidency Small Cause Courts Act (XV of 1882) Section 69—Small Cause Court—Question of title in the suit—Jurisdiction.*

The Presidency Small Cause Court has jurisdiction to try questions of title, which arise incidentally in the suit. And although the question of title may be a principal one, if it be not the sole one, the jurisdiction is not ousted. RAJENDRA MULLICK *v.* NANDA LALL GUPTA. **31. C. 1001.**

317 s. 11—*S. 13—See probate and Administration Act V of 1881 s. 50—No 34 Col. 520* **10. C. W. N. 955 = 33. C. 1001.**

318 s. 11 = *S. 13—Parties—Revenue sale—Auction purchaser not a representative of defaulting proprietor—Evidence—Thak map—Decree against defaulting properietor for possession.*

An auction-purchaser at a revenue sale cannot be considered to be the successor in interest of the defaulting proprietor so as to be bound by a judgment passed in a suit previous to the sale to which the defaulting proprietor was a party. *8. C. W. N., 676. 8 W. R., 222, 12 Cal., 82 referred to.*

And a decree obtained before sale against a defaulting proprietor for possession of the land sold though admissible in evidence against the purchaser in a suit subsequent for the purpose of showing how the possession was obtained is not binding on the purchaser. *11 Cal., 745 relied on.*

The fact that certain lands are shown in the *Thak* map as part of a particular estate is not a conclusive evidence that those lands were part of that estate when that

Sup: Govt. acts (V of 1908) *(Contd.)*

estate was first created. GOKUL CHANDRA DAS *v.* HARA SINDARI DASI. **9. C. W. N. 383.**

319. s. 11—*S. 13—Parties—How far trustee representative.*

A beneficiary is ordinarily sufficiently represented by a trustee; but the rule does not apply where the contest is between two beneficiaries. ADVOCATE GENERAL *v.* KARMALI. **29 B. 133 at 139.**

320 s. 11—*S. 13—Parties—Sale by benamidar*—Res-judicata.

In a suit for the recovery of a piece of land, plaintiff's case was that it had been mortgaged by his sister Ma Lon, whom he had left in charge of it, to one Mi Wi (represented by the appellants in the present case) about twenty years before. Previous suits by Ma Lon against Mi Wi for the recovery of the land had been dismissed, Mi Wi pleading that the transaction was a sale and not a mortgage. It appeared that Ma Lon, who had no personal interest in the land, had brought these suits as a *benamidar* on behalf of plaintiff.

Held, that plaintiff, was bound by the decrees in the former suits, and could not recover on his secret title in the present case, which was barred by *res-judicata.*

Khub Chand v. *Narain Singh*, (1881) I. L. R. 3, All., 812; *Nand Kishore Lal* v. *Ahmad Ata*, (1895) I. L. R. 18, All. 69; *Shangara* v. *Krishnan*, (1891) I. L. R. 15, Mad., 267; *Ravji* v. *Mahadev* (1897), I. L. R. 22, Bom., 672; *Maung Sa* v. *Ma Kyok*, (1899) P. J. L. B., 512; cited. NGWE GYI *v.* SHWE BO. **3 L. B. R, 1905 P. 18.**

321 S. 11—*S. 13—Parties—Suit by reversioners.* See S. 11 of 14—ADILAKSHAMI *v.* VENKATA RAMAYYA. **13 M. L. J. 359.**

322 s. 11—*S. 13—Reversioners suit dismissed on the ground of their remoteness to the alienor no bar against other reversioners.*

Held, that, the reversioners related to a childless Jat proprietor of Amritsar District in 9th degree can successfully contest the alienations made by him without necessity in favour of the other reversioners one degree further removed.

Held, also, that when reversioners have made great delay in suing to protect their reversionary rights, justice requires that Court should not seek to narrowly scrutinize the acts of the allionor; but where the deed of transfer is in itself silent as to the detail, and there is no satisfactory proof of necessity, the reversioners cannot be deprived of their just rights on the ground of mere delay.

Held, also, that the dismissal of a previous declaratory suit, brought by some of the reversioners on the ground that they are so distantly related to the alienor that they have no *locus standi* to object to his alienation, does not bar the other reversioners, not party to the former litigation, from maintaining another suit to challenge the alienations.

Sup: Govt. acts (V of 1908) *(Contd.)*

Held, further, that a few of the reversioners cannot claim the whole of the property left by the aliener in the hands of the alienees, but can get it only up to the extent of their own share in it. HIRA SINGH *v.* GULAB SINGH, **36 P. W. R. 1908 = 111 P. L. R. 1908.**

323. S. 11—*S. 13—Parties—Reversioner's suit—Custom—Alaination by childless male proprietor—Gift—Will—Suit by collateral to set aside alienation—Collateral not joining made* pro-forma *defendant—Suit for possession by sons of* pro-forma *defendant—Extoppel—Limitation Act (XV of 1877), Schedule II, Articles 91 and 144.*

One Khuda Dad made a gift of one-fourth share of his ancestral land to Karm Dad in 1877. In 1883 he made a second gift of his one-fourth share out of his remaining land and in 1887 made a bequest of the remaining one-half share to the same person. At the suit of the collaterals the bequest was set aside as to two-thirds of the one-half share bequeathed. The alienor died on the 9th September 1890 leaving a widow who died on 6th May 1901. The plaintiffs, brothers of Karm Dad, sued on the 12th December 1902 for possession by right of succession of their share in the property of Khuda Dad. In the previous suit father of the present plaintiffs and of Karm Dad was a *pro-forma* defendant but the plaintiffs were no parties to the suit. It was contended for the defendant, that the suit was barred by limitation under articles 91 and 144 of the Limitation Act and that the plaintiffs were bound by the decision of the previous suit. The suit was not governed by the Punjab Limitation Act.

Held, that the contentions had no force. That article 91 of the Limitation Act was not applicable to the case, for the plaintiffs were no parties to the alienations, and article 144 did not apply, for limitation did not begin to run in the life-time of the widow of the alienor.

That the plaintiffs were not bound by the decision in the previous case. KARM KULLI *v.* KARMDAD. **102 P. L. R., 1905 = 79 P. R. 1905.**

324. S. 11—*S. 13—Parties—Suit by reversioner to set aside alienation by widow—Death of reversioner pending his appeal against dismissal of his suit—Right of next reversioner to prosecute appeal.* See O. XXII. R. I. = (S. 361)—SAKYAHANI INGLE RAO SAHIB *v.* BHAWANI BOZI SAHIB-**27. M. 588.**

See also 16. M. L. J. 347 = 28. M. 390.

325. S. 11.—*S. 13—Suit by one reversioner barred by—How far other reversioner bound.* See Hindu Law Reversioners. **4. B. L. R. 893.**

326. S. 11—*S. 13—Parties—Custom-Alienation by chidless male proprietor—Suit by father of reversioner to have the alienation declared null and void—Dismissal of suit on merits—Subsequent suit by reversioner for possession of alienated property after death of alienor—Estoppel*

Held, that under the customary law a suit by a reversioner for possession of property alienated by a sonless proprietor is barred by the dismissal on the merits of a suit previously filed by his father for a declaration that alienation did not affect the father's reversionary interests. 18 P. R. 1895; 84 P. R., 1898 (F. B.); 58 P. R., 1905, s. c., 59 P. L. R., 1905; 2 P. R., 1882, (F. B.) 15 P. R., 1903, s. c., 55 P. L. R., 1903, referred to; 10 Cal., 324, (P. C.); 22 All., 33 (F. B.); 24 All., 94 (P. C.) *distinguished.* INDAR *v.* CHOKI RAM. **2 P. L. R. 1906 = 68 P. R. 1905.**

327. S. 11—*S. 13—Same parties—Reversioner's power to represent another reversioner.*

Suit by one reversioner to set aside on adoption or alienation made by the widow is not *res-judicata* as against another reversioner. **16 M. L. J. 9.**

328. S. 11—*S. 13—Parties* Res-judicata.

Held, that a decision in a suit between the ancestor of the parties to the present suit and a stranger would not operate as *res-judicata* between the parties to the present suit, all of whom claimed under their common ancestor, in whose favour the previous suit was decided. *(Syed)* ASGHAR REZA KHAN *v.* *(Syed)* MAHOMED MEHDI HOSSEN KHAN. **7 W. N. C., 482 (P. C.) = 31 I. A. 71 = 30. C. 556 (P. C.).**

329. S. 11—*S. 13—Parties.*

Where a decree has been passed against a person who sues or is sued in a representative capacity the person or persons represented by him are bound by the decree in the absence of any fraud or collusion. MADHAVAYA *v.* KERALA VERMA ARSAN. **13 M. L. J. 63.**

330. S. 11.—*S. 13—Same parties.*

The question whether a Hindu father in a particular suit in which he alone of the family is a party, represents his co-parceners, is a question to be decided with reference to the circumstances of the case. **2 M. L. T., 86 = 7 M. L. J., 197.**

331. S. 11—*S. 13—Parties*—Res-judicata—*Mortgage—Redemption suit—Claiming title through another person—Joint Hindu famity—Right of members of joint Hindu faimily to redeem.*

A second suit by the sons of a Hindu father, who lived jointly with him for redemption of a mortgage executed by the father, is not barred by *res-judicata* by reason of a previous suit filed by the father for the same purpose, for they cannot be said to claim under their father within the meaning of Section 13 of the Civil Procedure Code. SUNDER LAL *v.* CHHITAR MAL. **S. C., 3 A. L. J., 644 = A. W. N.. 1906, P. 242.**

332. S. 11—*S. 13—Parties*—Res-judicata *—Two cases tried together—Appeal in one—Judgment on particular issue, if final.*

Per Ghose, C. J. and Harington, J. (Rampini, J., dissentiente).—The decision of an issue in one of two suits tried together and

Sup. Govt. acts (V of 1908) *(Contd.)*

decided by the same judgment, which is not appealed against, cannot operate as *res-judicata* so far as the same issue is concerned in the appeal preferred against the decision in the other suit.

Two co-widows instituted two suits in the Subordinate Judge's Court for dower chargeable on their husband's estate. One of them averred that certain properties were her own and did not appertain to the husband's estate, and was, therefore, not chargeable, while the other maintained the contrary. On an issue framed, in both the suits which were by consent tried together, the Subordinate Judge found that the particular properties did not appertain to the husband's estate. There was only one judgment in the two suits but two decrees. The widow who had maintained the contrary appealed from the decree in her own suit. It was contended that the decree in the other suit not having been appealed against the decision on the particular issue had become final and must be treated as *res-judicata*, each widow being a party to the other's suit.

Held, (by the majority of the Court), that it was not *res-judicata*, 16 *Cal.*, 233, *followed.*

Per Ghose, C. J.—The main object of the doctrine of *res-judicata* is to prevent a multiplicity of suits. Observations of *Mahmood, J.*, in 11 *All.*, 148, *approved.*

Per Rampini, J.—The decision did operate as *res-judicata.* 16 *Cal.*, 233, *dissented from*, 11 *All*, 148; 24 *Mad.*, 350, *followed.* MARIAM NISSA BIBI *v.* JOYNAB BIBI. **4 C. L. J., 149; 10 W. N., C., 934=33 C. 1101.**

333. S. 11—*S. 13—Same parties*—Res-judicata—*Member of Joint Family.*

A compromise settling a *bona fide* dispute between the members of the family, to which all the adult members assented at the time, is valid and binding upon the family. KUNHIANNI *v.* SRIVALLABHAN. **11 M. L. J. 1901 P. 10.**

334. S. 11—*S. 13—Parties—Suit against widow.*

Where a widow did not conduct the previous suit for the benefit of her adopted son, she having set up an agreement with his natural father that he should not be entitled to the possession of the estate till her death, she can not be assumed to have defended the suit as guardian of the adoptee, and the judgment passed in the previous suit as to the validity of the adoption is not binding on him in a subsequent suit by him. RADHA KISHAN *v.* JAMUNA PARSHAD AND OTHERS. **9 O. C. 339.**

335. S. 11—*S. 13—Parties—Hindu Widow.*

Where a decree has been obtained upon a fair trial in a suit against a Hindu widow, that decree is effectual and operative as against the reversioners, unless the decree can be successfully impeached on some special ground. Such a decree, however, operates as *res-judicata* only in respect of questions tried in the suit. **6 C. L. J. 490 at 524.** *See also 30 M. 3.*

Sup: Govt. acts (V of 1908) *(Contd.)*

336. S. 11—*S. 13—Estoppel*—Res-judicata—*Compromise by father of reversioner—Son bound by father's compromise.*

The father of the present plaintiffs Nos 1, 2 and 3 and plaintiffs Nos 4 and 5 had filed a suit contesting an alienation made by a widow and entered into a compromise with her in good faith under which they received some property and gave up all claims as regards balance.

Held, that the plaintiffs were thereby barred from contesting a subsequent alienation. DEVI DIAL *v.* UTTAM DEVI. **120 P. L. R. 1907=37 P. R. 1907.**

337. S. 11.—*S. 13—Same parties—Widow.*

A decree obtained by consent against a Hindu widow on the strength of an award of arbitration will not bind the reversioner. **5. B. L. R. 885.**

338. S. 11.—*S. 13—See Specific Relief Act I of 1877 S. 42 No. 102 Col 425*—**5. C. W. N. 445.**

339. S. 11.—*S. 13—Same Parties—Daughter.*

A qualified heir such as the daughter represents the inheritance, and a decision properly and fairly obtained against her in regard to a matter connected with the inheritance is binding upon persons entitled to take the estate in succession to her as reversionary heirs of the last male owner. AYYADORAKI PILLAY *v.* SOLAI AMMAL. **24. M. 405 at 407.**

340. S. 11.—*S. 13—Absent persons—Procedure*—Res-judicata.

In England under rule 9, order XVI, Rules of Supreme Court, where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued or may be authorised by the Court to defend in such cause or matter on behalf of or for the benefit of all persons so interested. But an order under rule 9 affecting the rights or interests of persons not parties should either be served on them or should expressly appoint a person to represent the absent person or class; otherwise the absent person will not be bound 56. L. J. ch: 313, 62 L. J. ch: 708 referred to. UCHABO BARIK *v.* BANMALI AND OTHERS. **16. C. P. L. R. 1903. P. 162.**

341. S. 11.—*S. 13—Parties*—Res-judicata. *Suit by benamidar.*

The decision in the suit would be as much binding upon the real owner, as if the suit had been brought by the real owner himself. **4 A. L. J. 689.**

342. S. 11.—*S. 13—Parties—Executor or administrator.*

The position of an executor or administrator, as the case may be, of a deceased person as legal representative, in whom all the property of the deceased vests as such by virtue of S. 179 of the Indian Succession Act, may be said to be similar to that of the shebait of an idol. BAI

Sup: Govt. acts (V of 1908) (*Contd.*)

MEHERBAI *v.* MAGANCHAND MOTIJI. **6. B. L. R. 853=29. B. 96.**

343. S. 11.—*S. 13—Palics—Escheat.*

In the case of a claim founded on the custom of escheat in favour of the proprietary body, that body no more represents the deceased than the crown does where property lapses to it for want of heir. **58 P. W. R. 1908.**

344 s. 11—*S. 13—Guardian and Ward—Guardian—*ad litem—*Collusion—Suit by minor to have the decre allowed to be passed against him by guardian set aside—Maintainibility of suit—Estoppel.*

One *M.*, a minor, was made a defendant in a mortgaged suit and his mother was appointed guardian *at litem.* He justly with his mother defended the suit. It was decided against him. He now brought a suit for a declaration that his share in certain property, subject of the mortgage was not liable to sale in execution of the decree obtained upon the mortgage. His allegations that his mother had colluded with the opposite party and had allowed the decree to pass, and owing to collusion did not appeal from it, were found to be false.

Held, that the latter suit was not maintainable. *29 All., 90 and W. N. All., 1905, p. 229 distinguished.* GANGA RAM *v.* MIHIN LALL. **W. N. A., 1906, P. 73=3 A. L. J., 187=28 A. 416.**

345 S. 11—*S. 13—"Parties under whom they claim"—Representative capacity—Suit against defendants as wrong-doers—Present suit for declaration and injunction.*

A decision in a prior suit not being a representative suit binding property nor designed or framed for the purpose of binding for all time the community itself brought against certain members of a community as wrong-doers in their individual capacity cannot operate as *res-judicata* in a subsequent suit against the community for a declaration of right.

Quære:—Whether a suit for binding a community for all time to a particular course of conduct is maintainable. Whether there is in law any body or community which can be described as the Thengalai community. SADAGOPACHARIAR *v.* RAMA RAO. **9 B. L. R. 663=5 C. L. J. 566=17 M. L. J. 240=4 A. L. J. 333=11 C. W. N. 585=9 B. L. R. 663=30 M. 185=30 I. A. 93; P. C.**

346. S. 11—*S. 13—Parties guardian and minor—Second Appeal—Findings of fact—Power of High Court to interfere—Guardian and minor—Gross negligence of guardian—Withdrawal of defence or suit.*

Though pure findings of fact cannot be interfered with on second appeal, yet the High Court is competent to, and is its duty on second appeal to interfere with incorrect inferences of law as to the legal consequences regarded as following from the facts found by the lower Appellate Court.

A mere withdrawal of the guardian *ad litem* from the suit, even though there may be *prima facie* a good case, is not in itself gross negligence on the part of the guardian to entitle the minor to re-open the case.

To withdraw from an uncertain defence, which may or may not have been substainable, is not in itself such gross negligence as in the eyes of the law to be tentamount in its consequences to fraud on the part of the guardian *ad litem.* VENKATESH SOIRE *v.* BHAVANISHANKAR MANGESHRAO; **5 B. L. R. 174.**

347 S. 11—*S. 13—Parties tenants.*

A decree against a registered tenant is binding on an unregistered tenant and unregistered transferee. **9 C. W. N. 130.**

348. S. 11—*S. 13—Parties—Auction purchaser—Public Demands Recovery Act (VII of 1880, B. C.)—Sale under certificate—What passes.*

When a certificate under the Public Demands Recovery Act is filed in a Collector's Office and notice issued to the judgment-debtor, it can only be enforced against the property of the person whose name is entered on such certificate, as if it were a personal debt of his.

Held, that the plaintiff purchaser in execution of a sale under such certificate, was entitled to the right, title and interest of the person whose name was entered in the certificate, and the interest of the other joint tenants was not affected by the sale. 10 Cal., 996; 26 Cal., 677; 19 Cal., 783; 14 Cal., 9, *referred to.* RUPRAM NAMASUDRA *v.* ISWAR NAMASUDRA. **6 C. W. N. 302.**

349. S. 11—*S. 13—Parties under whom they or any of them claim.*

Where in a previous litigation the question was whether the heirs of the grantee were entitled to claim the remission of rent and the same questions, that is, as to a permanent remission of rent, is raised in a subsequent litigation by the transferees from the representatives of the original grantee, the decision in the former litigation does not amount to *res-judicata* **7 C. L. J. 202.**

350. S. 11—*S. 13—Parties—Mortgagee.*

The mortgagee is not a representative in interest of the mortgagor, as he does not succeed to the position of the mortgagor as regards the property. SHEO GHULAM SINGH *v.* GHULAM SARWAR AND OTHERS. **4 O. C. 100.**

351. S. 11.—*S. 13.—See Contract Act IX of 1872. S. 260 No. 404 Col: 379. 28. C. 597*

352—S. 11—S. 13.—Parties Purchaser at Revenue sale.

So a decree in a suit against the defaulting proprietor, to which neither the auction purchaser nor his predecessor in title was a party, can not operate as *res-judicata* against the purchaser. **34 C. 868.**

See also Kanta Proshad Hajari v. *Abdul Jamir Sodagar 8. C. W. N. 676.*

352. S. 11.—*S. 13—Parties—Auction purchaser.*

Sup: Govt. acts (V of 1908) *(Contd.)*

An auction purchaser at a sale for arrears of revenue does not derive his title through the defaulting proprietor, but he claims under a paramount title. **9. C. W. N. 383.**

353. S. II.—*S. 13—Same Parties—Vendor and vendee.*

A purchaser of land can not be estoped, as being privy in estate, by a judgment obtained in an action against his vendor commenced after the purchase. See also Bengal Tenancy Act VIII of 1885. S. 109—(4. C. W. N. 283 followed)—JOY CHANDRA BANERJEE *v.* SREE NATH CHATTERJEE. **32. C. 357.**

354. S. II.—*S. 13—Parties—Shebait.*

A decision obtained in a suit lodged in his own name by a person who was in possession of and represented the Debutter estate under an authority from the shebait is binding on a succeeding shebait. **I2 C. W. N. 739.**

355. S. 11—*S. 13*—Res-judicata—*Same parties.*

The plaintiffs claimed under S. 106 of the Bengal Tenancy Act, against the landlord of defendants Nos. 2 to 9 to have their names recorded as tenants in the settlement proceedings. The Assistant Settlement officer made an order in favour of the plaintiffs. The landlord did not appeal against this order but the other defendants Nos. 2 to 9 did appeal to the Special Judge who reversed the order of the Assistant Settlement Officer and held that the plaintiffs had not proved that they were the tenants, and at the same time ordered that the names of the defendants Nos. 2 to 9 should be registered as tenants.

Held, that a subsequent suit by the plaintiffs to have their rights declared as tenants of the land with a right of occupancy therein was not barred by *res-judicata* on the ground that the previous decision cannot be said to have been between the same parties. 21 *Cal.*, 378 *and* 12 *Cal.*, 580, *referred to.* MOHUNT JAGANNATH *v.* CHANDRA KUMAR BOSE. **5 W. N. C., P. 421.**

356. S. II.—*S. 13—Not the same parties*—Res-judicata—*Prior suit between parties under whom the present do not claim—Evidence, judgment, admissibility of the status:—*

A decision in a suit between parties under whom the present parties do not claim is not *res-judicata*, even though the judgment in the prior suit is evidence to the extent pointed out in 22 I. A. 60; 24 I. A. 10; 12 A. I. and 5 Bom. L. R. 230.—GOBIND KRISHNA NARAIN *v.* ABDUL QUAGYUM. **25 A. 546 1903 A. W. N. 137.**

357. S. 11.—*S. 13*—Res-judicata—Pro-forma *defendants.*

In a previous suit the plaintiff sued for redemption of a mortgage on the allegation that the mortgage was satisfied by payment of one-half of the mortgage money to *N.* and *M.* and the other half to the present defendants. The present defendants were added as defendants to that suit on *N.* and *M.* pleading that they were entitled to receive the whole of the mortgage money. The Court accepted the plea of *N.* and *M.* and dismissed the suit. The plaintiff brought the present suit to recover from the defendants the money he had paid them towards satisfaction of the mortgage.

Held, that the previous decision could not operate as *res-judicata* in the present suit for there was in the former suit no matter in issue between the parties to the present suit. *12 Cal. 580, approved.* MALHI KUNWAR *v.* IMAM-UD-DIN. **A. W. N. 1904 p. 162.=I A. L. J. 363.=27. A. 58 (59).**

358. s. 11—*S. 13.—Same parties.*

Where the question is not the existence of any right or custom but a simple question of fact as to whether a certain property was held by a certain person, the judgment in the previous suit not between the same parties is not admissible in evidence nor does it create a *res-judicata.* **56 P. R. 1906.**

359. s. 11.—*S. 13.—Litigating under the same title—Matter in issue—Interest.*

It is the matter in issue in the suit and not the subject-matter of the suit that forms the essential test of *res-judicata.*

In the previous suit the plaintiff who was assignee of the Government Revenue, instituted a claim for arrears of Government Revenue in respect of *Khata* No. 47 in *Mouza* F., and also for interest due on the arrears. The issue whether the defendant was liable to pay interest on arrears of assigned land-revenue was heard and determined, and the final determination was that the defendant was liable. In the present suit claim was for arrears due on account of *Khata* No. 29. The same matter, namely, whether the defendant was liable to pay interest upon arrears of Government Revenue was put in issue. The title under which the plaintiff claimed the arrears of revenue, whether they accrued due out of *Khata* No. 29 or *Khata* No. 47, was one and the same title.

Held, that the decision as to interest in the previous suit operated as *res-judicata* in regard to the interest claimed in the present suit. *2 Q. B. D., 574 (1891); 15 Mad., 264; 10 Mad., 494; 11 All., 148; 4 All., 55, referred to.* CHANDI PRASAD *v.* MAHARAJA MAHENDRA SINGH. **W. N. A., 1901, p. 177 =24 A. 112.**

360 s. 11.—*S. 13.—Different titles—Same parties under different capacities.*

The first suit A *versus* B as an owner does not bar a second suit as an heir. CHIRAGH DIN *v.* NIZAM DIN. **55 P. R. 1907=96 P. W. R. 1907—65 P. L. R. 1908.**

361. s. 11.—*S. 13.—Litigating under the same title*—Res judicata—*Prior suit for possession dismissed as barred by S. 317, C. P. C. —Subsequent suit by defendant in prior suit for share of mesne profits—Plea by the former*

Sup:Govt acts (V of 1908). *(Contd.)*

plaintiff of benami purchase for him—Prior dismissal no res-judicata.

Where the defendant brought first a suit for possession of land and the suit was dismissed as contravening the provisions of S. 317 C. P. C.

Held, that in a subsequent suit by the defendant in the prior suit for mesne profits, the prior plaintiff (now defendant) can set up the plea of benami purchase by him. GHAZI-UD-DIN *v.* BISHAN DAYAL. **2 A. L. J. 111.**

362. s. 11.—*S. 13.—Litigating under the same title—Hindu Law*—Math—*Manager—Suit by Manager in private capacity—Subsequent suit as Manager.*

The defendant took the house in dispute on lease from one Raghunathdas (who was the head and Manager of a *Math*) for one year from the 8th December 1887. Some time between then and 1889 Raghunathdas died and thereupon the present plaintiff brought a suit for possession in the Court of the Mamlatdar under section 15, clause 1 of the Mamlatdar's Act. The claim was made by the plaintiff in his private capacity and was dismissed on the ground that the plaintiff had failed to establish his heirship to Raghunathdas and the rights of the endowment were not discussed.

In the present suit the plaintiff claimed possession as head of the *Math*. It was contended for the defendant that the suit was barred by reason of the dismissal of the previous suit.

Held, that the contention was not valid for the scope of the enquiry in the previous suit was limited to the private rights of the plaintiff and did not purport to touch the rights of the *Math* as represented by him. The fact that the plaintiff stated in the present suit that the previous suit was filed by him as representing the *Math* did not effect the case, for the statement could not have any decisive effect.

An order in a Mamlatdar's suit does not give rise to the bar to which Explanation II of section 13 of the Civil Procedure Code relates.

A *Math*, like an idol, is in Hindu Law a judicial *persona* capable of acquiring, holding and vindicating legal rights, though of necessity it can only act in relation to those rights through the medium of some human agency. When the property is vested in the *Math*, then litigation in respect of it has ordinarily to be conducted by, and in the name of, the manager, not because the legal property is in the manager but because it is the established practice that the suit would be brought in that form. But a person in whose name a suit is thus brought has in relation to that suit a distinct capacity; he is therein a stranger to himself in his personal and private capacity in a Court of law. BABAJI RAO GAMBHIRSING *v.* LAXMANDAS GURU RAGHUNATH DAS. **6 B. L. R., 932=28 B. 215.**

Sup: Govt. acts (V of 1908) *(Contd.)*

363 s. 11—*S. 13—Mamlatdar's Courts Act (III of 1876, Bombay), sections 18 and 21—Claim disallowed by Mamlatdar—Suit to establish—Limitation.*

When an order is passed rejecting a plaint or disallowing the claim of a plaintiff under the Mamlatdars' Courts Act (Act III of 1876, Bombay) and *containing no direction as to possession*, Article 47 of the second Schedule of the Limitation Act or section 21 of the Mamlatdars' Courts Act does not apply to a subsequent suit brought by the person who presented the (possessory plaint or claim so rejected or disallowed) or by any one claiming, under such person to recover the property which was the subject matter of the plaint so rejected or claim disallowed. There is no provision corresponding to s. 13 (s. 11) C. P. C. which would make the decision of the Mamlatdars, Court operate as *res judicata*. TUKARAM JAYARAM *v.* HARI. **6 B. L. R. 612.**

364. s. 11—*S. 13—Competent Courts* res-judicata.

To make a matter *res-judicata* it is not necessary that the two suits must be open to appeal in the same way.

25 *Cal.*, 571; 9 *Bom.*, 75; 15 *Bom.*, 104 15 *Mad.*, 111, *referred to.* 9 *Cal.*, 439 S. C., 12 *C. L. R.*, 520, *S. C., L. R.* 9 *I. A.* 917, *followed.*

A plaintiff cannot be allowed to evade the provisions of section 13 Civil Procedure Code by joining together several causes of action. BHUGWANBUTTI CHOWDHRANI *v.* A. H. FORBES. **5 C. W. N. 483=28. C. 78.** *See also 13 M. L. J. 23= 27. M. 63.*

365. s. 11—*S. 13—Competent Court—Small Cause Court.*

Three suits between the same parties, were pending in the Court of Subordinate Judge, two on the Small Cause Court side and one on the ordinary side. It was agreed that the suits on the Small Cause side should follow the result of the suit on the ordinary side of the Court. The suit on the ordinary side was decreed and so were those on the Small Cause side but on appeal the decree passed in the suit on the ordinary side of the Court was set aside and at the rehearing of the suits on the Small Cause side it was contended that the decrees should be set aside as the final decree in the other suit operated as *res-judicata.*

Held, that the plea was valid for the Court which passed the decree in the other suit was competent to try these suits. Its inability to entertain these suits arose not from incompetence but from the existence of another Court with a preferential jurisdiction. GHULAPPA *v.* RAGHVENDRA SWAMIRAO. **6 B. L. R. 77=28 B. 338.**

366. s. 11—*S. 13*—Res-judicata—*Competent Court—Prior decision in a case in which second appeal did not lie does not operate as* res-judicata *in a subsequent suit in which second appeal is competent.*

Sup: Govt. acts (V of 1908) *(Contd.)*

Held, by the Full Bench, that a decision by a Munsif in a case in which second appeal did not lie cannot operate as *res-judicata* in a subsequent suit in which a second appeal is competent. AWANASI GOUNDEN *v.* NACHAMMAL. **M. L. J., 1906, p. 41=29 M. 195. (F. B.).**

367. s. 11—*S. 13—Competent Court*—Res-judicata.

In order to establish the plea of *res-judicata* the Court which decided the former suit must have been such a Court as would have been competent to try and decide not only the particular matter in issue in the subsequent suit but also the subsequent suit itself in which the issue is subsequently raised. (24 B. 456, 9 C. 439, 11 C. 301 (P. C.) 29 C. 707 ref, 5 C. 832 not foll. 24 M. 275 ref.

It is the competency of the original Court which decided the former suit that must be looked to and not that of the Appellate Court in which the suit was ultimately decided on appeal. 23 C. 415 ref, 25 C. 571, 10 C. W. N. 529 ref, 28 C. 78 dist, 8 M. 83 not foll. SHIBU ROUT *v.* BABAN ROUT. **12 C. W. N. 359=35. C. 353.**

368. s. 11—*S. 13—Competent Court—Code. Provisions of—Construction of Statutes.*

Under section 13 of the Civil Procedure Code a decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue but also the subsequent suit itself in which the issue is subsequently raised. Section 13 goes beyond the law laid down in *Duchess of Kingstone's Case, 2 Smith's leading Cases*, 10th edition, page 713. The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction. GOKUL MANDAR *v.* PUDMANUND, **6 W. N., C., 825 4 B. L. R. 793=29 I. A. 196 =29 C. 707 (P. C.).**

369. S. 11—*S. 13—Competent Court*—Res-judicata—*Court in which suit was instituted —Custom of Motap.*

The custom of Motap exists among the Chundasama Garasias of the village of Kharad in the Dhandhuka Taluka

In considering the competency of a Court for the purpose of deciding on a question of *res-judicata*, one must look to the powers of the Court by which the suit was instituted and not to the powers of the Court by which that suit was decided on appeal. MALUBHAI LUDHABHAI *v.* SURSANGJI JALAMSANGJI, **7 B. L. R. 821=30 B. 220.**

370 s. 11—*S. 13*—Res-judicata—*Competent Court.*

A judgment passed by a Court not competent to hear the suit cannot operate as *res-judicata.* And a fresh suit on the same cause of action cannot be dismissed on the ground that "it would be inexpedient, and would set a bad example and encourage a multitude of suits for the same cause of action."

The legal right of a party to bring a suit and to have it determined by the proper court created for the purpose of determining such suit cannot be barred upon the considerations of policy or expediency. SRI VIKRAMA DEO MAHARAPILUGAM *v.* GUNAPURAM DEENABANDHU. **9 W. N., C., 257=32 I. A. 45=2. A. L. J. 135=28. M. 42. (P. C.)**

371. S. 11.—*S. 13—Competent Court—Committee of Oudh Taluqdars.*

A Committee of Oudh Talukdars had dismissed a claim for maintenance which was brought forward by the respondent in the case, on the ground that the respondent had been adopted into another family and had consequently ceased to have any interest in the heritage of his natural family. The award was subsequently affirmed by the Financial Commissioner.

Held—That the Committee of the Oudh Talukdars was not in any sense a "Court" within the meaning of S. 13, C. P. C., and was much less a Court with competent jurisdiction within the meaning of the section, and that the committee had no jurisdiction to decide the question of adoption.

Held also—That the affirmation of the award by the Financial Commissioner could not give judicial validity to the decision of the said Committee on a point outside their jurisdiction. —HAR SHANKAR PRATAB SINGH *v.* RAGHURAJ SINGH.—(LORD COLLINS.) **4 A. L. J. 437=11 C. W. N. 841=9 B L. R. 757. 4 C L. J. 13=17 M. L. J. 354=34 I. A. 125.=2 M. L. J. 205=29. A. 517.**

372. s. 11.—*S. 13—Competent Court.*

The word competent means competent to try with conclusive effect, as regards its jurisdiction at the time the first suit was brought. **2. O. C. 261.**

373 s. 11—*S. 13—See Specific Relief Act 1 of 1877 s. 42 Col. 435 24 M. 275.*

374 S. 11—*S. 13—Competent Court—Court of competent jurisdiction—Pecuniary value—Interest—Effect of augmentation of claim by subsequent interest. T. P. A. S. 85.*

For a judgment to operate as *res-judicata* in respect of the same subject-matter the value of the matter of relief in the subsequent suit must not be above the pecuniary limits of the jurisdiction of the Court which decided the previous suit. The jurisdiction of the two Courts must be concurrent as regards pecuniary limit as well as subject-matter. *L. R., 12 I. A., 23 followed.*

The augmentation of the claim by accrual of interest will prevent the operation of section 13, Civil Procedure Code. *10 Cal., 697: 8 Mad., 83 distinguished.*

Sup: Govt acts (V of 1908) *(Contd.)*

Mortgage suits do not form an exception to this rule.

Section 209 of the Code of Civil Procedure does not apply to mortgage decrees. GIRIYA CHETTIAR *v.* SABAPATHY MUDALIAR. **29 M. 65.**

374. A *Competent Court.*

An award made by arbitrators on a point outside their jurisdiction can not be accorded judicial validity by reason of affirmation by an officer who has jurisdiction only to approve awards made with jurisdiction. **11 C. W. N. 841=6 C. L. J. 13 =9 B. L. R., 757=17 M. L. J. 354=4 A. L. J. 497=2 M. L. T. 205=29 A. 519.**

375 s. 11— *S. 13—Competent Court—Small Cause Court.*

Three suits between the same parties were pending in the Court of Subordinate Judge, two on the Small Cause Court side and one on the ordinary side. It was agreed that the suits on the Small Cause side should follow the result of the suit on the ordinary side of the Court. The suit on the ordinary side was decreed and so were those on the Small Cause side but on appeal the decree passed in the suit on the ordinary side of the Court was set aside and at the rehearing of the suits on the Small Cause side it was contended that the decrees should be set aside as the final decree in the other suit operated as *res-judicata.*

Held, that the plea was valid for the Court which passed the decree in the other suit was competent to try these suits. Its inability to entertain these suits arose not from incompetence but from the existence of another Court with a preferential jurisdiction. GHULAPPA *v.* RAGHVENDRA SWAMIRAO. **6 B. L. R. 77=23 B. 333.** *See also 27 M. 63.*

376 s. 11—*S. 13—Competent Court*—Res-judicata—Motap—*Jhalla Garasias of Limri in Kattiawar.*

Among the Jhalla Garasias of Limri in Kattiawar according to custom prevailing among them the eldest member of a family or the representative of the eldest member is entitled to *motap* and the extent of the *motap* is extra share.

It is clear from Explanation VI of s. 13 of the Civil Procedure Code that the section is not confined to decree passed by British Indian Courts. PRITHISINGJI DEVISINGJI *v.* UMEDSINGJI SANGAJI. **6 B. L. R 93.**

377 S. 11—*S. 13—Competent Court.*

The judgment of a Court which has no jurisdiction over the subject matter of the litigation must be treated as null and void and need not be adjudged to be such by a formal and direct proceeding to have it vacated and reversed, the parties can ignore its existence altogether. GULAB SAO *v.* CHOWDHRY MADHOLAL. **2 C. L. J. 384=9 C. W. N. 956.**

378 S 11—*S. 13—Competent Court.*

A party can show in the same case

Sup: Govt. acts (V of 1908) *(Contd.)*

that the judgment set up against him as a *res-judicata* was that of an incompetent Court or was obtained by fraud or collusion. BANSILAL *v.* DHAPO. **A. W. N. 1902. P. 33=24 A. 242.** *See Act 1 of 1872 S. 44 Col. 180.*

See to the same effect Act 1 of 1872 S. 44 —26 A. 272=A. W. N. 1904 P. 25 also 32 C. 357 S. 115 Act 1 of 1872 Col. 238.

379 s. 11—*S. 13—Competent Court—Enquiry as to.*

A Court can enquire into the jurisdiction of Court which passed the former judgment and see if it is not void for want of jurisdiction. **2 L. B. R. 24.**

380. s. 11—*S. 13—Competent Court—Construction of statutes. 6 C. W. N. 825 P. C. See No. 368 supra.*

See also—24 M. 275, 29 M. 65, 24 A. 242, 26 A. 272, 32 C. 357 supra.

381. S. 11—*S. 13*—Res-judicata—*Rent cases —Effect of decree passed for rents of previous years—Bengal Tenancy Act (VIII of 1885), Section 51—Presumption as to rate of rent.*

Held, that, so far as the rents of the years which were in contest in the previous suit were concerned, the decision in the previous suit was an absolute bar under the doctrine of *res-judicata* to any suit for the rents of those years. But so far as the rents, or rates of rent of subsequent years were concerned, the judgment in the previous suit could not be held to be an absolute bar as to prevent the parties from raising the question in a subsequent suit. The prior decision might be taken to determine the rent claimed in that suit, and to give rise under Section 51 of the Bengal Tenancy Act to the presumption that the rents for subsequent years remained the same. MAHARANI BENI PARSHAD KOERI *v.* RAJ KUMAR CHOWBEY. **6 C. W. N. 533 (539).**

382. S. 11—*S. 13—Competent Court-Road-cess.*

Decree for cesses obtained previously do not operate as *res-judicata* in subsequent suits as regards the due rate. They are admissible in evidence and raise presumption as to the rate originally decreed.

The publication of a valuation roll is not a condition precedent to the attaching of liability to pay road cess for rent paying lands.

25 *Cal.*, 725, *followed*, 13 *Cal.*, 197, *distinguished.*

The amount of road cess payable by landlords and tenants is not fixed for all time. It is a variable quantity changing from year to year according to the valuation of the estate made by the Collector and the rates fixed by him for the levy of cesses for the year. Therefore that because decrees were passed for cess at one rate in previous years, it does not follow he is to get cess at that rate for ever. Such decrees are, no doubt, admissible in evidence, and there is a presumption that the tenant is liable to pay at the decree

Sup: Govt acts (V of 1908) *(Contd.)*

rate. They do not have the effect of *res-judicata.* The fact that the Collector's valuation roll was filed in the previous litigation does not make any difference. RICKETS *v.* RAMESWAR MALIA. **28 C. 109.**

383. S. 11—*S. 13—Competent Court—Decision of a Court in British India, not* res-judicata *in Berar.*

In British India, it is Act XIV of 1882 enacted by the Governor-General in Council. In Berar it is a *replica* of this enactment set up by an executive order of the Government of India in the Foreign Department.

In Berar the judgment of the Nagpur Court is a Foreign judgment. Hence a matter decided by a Court in Nagpur is not *res-judicata* as applied to Berar. 29 C. 707 (715) followed. SYED IMAM *v.* MOHAMAD SHIKANDAR. **4 N. L. R. 61.**

384 S. 11—*S. 13—Rent and Civil Courts —Title Question of—Orders of ejectment.*

When a Rent Court orders the ejectment of a tenant upon one of the grounds mentioned in S. 58 of the U. P. Tenancy Act deciding itself under S. 199 of the Act the question of title against him, he is barred by the rule of *res-judicata* from reopening the question of title in a civil court. SALIG DUBE *v.* DEOKI DUBE. **2 A. L. J. 334.**

385 S. 11—*S. 13.—Rent and Civil Courts res-judicata—Finally decided—Limitation Act* (XV of 1877) *Schedule II, Article 131—Adverse possession—Rent—Non-payment for twelve years.*

Mere non-payment of rent for a period of twelve years prior to suit is not enough to bar the landlord's right to collect the rent. There should be a refusal of the landlord's enjoyment of his right for twelve years prior to suit.

In a previous suit the plaintiff claimed kattubadi for eleven *faslis* from 1295 to 1305. The Court, after stating that "the defence was *inter alia*, that the suit was barred by limitation, and the question is the only one which need be considered in the case," gave a finding in the affirmative, basing its conclusion upon the single circumstance that the plaintiff had not proved that he had collected any kattubadi within 12 years prior to the date of the suit.

Held, that the dismissal of the previous suit did not operate as a bar to the present suit for kattubadi for subsequent *faslis.* That it was neither competent nor proper for Court to depart from the unequivocal statement in the judgment as to what was decided, and, because such decision would, by itself, be unsound with reference to the reason assigned for it, to substitute something else quite different, in order to make it seem right so as to enable one of the parties thereto to found a plea of *res-judicata* thereon JALASUTRAM LAKSHMINARAYANA *v.* ZEMINDAR OF VALLUR **16. M. L. J. 35=29. M. 42**

386 S. 11—*S. 13—Rent and Civil Court* Res-judicata—*Suit by tenant to compel landlord to*

Sup: Govt. acts (V of 1908) *(Contd.)*

tender patta—Suit by landlord to compel acceptance of patta—Decisions in both suits against tenant—Appeal by tenant against one decision only—How far the other judgment res-judicata *in appeal—Practice—Procedure.*

An appellate tribunal is not precluded from dealing with a question which comes before it on appeal, because an inferior Court had given a decision upon the same facts in a case other than the one under appeal between the same parties and at the same time as the decision in the case under appeal.

A tenant sued the landlords to compel them to grant a patta; subsequently the landlord sued the tenant for enforcement of acceptance of the patta tendered by him for the same *fasli.* The suits were tried together. The tenant's suit was dismissed and the landlord's suit was allowed. The tenant appealed only against the decision of the Court in the suit brought by him.

Held, that the failure of the tenant to appeal against the decision in the suit brough by the landlord did not preclude the appellate Court from disposing of the appeal preferred by the tenant on the merits.

The proper course was to have allowed the appellant to amend his memorandum of appeal so as to make it an appeal in both suits. PANCHANADA VELAN *v.* VAITHINATHA SASTRIAL. **16 M. L. J. 63.**

386 (a). S. 11—*S. 13—Rent and Civil Courts—Bengal Tenancy Act (VIII of 1885, before its amendment), sections 101-119 and 189—Application for preparation of Record-of-rights —Procedure—Legal effect of Decision—Revenue officer—*Res judicata.

Upon an application under section 103 of the Bengal Tenancy Act, made by a proprietor or a tenure-holder for the preparation of a record of-rights, the Revenue officer is competent to make a survey and measurement of the lands and to record the particulars specified in section 102. When the tenancy is denied, it is absolutely necessary for the Revenue officer to deal with the question adopting the procedure laid down in section 101, in order to enable him to make the necessary entries under section 102 of the Act, that is, the entries relating to the name and status of the tenant.

The decision of the Revenue officer has the force of a decree under section 107 of the Act.

But he being not competent to finally adjudicate the question for all purposes, his decision does not operate as *res-judicata* on the questions of title, ejectment and mesne profits in a suit subsequently brought in the Civil Court.

Ghosh, J. contra.—The Civil Court cannot try a subsequent suit by the landlord to eject the tenant and for mesne profits, as the matter is *res-judicata 2 C. W. N. 491; 27 Cal., 167; 17 Cal., 721; 20 Cal., 249, referred to.* DHARANI KANTA LAHIRI (CHAUDHURI) *v.* GABAR ALI KHAN.—**7 W. N. C., 83.=30. C. 339.**

Sup: Govt. acts (V of 1908) *(Contd.)*

387. S. 11—*S. 13—Competent Court—Finally decided—Decree upheld on strength of oath.*

To make a matter *res-judicata* it is not necessary that the two suits must be open to appeal in the same way.

Held, that the present suit was within the competency of the Court which tried the other suit notwithstanding that in that other case there could have been no second appeal.—*17 Mad., 273; 28 Cal., 78, followed; 18 Mad., 189, referred to.*

As between the parties a decree arrived at after the taking of an oath on a question of fact involved in the case is none the less a final adjudication.—*L. R. I. H. L., S. C. 117; 1. Ch. 37 (1895); 5 Mad., 259 referred to.* AHMED *v.* MOIDIN. **24 M, 444.**

But See 16 M. L. J. 41—29 M. 195 supra S. 11. In issue.

388. S. 11.—*S. 13—Bengal Tenancy Act (VIII of 1885), Chapter X—Rate of rent declared in settlement proceedings.*

The plaintiffs sued for rent from 1895 to 1897 at a certain rate stated to have been declared in the proceedings of the Settlement Officer, who was making a record-of-rights under Chapter X of the Bengal Tenancy Act. The final publication of the record-of-rights was made on the 13th January 1894.

The defendant stated that the rate of rent was lower and relied on a decree for rent from 1886 to 1890.

Held, that the decree could not affect the rate claimed by the plaintiffs. RAJAH PUDMANAND SINGH *v.* GHANSHAM MISSER. **6. C. W. N. 914.**

389. S. 11.—*S. 13*—Res-judicata—*Competent Court—Question of title decided by Revenue Court.*

Where it was necessary for a Revenue Court in order to enable it to make a decree in a suit for profits, to decide a question of title—

Held, that the decision was not conclusive in a subsequent suit brought in the Civil Court to try the question. *18 All., 270, 26 All., 601 referred to.* INAYAT ALI KHAN *v.* MURAD ALI KHAN, **A. W. N. 1905. P. 103=2. A. L. J. 285=27. A. 569.**

390 S. 11.—*S. 13.—Rent and Civil Courts* Res-judicata—*Competent Court—Suit for rent decreed by Revenue Court—Suit for declaratory decree to the effect that counterpart of the lease on which the suit was based was not genuine.*

Where a suit for rent filed in the Revenue Court, was decreed, and the counterpart of lease, relied on by the plaintiff, was held genuine, and the defendant filed a suit in the Civil Court for a declaratory decree to the effect that the document was not genuine—

Held, that the adjudication of the question by the Revenue Court did not operate as *res-judicata*, on the ground that the Revenue Court was not competent to try the suit filed in the Civil Court—*6. C. W. N., 825, and W. N., All., 1901, p 49, referred to.* GUMTI KUNWAR *v.* GUDRI. **W. N. A. 1902 p. 220=25. A. 138.**

391 S. 11—*S. 13.—Rent and Civil Courts* Res-judicata—*Question of title decided by Rent Court.*

When an Assistant Collector hears a suit for profits, or for rent, or any suit which under the Rent Act he is competent to hear, it is necessary for him for the purpose of that suit to decide every question, whether of title or otherwise, which may be raised before him. Those questions he decides only incidentally and for the purpose of arriving at a correct decision on the matter in dispute between the parties litigating before him. His decision cannot be treated as *res-judicata* in a subsequent suit in a Civil Court in which the proprietary title is in question. ASHRAF-UN-NISSA *v.* ALI AHMAD. **W. N. A. 1904, p. 141=261. A. 601.**

392 S. 11—*S. 13—Revenue and Civil Courts "of competent jurisdiction."*

When as between parties to the Revenue suit, a Civil Court of competent jurisdiction has decided the title to the property adversely to the plaintiff who claims profits, the revenue Court is not competent to ignore that decision, and that decision being binding upon the Revenue court, and the suit should be dismissed.—DURGA SHANKAR *v.* GUR CHARAN. **2. A. L. J. 834.**

393 S. 11—*S. 13—Revenue Court—Order of* See N. W. P. Rent Act 1881—S. 93, 95—NAIDAR *v.* BARU MAL, **A. W. N. 1901 P. 204=24. A. 153.**

394 S. 11—*S. 13 - Court of jurisdiction—Competent*—Res-judicata—*Revenue Courts decision—No Resjudicata in a Civil Court for a suit for substantially the same relief—U. P. Rent Act s.36 and 39—Decision of rent court that defendant was not a tenant—Suit for ejectment in Civil Court.*

The plaintiffs applied to a Rent Court for dispossession of the defendant alleging that he was their tenant, but ultimately it was found by the appellate Court, that the defendant was either the owner or a rent-free tenant of many years' standing, and that he could not be ejected. The plaintiffs then made an application to have rent assessed on the same land in respect of which they had previously sought to eject the defendant, but this application also was rejected on the finding that the defendant was in adverse possession. Subsequently the plaintiffs brought the present suit in a Civil Court to eject the defendant as a trespasser from the land under previous litigation and from some other fields. It was urged on behalf of the defendant that the suit was barred as *res-judicata* under section 13 of the Civil Procedure Code.

The appellate Court confirmed the decision of dismissal of the lower Court relating to the land under previous litigation but remanded the case under section 562 of the Civil Procedure Code as regards the other fields.

Sup: Govt. acts (V of 1908) (*Contd.*)

Held, on second appeal, that the suit in the Civil Court was not barred as *res-judicata*, for section 13 of the Civil Procedure Code only applies in cases where the Court whose decision is cited as *res-judicata* was competent to try the second case, and this suit being a suit in ejectment for dispossession of a trespasser, was one which no Rent Court could try. 15 *All.*, 189 *distinguished.*

Held, also that the order of remand was bad, for section 562 of the Civil Procedure Code authorizes a remand only where the entire suit, and not merely a portion of it, has been disposed of by the original Court on a preliminary point. 11 *All.*, 488 *followed.* MAHESH PRASAD *v.* RANJOR SINGH. **A. W. N. 1904. P. 202 =1 A. L. J. 202=27. A. 163.**

395 S. 11.—*S. 13—Revenue and Civil Court*—Res-judicata—*Suit for rent—Decision on application under Section 43, N. W. P. Rent Act (XII of 1881).*

On an application under section 43 of the N. W. P. Rent Act, there can be no decision as to the liability of a tenant to pay rent.

When a suit for rent is brought, a previous decision on an application, made under the above section, does not operate as *res-judicata* on the question of the tenant's liability to pay rent—*W. N., All.*, 1903, *p.* 40, *followed.* JAFAR KHAN *v.* GHULAM MUHAMMED **W. N. A., 1903 p. 41=25 A. 282.**

395 S. 11—*S. 13*—Res judicata—*Revenue Court. Decision of, on question of proprietary title.*

In a suit of a civil nature such as a suit for a declaration of proprietary right, an adverse decision on the question of title previously passed by a Revenue Court even when it was necessary for Revenue Court to determine the question of the title. does not operate as *res-judicata* so as to oust the jurisdiction of the Civil Court to give its decision on the right. *3. All.*, *40*; *2 All.*, *428*: *6 All.*, *403*; *W.N. All.*, *1902 p. 220*; *W.N. All.*, *1901 p. 197*; *19 All.*, *101*, *referred to.* RANI KISHORI *v.* RAJA RAM **A. W. N. 1904. P. 109=26. A. 468.**

397. S. 11—*S. 13—Settlement officer's decision*—Res-judicata—*Bengal Tenancy Act, 1885, Sections 105 and 106.*

Section 105 of the Bengal Tenancy Act lays down that during the pendency of the draft publication any person affected by an entry in the record may raise an 'objection' with regard to it, which the Revenue Officer is to 'receive' and 'consider' and dispose of in a summary manner. From an order disposing of such an 'objection' there is no appeal and no second appeal, and the order cannot have the effect of *res-judicata.*

A 'dispute' under Section 106 is to be 'heard' and 'decided' by the Revenue Officer under the procedure laid down in the Code of Civil Procedure for the trial of suits and is subject to appeal and second appeal, and the order passed in such a case will operate as *res-judicata.*

1 *C. W. N.* 294; *S. C.* 24 *Cal.*, 462, *considered.* SHEIKH KURBAN ALI *v.* SHEIKH JAFAR ALI. **5 W. N. C. 798.**

398. S. 11—*S. 13—Settlement Officer's decision*—Res-judicata—*Bengal Tenancy Act (VIII of 1885), Sections 104 (2) and 107.*

Decisions in proceedings taken under the 2nd clause of Section 104 of the Bengal Tenancy Act in consequence of applications made by the landlord for a settlement of the rent have the effect of decrees and everything necessary to be decided for the purpose of arriving at the decisions must be held to be decided in them.

It is necessary to determine the status of the tenant in order to decide what is a fair and equitable rent, and when that question is decided it operates as *res-judicata* between the parties and cannot be reopened afterwards. 24 *Cal.*, 711, *distinguished.* DURGA CHURN LAW *v.* BASIR MANDAL. **6 C. W. N. 238.**

399 S. 11—*S. 13—Order of Settlement Officer how far* res-judicata—*U. P. Revenue Act, S. 63 and 68.*

S. 68 of U. P. Revenue Act does no more than, as regards the list of tenants, directs the Settlement Officer that particulars respecting them he is to mention in the list. It in no way extends or amplifies the authority given by S. 66. An order passed by a Settlement Officer recording the name of a person as occupancy tenant of certain *sir* land on the basis of possesion under S. 63, Act XIX of 1873, is no more than an executive order and cannot operate as *res-judicata* in a subsequent litigation between parties who applied against each other to that officer for entry of names. 1901 A. W, N. 204 relied on. 19 A. 101 and 18 A. 340 *referred to.*—HAMID-UN-NISSA *v.* ABDUL HAMID. **1 A. L. J. 9.**

400 S II—S. *13—Heard and finally decided*—Res-judicata—*Finally decided—Suit dismissed in defendant's absence on plaintiff's failure to advance evidence.*

Section 13 of the Civil Procedure Code does not apply to a case when in the previous suit which is set up as a bar, the defendant was absent at the date of hearing and the suit was dismissed on the failure of the plaintiff to adduce any evidence. 13 *All.*, 53 *referred to.* DOMA RAM *v.* RAGHU NATH PANDIT. **10 C. W. N. 40.**

401 S. 11—*S. 13—Heard and decided and not merely in issue*—Res-judicata.

In the previous suit the plaintiff claimed in the first place, the winding up of a partnership business, the defendant being regarded as a co-partner in the business, which was being managed by him; in the second place, for an account being taken from the defendant, he being regarded as the managing partner; and in the third place,

Sup: Govt. acts (V of 1908) *(Contd.)*

for the recovery of such sums of money as might upon the taking of an account from the defendant be found due to the plaintiff. The suit was dismissed, the Court having held that the plaintiff and defendant were not partners, and also that one of the terms of the contract between the parties was not that which the plaintiff alleged, namely, that the defendant should take over, at the time of the dissolution of the partnership business, all the outstandings; plaintiff's request at the conclusion of the trial, that an account might be decreed against the defendant, he being treated as a servant which he alleged himself to be, was rejected.

Held, that a subsequent suit for an account and for recovery of such sum of money as upon the taking of such account may be found due to the plaintiff from the defendant, the latter being regarded as the plaintiff's servant, was not barred but the decision as to the term of contract could not be questioned in the subsequent suit. UMESH CHUNDER DEY *v.* SHARBESSUR CHUNDER. **5 C. W. N 304.**

402. s. 11—*S. 13—Heard and decided—Issue decided in prior suit without production of document—Document not fully executed at the time.*

Where the plaintiff, a panjotdar, had executed a *kabuliyat*, and the defendant, andlord, served upon him a notice under S. 36 of U. P. Rent Court Act, and the rent court ordered his ejectment.

Held, that in a subsequent suit by the plaintiff for specific performance the decision of the Rent Court could not operate as *res-judicata* as for want of a lease at that time (*kabuliyat* not being itself a lease) plaintiff could not set up his right as a perpetual lessee in answer to the notice under s. 36 of Act XII of 1881. 1904 I A. L. J. R. 96 foll. MAHANT KASHI GIR *v.* JOGENDRA NATH GHOSH. **I. A. L. J. 516.**

403. s. 11—*S. 13—Heard and finally decided—Different suits—Appeal in one—Consideration*—Pre-emption *suits.*

Where with regard to the sale of certain property three suits for pre-emption were instituted, all questioning the amount of the price, and they were disposed of by one judgment awarding to the different sets of plaintiffs separate shares in the property on payment of proportionate amounts of the sale consideration which was put at a much lower figure than that claimed by the vendees preferred an appeal against the decree in one of the suits.

Held, that the decree not appealed against did not operate as *res judicata* on the question of the sale-consideration. JHAMUN *v.* BILASS KUNWAR. **1 A. L. J. 466.**

See also 33 C. 1101—29 M. 333; F. B. supra.

See for other cases S. 11 Woomesh Chandra Maila v. Baroda Das Maila. 28. C. 17 and Rajendra Nath Ghose v. Tranjini Das. 1 C. L. J. 248 infra.

Sup: Govt. acts (V of 1908) *(Contd.)*

404. S. 11—*S. 13—Finally decided*—Res-judicata—*Order of reference to Chambers passed by consent of parties—Subsequent claim for damages not allowed.*

When in a suit for dissolution of partnership with the consent of parties an order of reference to Chambers was made, in order that the accounts of the partnership might be taken—

Held, that the order of reference to Chambers was an adjudication by consent on the question of the right of the plaintiff in that suit to a decree for dissolution and, on the alleged right of the defendants in that suit to damages for dissolution before the expiry of the term fixed and the parties were not at liberty to go behind that order in a fresh suit. A fresh suit filed by the defendants was dismissed as barred. NAGASAWMY AIYAR *v.* RAMAIYAR. **12 M. L. J. 445.**

405. s. 11—*S. 13*—Res-judicata—*Rival pre-emption suits—Same judgment in both suits—One appeal sufficient.*

When two suits are filed by two persons in respect of the same subject-matter, *e. g*, pre-emption, against the same defendant and they are impleaded in each other's suit and the same issues are fixed in each and the suits are heard together and disposed of by one judgment and decree, it is not necessary for the party against whom the decree is passed to file an appeal in each case. It is sufficient for enabling the Court of appeal to give a binding decision with respect to any matter common to the cases, if that party appeals in his own suit, though such matter has been decided adversely to him in the other suit also. The adverse decision in the other suit not appealed against does not preclude the Court of appeal from entering into the question in each party's appeal. P. R., 83 of 1888, 10 All., 123, 16 Cal., 233, P. R., 23 of 1897, 31 of 1898, 8 of 1904, S. C., 1.4 P. L. R., 1903 *referred to.* JUGAL KISHORE *v. Mussammat* CHAMMO. **151 P. L. R. 1905.**

406. S. 11.—*S. 13—Heard and finally decided—Abatement of suit—Effect on title*—Res-judicata.

The abatement of a suit under section 371 of the Civil Procedure Code has no other effect than that of preventing the plaintiff or those claiming under him from suing again on the same cause of action. The section does not say that the title of the plaintiff or those claiming under him is extinguished by such abatement, and that in any suit brought not by but against him, the plaintiff cannot defend his possession or rights by relying upon his true title. The abatement of a suit under section 371 has not the same effect as *res-judicata* under section 13 of the Civil Procedure Code. JAYASINGH LALCHAND *v.* GOPAL YESHWANT. **6 B. L. R. 638.**

Sup: Govt. acts (V of 1908) *(Contd.)*

407. S. 11.—*S. 13—Heard and finally decided—Order in objection proceedings—C. P. C., S. 283*

Where a claimant does not bring a suit within one year to set aside an adverse order passed against him in the claim proceedings, the order is *res-judicata* against the claimant in subsequent proceedings and it is not open to the claimant in such subsequent proceedings to contend that in truth and fact the claimant's interest was not attached. RAMASAMI CHETTI *v.* ALAGIRISAMI CHETTI. **14 M. L. J. 14=27 M. 361.**

408. S. 11—*Explanation I—S. 135.*

The decision and not the institution of a suit bars a repetition of the same Act. The decision of an issue as a judicial act and not the commencemt of a suit as an act of a party constitutes *res-judicata.* **A. W. N. 1908, P. 211 at 212.**

See also 29 M. 333, 33 C. 1101, 29 A. 730 supra under the heading "heard and finally decided."

N. B.—Explanations I and II of S. 11 of the new code are new and do not correspond with any explanations of S. 13 of the old code.

409. S. 11.—*Explanation I—S. 13—*Res-judicata—*Pre-emption suits by rival pre-emtors—Final decision in one suit operates as* res-judicata *in the other.*

Where in the pre-emption suits filed by rival pre-emptors the plaintiffs are impleaded as defendants in each other's suits, and decree is passed in the suit instituted first, and the unsuccessful pre-emptor files appeal against the decree passed in the suit in which he is defendant, but omits to file appeal in the counter-suit, the decree not appealed against operates as *res judicata*, and the appeal in the other suit cannot be heard. The Appellate Court may in a fit case keep the appeal pending and allow the appellant time to enable him to file appeal in the other case. *W. N., All.*, 1887, *p.* 301, *P. R.*, 83 *of* 1888, *referred to.* GURMUKH SINGH *v.* HARI CHAND. **104 P. L. R., 1903=8 P. R. 1904.**

410. S. 11.—*Explanation II—S. 13.*

The judgments in two suits need not be open to appeal in the same way, so that the decision upon an issue in the earlier suit can bar the trial of the same issue in the latter suit. **28. C. 78.** *See also 24 M. 444.*

411. S. 11. *Expl. II.—S. 13.*

The competency of one Court as compared with another is not affected by the circumstance that in the one case an appeal lies in the first instance to the District Court, and in the other directly to the Hight Court, 20 P. R. 1891, 27 P. R. 1979, 157 P. R. 1889 distinguished. GIRDHERLAL *v.* DEOKINANDAN. **111. P. R. 1907.**

412. S. 11—*Expl. II—S. 13.*

A previous decision in a District Munsiffs Court in the exercise of its ordinary jurisdiction may operate as *res-judicata* in a subsequent suit on the Small Cause side of the Court. **13 M. L. J. 23=27 M. 63.**

413. S. 11—*Expl. II—S. 13.*

Where a party to a suit has not got a right of appeal the decision of that suit does not operate as *res-judicata* against him. **27 A. 59 at 61.**

414. S. 11—*Expl. III—S. 13—Expl. I.*

This explanation reproduces the English rule "if a thing be not directly and precisely alleged it shall be no estopel"—**3 B. L. R., 450=26 B. 25.**

415. S. 11—*Expl. III—S. 13. Expl. I.*

The section requires that the matter must have been decided in the former suit. A matter alleged by one party may be in issue even if it is admitted by the other party. **4 O. C. 403 at 418.** *See also 26 M. 104 under Expl. IV infra.*

416. S. 11. *Expl. IV—S. 13—Expl: II.* Res-judicata—"*Any matter*"—*Court giving leave to bring fresh suit.*

A man cannot be deprived of his rights as they exist, merely because he put forward rights that did not exist.

There is nothing in explanation II to section 13 of the Civil procedure Code or in the section itself to show that "any matter" means "matter arising out of the same cause of action." The explanation applies to a defendant as well as a plaintiff.

The mere fact that the Court refers the party in its judgment to a fresh suit is not sufficient to take the case out of the bar of *res judicata.* TARACHAND JAGJIVANDAS *v.* BAI HANSLI. **6 B. L. R. 594.**

417. S. 11.—*Expl. IV—S. 13—Expl: II.* Res judicata—*Matter directly and substantially in issue.*

In a previous suit brought by the defendant's husband against the plaintiff, for a declaration of his title to a moiety of a garden purchased from the ancestors of the plaintiff, and for partition, the suit was not defended, and an *ex-parte* decree was passed. In a subsequent suit by the the plaintiff, to have his title to the said garden declared, to have the sale to the defendant's husband set aside as having been made without legal necessity, and to recover possession, the defence was that the suit as regards the moiety of the land was barred by the operation of S. 13 of the Civil Procedure Code:

Held, that the question of the validity of the sale to the defendant's husband ought to have been raised by way of defence to the previous suit, and it must therefore, by virtue of Explanation II to S. 13 of the Civil Procedure Code, be treated as having been directly and substantially in issue in that suit, and was consequently *res-judicata. Sundar* v. *Parbati* (I. L. R. 12 All. 51; L. R. 16, I. A. 186) distinguished. *Mahabir Pershad Singh* v. *Macnaghten*, (I. L. R. 16 Cal. 682; L. R., 16, I. A.

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107), and *Kameswar Pershad* v. *Rajkumari Ruttan Koer*, (I. L. R. 20 Cal. 79: L. R. 19 I. A. 234), referred to.—SHYAMA CHARAN BANERJI *v.* MRINMAYI DEBI, **I. L. R. 31 C. 79.**

418 S. 11. *Expl. IV—S. 13—Expl. II* Res-judicata—*Matter which might and ought to have been made ground of attack in former suit.*

The plaintiffs brought a suit to recover their share by right of inheritance in the estate of a deceased Muhammudan, against the widow of the deceased. The widow set up the defence that she was in possession of the property claimed under a deed of gift from her late husband, and also that she was entitled to hold possession of the property in dispute until her dower-debt, which she alleged remained unpaid, had been discharged. The first defence of the widow failed, but the latter defence was accepted.

The plaintiff then instituted the present suit against the widow for redemption of the property upon payment of the dower-debt if any remained unpaid. The suit was dismissed on the ground of *res-judicata*

Held, that the order of dismissal was wrong for the suit was not barred. Explanation II of section 13 of the Civil Procedure Code was not applicable as the matter involved in the present case was not a matter which might and ought to have been made a ground of attack in the former suit. ZINAT-UN-NISSA *v.* RAJAN. **1. A. L. J. 498=A. W. N. 1904. P. 191 =27 A. 142.**

419 S. 11—*Expl. IV—S. 13 Expl. II—Might and ought—The subsequent claim must be within the knowledge of the person during the first suit.*

A first brought a suit as heir of her father claiming that an account should be taken of the partnership between her father and the defendants. The suit was dismissed as barred by limitation under Act 106 of the Limitation Act. A then brought another suit against the same defendants claiming as heir of her father and mother, and alleging that on her father's death the mother was admitted into the partnership; and she prayed an account of both the partnerships.

Held (1) that so far as the partnership with the father was concerned, the claim was barred as *res judicata* by the decision in the previous suit—(2) that the claim relating to the partnership between her mother and the defendants cannot be rejected as *res-judicata* unless it was shown that during the previous suit she was aware of the claim. 2 Bom. L. R. 872 followed, The word "might" in explanation II to S. 13 of the Civil Procedure Code 1882, presupposes that the person defending or attacking in the former suit had knowledge of the matter at the time of that suit could have made it a ground of defence

Sup: Govt. acts (V of 1908) (*Contd.*)

or attack therein. MANIKBAI JEVARAJ *v.* VIRCHAND RAMCHANDRA. **9 B. L. R. 1020.**

420 S. 11—*Expl. IV—S. 13 Expl. II—* Res-judicata—*Matter which might and ought to have been made a ground of defence in a former suit.*

A sued B. to recover certain unspecified sums alleged to have been realized on his behalf by B as refunds of octroi duty. B had previously sued A for a general balance of account and A, as defendant in that suit, had mentioned but omitted to counter-claim the refunds of octroi duty now sued for.

Held, that sectin 13, explanation II, of the Code of Civil Procedure applied, and the suit was barred. JAGAN NATH *v.* BAL KISHAN. **4 A. L. J. 675=A. W. N. 1907 P. 275.**

421. S. 11—*Expl. IV—S. 13, Expl. II—* "*Might and ought to have raised*".

A obtained a decree for money against *B* and attached several villages. While under attachment the share in one of the villages was sold by *B.* to *C*, who applied for partition of that share. *A*, who was also a co-sharer, resisted partition, alleging that he was in adverse possession for over 12 years. That suit was dismissed. He then attached the share as the property of his judgment debtor.

Held, that the decree in the former suit did not bar the decree-holder from claiming the share in dispute as the property of his judgment-debtor. A sale of property which is under attachment is not void, but voidable at the option of the attaching creditor alone if he wishes to proceed against the property. In a suit, therefore, not brought by the creditor as such against the purchaser, the plea that the sale is voidable is not one which the plaintiff might and ought to raise. KAVAL NARAIN *v.* SAT NARAIN. **2 A. L. J. 265.**

422. S. 11—*Expl. IV—S. 13—Expl. II—* "*Might and ought*"—*Previous decision on a preliminary point—Second suit on a point not decided in previous suit.*

The leading provisions of section 13 govern its explanations which must be read thereto. Two of those conditions are :(1) that the matter must have been in the former suit directly and substantially in issue and (2) that it must have been heard and finally decided in that suit.

The explanation only lays down that if a matter, which might and ought to have been made a ground of defence in the former suit is not made such a ground, it shall be dealt with as falling within the first of the above-mentioned conditions. That is, the omission shall have the same effect given to it as it would have had if it had been made a ground of defence. But to constitute *res-judicata* a second condition is necessary; it must have been finally decided, and if the former suit went

off on a preliminary ground, not calling for adjudication on any other grounds of defence, whether raised or not, those grounds remain undecided.

The same effect must be given to a matter which might and ought to have been, but has not been made, a ground of defence in the former suit, as must be given to a matter which was made a ground of defence in the former suit. ABDULLAKHAN USMANKHAN *v.* KHANMIYA ARABKHAN, **10 B. L. R. 380=32 B. 315.**

423 S. 11—*Expl. IV—S. 13, Expl. II—'Ought' to have been made a ground of defence.*

In execution of a Small Cause Court decree obtained against defendants by the plaintiff's predecessors, the entire village belonging to the defendants was sold and purchased by the decree-holder.

Some 7 years after this an ancestor of the plaintiffs brought a mortgage suit against defendants 2 to 4 and obtained a decree: and in execution thereof purchased 49½ bighas of land in the village. Some two years afterwards defendants 2 to 4 brought a suit to have the Small Cause Court decree and sale thereunder set aside. A year after this, they brought another suit to have the mortgage-decrees and sale set aside. The suit was dismissed for default. The first suit was decreed and the Small Cause Court decree and sale set aside.

Plaintiffs applied under the Land Registration Act to have their names registered as proprietors of 49½ bighas, and on their application being refused by the Collector and Commissioner, brought the present suit, which was resisted on the ground that in their defence to the suit to have the Small Cause Court decree set aside, they ought to have put forward their purchase under the mortgage decree and they having failed so to do, their suit was barred by Expl. 2 to S. 13.

Held, the suit was not barred.

Per Brett, J.—As the two causes of action were not and could not have been joined by the defendant in the same suit, it was not obligatory upon the plaintiffs to make their claim under the mortgage-decree a ground of defence in the suit to have the other decree set aside. MAHABIR TEWARI *v.* PURBHOO NATH CHOWBEY, **7 C. L. J. 504.**

424. S. 11 *Expl. IV—S. 13 Expl. II.*

Points not relied upon before District Judge, whether can be relied upon before High Court—Matter which might and ought to have been made ground of defence.. *See Resjudicata.* ABDUL RASHID *v.* ABDUL LATIF. **5. A. L. J. 117.**

425. S. 11. *Expl IV.—S. 13 Expl. II* Resjudicata—*Matter which ought to have been a ground of defence in a former suit—Mortgage suit.*

S. made a usufructuary mortgage of his property in favour of the appellants in August 1872. In September 1873 he made a simple mortgage of the same property to the same mortgagees and upon this simple mortgage a decree was passed on 2nd December 1880 for sale of the property. In July 1883 S. made a simple mortgage of the same property to the respondents, *i. e.*, the puisne mortgagees. In November 1883 S. sold the property in suit to the appellants in satisfaction of their decree obtained by them in December 1880, and they took possession of the property. In 1884 the respondents, puisne mortgagees, brought a suit for sale upon their mortgage of July 1883 and obtained a decree in February 1884. The appellants, prior mortgagees, were impleaded as defendants in the suit and though they set up the prior mortgages made in their favour, yet the Court passed a decree for sale of the mortgaged property in favour of the puisne mortgagees. Afterwards an order absolute was obtained by them. But neither to the proceedings in which the order absolute was passed nor to the subsequent execution proceedings were the prior mortgagees, appellants, joined as parties. The mortgaged property was sold by auction in execution of the decree of the puisne mortgagees and they themselves became the purchasers. Thereupon the prior mortgagees, appellants, brought a suit for a declaration that the auction sale was void as against them, but the suit was dismissed. The puisne mortgagees who had not yet obtained possession of the property brought a suit against the prior mortgagees for the redemption of the two mortgages made in their favour in 1872 and 1873. A decree was passed in their favour, but when they applied for mutation of names, their application was opposed by the appellants, prior mortgagees, and in consequence of this opposition the puisne mortgagees brought a new suit for recovery of possession of the disputed property. The prior mortgagees contended that as they purchased the property subsequently to the mortgage made in favour of puisne mortgagees by S. and as they were not made parties to the proceedings which ended in the actual sale of the property their right of redemption still subsisted.

Held, that the prior mortgagees were precluded from raising these contentions, because under section 13, explanation II of the Civil Procedure Code, the prior mortgagees were as much bound by the decision in the former suit as if they had expressly set up the defence now set up and it had been decided adversely to them. CHET RAM *v.* BARU MAL **2 A. L. J. 278=A. W. N. 1905 P. 107.**

426 S. 11 *Expl: IV S. 13, Explanation II.—Mortgage—*Res-judicata—*Prior and puisne mortgagees—Satisfaction of prior mortgage——First suit by puisne mortgagee to realise his mortgage money—Second suit to realise money paid by him to prior mortgagee not barred.*

A mortgagee obtained a decree for sale of mortgaged property. As allowed by the decree he paid off a prior mortgage of the

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property mortgaged with him and some other property. The property mortgaged with him proving insufficient to satisfy his decree, he brought a suit for sale of the property not mortgaged with him that was subject of the prior mortgage to recoup himself for the money paid by him to the prior mortgagee.

Held, that the subsequent suit was not barred by *res-judicata*. AJUDHIA PRASAD *v.* HAR DAYAL. **3. A. L. J. 541=W. N., A. 1906 p. 249.**

427 S. 11 *Expl. IV.—S. 13, Expl. 11—'Might and ought'—Redemption.*

Per Boddam, J.:—

In redemption suits all mortgages should be redeemed in one and the same suit, and if the plaintiff, knowing of the existence of a prior mortgage to those who are defendants to his action for redemption under a subsequent mortgage, chooses to make no claim for redemption under the prior mortgage, he must be taken to have abandoned his claim under it and cannot be allowed to bring a fresh action for redemption of the same lands by simply altering the form of his claim to redeem to an alternative claim either under the second or under the first mortgage.—PARAMBATI MANAKKAL *v.* PUTHENGATTIL MOOSAMU. **28 M. at 412.**

428 S. 11 *Expl. IV–S. 13 Expl. II—Matter directly and substantially in issue—Finally decided—Claiming under the same title—Same parties—Suit by reversioners against widow for declaration that alienation by her in favor of her daughters was invalid—Daughters not made parties—Decision not binding on daughters.*

Some of the reversioners to the estate of a childless male proprietor sued for a declaration that the alienation made by his widow in favour of one of his sons-in-law was invalid as against their reversionary rights.

Held, that the decision in the suit as to the question of succession, which arose on the widow's death, was not binding on the daughters of the proprietor who were no parties to it, for the question whether the reversioners had a preferential right was neither in issue nor judicially determined by the Court. The matter now in issue was not such as ought to have been made ground of defence in the former suit. *—I L. R., XXIV Cal., 711; XXVIII Cal., 17, followed, 29 P. R., 1895; 149 P. R.. 1882; I L. R., I All., 282; XI Cal., 186. referred to.* BHARI *v.* PIR BAKHSH. **76 P. L. R., 1907=107 P. R. 1906.**

429 S. 11 *Expl. IV—S. 13—Expl. II—First suit for declaration of ownership by virtue of purchase dismissed—Subsequent suit as heir for possession—No* res judicata*—Both the titles being defferent and inconsistent.* CHIRAGHDIN *v.* NIZAMDIN **55 P. R. 1907 =96 P. W. R. 1907=65 P. L. R. 1908.** *See S. 11. under the heading litigating under the same title supra.*

Sup: Govt. acts (V of 1908) *(Contd.)*

430 S. 11. *Expl. IV—S. 13—Explanation II—*Res-judicata—*Suit on hypothecation bond—Previous suit to set aside sale of equity of redemption in favor of plaintiff—Mortgage—Merger.*

The plaintiff brought the present suit for recovery of money due on a bond by sale of property hypothecated under the bond. Before suit the equity of redemption was purchased by the predecessor in interest of the plaintiff, but at the suit of the defendant the sale was set aside as fraudulent and void, and the possession obtained by the plaintiff as purchaser was delivered back to the defendant. It was contended for the defendant that the suit was barred by *res-judicata* and also on the ground that by the purchase by the plaintiff the hypothecation had ceased to exist as such having become merged as the plaintiff had become owner as well as mortgagee of the property hypothecated prior to the suit.

Held, that the contentions were not valid. That it was not necessary for the present plaintiff to set up his hypothecation in the previous suit as it could not alter the result of the previous suit which was to set aside the auction sale and re-vest the property in the defendant. That there was no merger because in law the plaintiff never became the owner of the whole premises, for that was the effect of the previous suit. GURUSAMI AIYAR *v.* KAVERI BOYEE AMMAL. **14. M. L. J. 485.**

431 S. 11. *Expl. IV.—S. 13, Expl. II—"Might and ought"—Successive purchase of the same land at two execution sales—Suit to set aside one such sale—Purchaser's defence—Whether he is bound to set up title acquired at the other sale.*

A purchased village S in execution of a decree obtained by him against C in the Small Cause Court. Subsequently A through B instituted a mortgage suit against C and in execution of the decree obtained therein purchased some lands in the same village S. C. instituted two suits, one to set aside the sale in execution of the Small Cause Court decree and the other to set aside the decree and sale in the mortgage suit. The latter suit was dismissed for default but the former succeeded. In this suit, A did not set up as a ground of his defence the title obtained by him at the mortgage sale.

Held—that A was not bound to do so, and a suit by A to recover the lands in Village S purchased at the mortgage sale is not *res-judicata* under Expl. II of S. 13 of the Civ. Pro. Code.

Per Brett.—Expl. II of S. 13 of the Civ. Pro. Code refers to the title litigated in the former suit as distinguished from relief claimed. When several independent grounds of action are available, a party is not bound to unite them all in one suit though he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of Action. This rule equally applies to the converse case of a

Sup: Govt. acts (V of 1908) *(Contd.)*

defendant when pleading in his defence 12. I. A. 116 and 26. M. 760 referred to. MOHABIR TEWARI *v.* PURBHOO NATH CHOWBEY, **12. C. W. N. 292**

432. s. 11—*Expl. IV—S. 13, Expl. II—'Might and ought'—Subject-matter, if must be identical—Rent suit—Ex parte decree—Plea of payment not raised—Claim of set off in subsequent rent suit.*

In a suit for rent, the defendant claimed a set off for a certain sum which, he said, he had paid on account of previous arrears of rent, but for which no credit had been given by the plaintiffs in a suit for the rent of that period. That suit had been heard *ex parte* and decreed in the plaintiff's favour.

Held, that the plea of payment now raised should have been made a ground of defence in the previous suit, and the defendant was precluded from claiming a set off in regard to it by Expl. II of S. 13 of the Civ. Pro. Code. 24 C. 711, 1 C. L. J. 248, 20 A. 110 refd. to.

Semble, per Ryves, J.—The Privy Council in 6 C. W. N. 889=24 A. 249 has by implication overruled the decision in 1 C. W. N. 565=24 C. 711. JAMADAR SINGH SERAZUDDIN AHAMAD CHOWDHURY. **12 C. W. N. 862.**

433. s. 11—*Expl. IV—S. 13 Exp. II.*—Res-judicata.

Under Explanation II of Section 13 of the Civil Procedure Code a plaintiff cannot raise in a fresh suit a plea which he could and ought to have raised in a former suit in which he was impleaded as a defendant.

The suit of a prior mortgagee on his mortgage was held barr d where he was made a defendant in the previously instituted suit of his subsequent mortgagee and his rights were not reserved. KRISHNAWACHARIAR *v.* SESHADRI AYANGAR. **11 M. L. J., 1901, p. 333.**

434. s. 11—*Expl. IV—S. 13—Expl II.*—Res-judicata—*Matter which might and ought to have been made a ground of defence—Mortgage-suits—Defendant not making a claim in respect of all the mortgages held by him—Power to go behind judgment and decree.*

In a suit based upon a mortgage under the Transfer of Propery Act for sale of the mortgaged property against the martgagor and a prior mortgagee holding several mortgages, the prior mortgagee might and ought to raise the defence that the plaintiff must redeem all the mortgages held by the de-defendant before the property is sold. If he omits to make a claim in respect to any of them, his right to a fresh suit to proceed on that mortgage is barred under section 13 of the Civil Procedure Code.

Likewise in such a suit against the mortgagor and a mortgagee holding mortgages prior and subsequent to the plaintiff's, the mortgagee-defendant might and ought to claim in that suit his right to redeem the plaintiff's mortgage on the strength of his holding the later mortgage. If he omits to do so and subsequently brings a fresh action against the plaintiff to enforce the prior mortgage he is barred under Explanation II of section 13 of the Civil Procedure Code.

A Court in determining a question of *res-judicata* is not justified in going behind a decree passed previously in a case between the parties where the decree might have been corrected, but the party affected by it did not take any action to have it done so. SRI GOPAL *v.* PIRTHI SINGH. **6 C. W. N., 889=4. B. L. R., 827=29. I. A. 118, (P. C.)=24. A. 429.**

435. S. 11.—*Expl: IV—S. 13. Expl: II.* Res-judicata—*Mortgage suit—Prior mortgage, omission to plead as a defence in a former mortgage suit—Transfer of Property Act (IV of 1882), Section 85.*

If a prior mortgagee is made a party to a suit brought by a subsequent mortgagee on a mortgage bond of certain property but omits to enter appearance and set up his prior right and claim that he should be paid off or that the property should be sold subject to his mortgage, his mortgage lien must be deemed to be extinguished.

A suit subsequently brought by him or his heirs on his mortgage is barred by Explanation II of section 13 of the Civil Procedure Code. *24 All. 429, S. C. L. R., 29 I. A. 118, followed.* GOPAL LAL *v.* BENARASI PERSHAD CHOWDHRY. **31 C. 428.**

436. S. 11.—*Expl: IV—S. 13.—Expl: II. Transfer of Property Act (IV of 1882), Sections 85, 96—Mortgage decree need not reserve rights admitted by all parties—Decree. Construction of, with reference to pleadings.* SRINIVASA RAO SAHEB *v.* YAMUNA BHAI AMMALL. **16 M. L. J. 1906 p. 50=29 M. 84.**

See Act IV of 1882 Col: 662.

437. S. 11. *Expl. IV.—S. 13, Expl. II. Subject-matter not identical*—Res-judicata *how determined—Reference to judgment and pleadings.*

Where in a suit to enforce a second mortgage the first mortgagee is made a party but no relief is claimed against him, it is not necessary for him to set up his prior mortgage, and his omission to do so does not bar a subsequent suit to enforce his security, under Expl. II, Sec. 13, Civil Procedure Code.

The scope of a suit by a second mortgagee to enforce his security, explained. The doctrine of constructive *res-judicata*, laid down in Expl. II. S. 13, Civil Procedure Code, does not apply unless the identity of the subject-matter of the two suits is clearly established. To determine whether a suit is barred by the principle of *res-judicata*, reference must be made, not merely to the decree but also to the judgment, and if need be, to the pleadings in

Sup: Govt. acts (V of 1908) *(Contd.)*

the previous case. SURJIRAM MARWARI *v.* BARHAMDEO PERSAD. **1 C. L. J, 337.**

438. s. 11, *Expl. IV—S. 13. Expl. II.* Res-judicata—*Mortgage—Decree for redemption—Payment of the amount of decree of lower Court and recovery of possession by mortgagors—Subsequent enhancement in appeal of amount ordered to be paid by decree—Second suit by the mortgagee to recover profits of the mortgaged property for period between recovery of possession by mortgagor and payment of amount of appellate decree—Civil Procedure Code (XIV of 1882), s. 13. expl. II.*

On the 25th September 1893, a decree in a redemption suit directed the plaintiffs (mortgagors) to pay to the defendant (mortgagee) Rs. 8,200 and costs within six months from its date, and to redeem the mortgaged property. The plaintiffs paid Rs. 8,200 and costs on 4th December 1893, *i. e.*, within the six months, and obtained possession in March 1894. In the meanwhile the defendant preferred an appeal, and the judgment in appeal, dated the 2nd September 1895, varied the decree by substituting Rs. 9,809-9-9 for Rs. 8,200, and directed that the six months' time should run from its date. The balance of Rs. 1,609-9-9 was paid by the mortgagors in March 1896. Subsequently the legal representatives and heirs of the mortgagee brought the present suit against the representatives of the mortgagors to recover the profits of the mortgaged property for the period intervening between the date at which they obtained possession (March 1894) and the date at which they paid the full amount ordered by the appellate decree (March 1896). The first Court allowed the claim, but on appeal by the defendants the Judge varied the decree by reducing the amount awarded. On second appeal,

Held, that the matter was *res-judicata* and the suit was barred, the question raised being one arising directly out of the mortgage transaction which was the subject-matter of the litigation in the former suit.—VINAYAK *v.* DATTATRAYA, **26 B. 661. 4 B. L. R. 492=26 B 661.**

439 S. 11. *Expl. IV.—S. 13. Expl. II. Mortgage—Prior and puisne mortgages—Intention to keep alive prior mortgage*—Res-judicata—*Estoppel—Limitation to enforce mortgage.*

The plaintiff brought a suit to enforce a mortgage executed in 1884 against the assignees of the mortgagor, defendants, first party, and other mortgagees, defendants, second party. The mortgage of 1884 was executed in lieu of a mortgage of 1876 and the plaintiff claimed priority as against the mortgage executed in favor of the defendants, second party, which was executed after 1876 but before 1884.

It was contended for the defendants, second party, that the plaintiff's claim was barred by *res-judicata* and that if the plaintiff relied on the mortgage of 1876 the suit was barred by limitation. The defendants also pleaded estoppel, and also urged that the plaintiff could not rely on the mortgage of 1876, (1) because it was divided into two by the two brothers of the original mortgagor who purchased his share and divided his liabilities under the bond of 1876 executing two separate bonds in place of it. (2) because the liabilities of the original mortgagor were thus transferred to others and (3) because the rate of interest in the original mortgage was higher than in the substituted mortgage of 1884. It appeared that the plaintiff had retained possession of the original mortgage-bond, that there was a special clause in the bond of 1884 which provided for the accrual of the rights of the mortgagees both from the date of the bond then executed and from the date of the prior bond for the debt covered by which or in lieu of which the bond was executed; and there was credible oral evidence on this question produced by the plaintiff.

To a previous suit filed by the defendants, second party, to enforce their mortgage the present plaintiff was impleaded as defendant. In that case the present plaintiff did not claim priority on the basis of mortgage of 1876.

Held, that (1) the plaintiff could rely on the mortgage of 1876 and the suit was not barred by limitation as relief was sought not on the mortgage of 1876 but of 1884

Held, further, that though there was no case made out for estopel *in pais* the suit was barred by *res judicata*. BARANASHI PERSHAD CHOWDHURY *v.* JOHRI LAL. **8 C. W. N. 385=31 C. 428.**

But see 29 M. 84. No. 436 supra.

440 s. 11.—*Expl. IV—S. 13, Expl. II—Widow's reversioners—Prior suit for pre-emption—Subsequent suit on widow's death for possession.*

A Hindu widow alienated her husband's estate to the defendant. The reversioner-plaintiff first brought a suit during the widow's lifetime for pre-emption which was dismissed on the ground that no right of pre emption was proved. Subsequently on the death of the widow the very same plaintiff brought a suit for possession as reversioner.

Held, that the second suit was not barred by *res-judicata*. The question in the former suit was the right of pre-emption in respect of which the widow had power to convey and did convey, that is her widow's interest, and the introduction of any question as to the effect of the conveyance upon the reversion would have been incongruous to the matter of the suit. DEPUTY COMMISSIONER OF KHERI *v.* KHANJAN SINGH [SIR ARTHUR WILSON.] **5 C. L. J. 344=11 C. W. N. 474=4 A. L. J. 232=2 M. L. T. 145=17 M. L. J. 233=9 B. L. R. 591=10 O. C. 117=29 A. 331 (P. C.).**

441. s. 11.—*Expt. IV—S. 13. Expl. II—Previous suit for partition rejected on the ground of limitation—Second suit for partition by defendant.*

Sup: Govt. acts (V of 1908) *(Contd.)*

In 1875 defendants 6—9 suit for partition and the High Court dismissed their claim decreed to them by the District Judge on the basis that an agreement found by him to have been arrived at by the parties previously to manage the properties by rotation was barred by limitation. In a suit in 1901 by the same defendant in the prior suit for partition

Held that the suit not barred by *res-judicata* as the High Court's finding on the question of limitation in the first litigation proceeded on the ground of an agreement between the parties to enjoy the property by turns, and as the question whether that made the property impartiable in the sense that the defendants in that suit could not ask for a partition by metes and bounds was not and could not be decided by the High Court, so as to bind the defendants therein, since the finding that the plaintiffs in the prior litigation had lost their right to the property was enough to dispose of the case. MAHADEO *v.* VASUDEO **5 B L. R., 787.**

442. **S. 11**—*Expl. IV—S. 13—Expl. II—* Res judicata—*Matter directly and substantially in issue—No claim and decree against one of the defendant—Decision not* res-judicata *against him.*

A brought a suit against his step-brother R and obtained a decree in execution of which he purchased certain properties. On being obstructed in taking possession of the same he brought a suit to establish his title against *B* and also his brothers *S* and *T* and widow of *R B* did not defend the suit. *A* had stated in the plaint that *R* being managing member of the family consisting of himself and his three step-brothers, the decree-debt was binding upon the whole family and that he had therefore acquired the interest of the whole family in the properties in suit. *S* and *T* claimed most of the item as their separate property. At the beginning of the trial the pleader for *A* made a statement abandoning the claim which he had made in the plaint on the footing that the properties purchased by him were joint family properties and based his claim on the footing that the properties there in question were the self-acquisitions of *R*. The Court found that the properties were not the self-acquisitions of *R* but with reference to the defence raised by *S* and *T* the judgment was—' on the question of division I find against the defendants 3 and 4." The finding of non-division was expressed to be only between *A* on the one hand and *S* and *T* on the other, and the decretal portion of the judgment was for the recovery of one-fourth of the properties in the possession of *S* and *T* and the suit was dismissed in other respects.

Held, that though the finding in *A*'s suit was based upon the Court's view that the properties in the possession of *B*, *R* and *S* were joint yet since the decree in

Sup: Govt. acts (V of 1908) *(Contd.)*

A's suit was not against *B* and he could not appeal against it, the judgment could not operate as *res-judicata* against *B* as finally settling that *B* was joint owner with *S* and *T* in properties mentioned in the judgment in *A*'s suit. *B* could not raise the defence in *A*'s suit that he was separate owner of the properties in his possession for he had no interest in the properties claimed by *A* as against *S* and *T*. GOVINDASAMI SOLINGA THEVAN *v.* GOPALASAMI SIVAJI MOHITHEI. **14 M. L. J. 281.**

See also Somasundara Mudali v. Kulandaivelu Pillai. 14. M. L. J. 404=28 M. 457 (F. B.)

443 **S. 11**—*Expl. IV—S. 13 Expl. II.—Reversioner. Suit by—how far binds other reversioners—"Might and ought to have been made ground of defence or attack—Limitation Act (XV of 1877), Schedule II, Articles 118 and 119—" Becomes known to plaintiff.'-*

Where it was pleaded that the plaintiff, a reversioner, was bound by the decision of a previous suit filed by another reversioner standing in the same degree to set aside an adoption—

Held, that the decision in the previous suit did not operate as *res-judicata*, for one reversioner does not claim through another.

On principle there is no distinction so far as the question of *res-judicata* is concerned between a suit for a declaration that an alienation is invalid, and a suit for a declaration that an alleged adoption is invalid.

Natural meaning should be given to the words "becomes known to the plaintiff" as used in Article 118 of the second schedule of the Limitation Act.

When in defence to a claim made in the alternative by the widow and the alleged adopted son the adoption was not questioned by the defendant, the validity of the adoption may be attacked in a subsequent suit, for the defendant was not bound to make it a ground of defence that no adoption had taken place. If the claim were well founded one of the plaintiffs was bound to succeed. ADILAKSHAMI *v.* VENKATARAMAYYA. **13 M. L. J. 359.**

444. **S. 11**—*Expl. IV—S. 13, Expl. II.*

In a previous suit the plaintiffs prayed to be confirmed in possession of the land in suit, and for an injunction; they alleged that they were entitled to the land; and the title they put forward was that as the sole surviving members of a joint family, they were its owners. The suit was dismissed on the ground that they had failed to establish their title. Having, in the meantime, been deprived of possession, the plaintiffs brought a suit for recovery of the same land alleging a title by heirship as distinct from survivorship.

Sup: Govt. acts (V of 1908) (*Contd.*)

Held, that the present suit was barred by section 13 of the Civil Procedure Code. GUDDAPPA *v.* TIRKAPPA. **26 B. 189.**

445 S. 11—*Expl. IV—S. 13. Expl. II.*

In a suit for rent including a cess no objection was made that the cess was illegal.

Held, that objection could be taken in a second suit for rent and cess for a period subsequent to that for which claim was made in the first suit that the cess was illegal. WOOMESH CHANDRA MAITRA *v.* BARADA DAS MAITRA, **28 C. 17.**

446. S. 11—*Expl. IV—S. 13, Expl II—Rate of rent—Previous suit for rent—Directly and substantially in issue—Constructive* res-judicata—*Heard and finally decided.*

The question, whether an issue as to the rate of rent generally is a direct or indirect issue in a suit for arrears of rent must be determined with reference to the frame of such suit, and cannot be determined upon any general *a priori* grounds; if the rent is claimed at a certain annual rate, on the simple ground of rent having been paid at that rate in the preceding year, it cannot be said that an issue as to the annual rate of rent generally, is a direct issue in such a suit. On the other hand, if the rent is claimed at an annual rate alleged to have been stipulated for in a binding contract between the parties, either written or oral, and the Court proceeds to try the question what is the yearly rent payable according to the contract set up, the general issue must be taken to be a direct one.

Explanation II, S. 13, C. P. C., which provides that any matter which might and ought to have been made ground of defence or attack in such former suit, shall be deemed to have been a matter directly and substantially in issue in such, is applicable only when the subject matter of the two suits or of the issues raised therein is identical.

Quære—Whether, in order to bar the subsequent suit or the trial of an issue therein, under Expl II, to section 13 C. P. C. it is necessary to show not only that the matter which might and ought to have been made ground of defence or attack was directly and substantially in issue in the previous suit but also that it had been heard and finally decided.

Quære further— Whether the observations in *Kailash Mondol* v. *Baroda Sundari Dasi* 24 C. 711, that both these elements must be proved, are consistent with the decision of the judicial Committee in *Sri Gopal* v. *Pirthi Singh 6 C. W. N. 889.* RAJENDRA NATH GHOSE *v.* TRANGINI DASS. **I C. L. J. 248.**

447. S. 11. *Expl. IV—S. 13. Expl. II—Suit for redemption—Suit for possession as owner and as mortgagee.*

The plaintiff brought a suit for possession and mesne profits of a certain property as heirs of a widow now deceased and alleged that the defendant had wrongfully dispossessed them of the field at the end of that year. The

Sup: Govt acts (V of 1908). (*Contd.*)

Munsiff found that the widow's husband's brother mortgaged the field to one H., that T. S., father of the defendant, redeemed the mortgage, and obtained possession of the field, and that the plaintiffs could not obtain possession of the field without redeeming the mortgage. These findings were based upon a decision passed in a suit, brought by T. S. against the widow for possession of the field in dispute. In that suit T. S. obtained a decree for possession of the field as mortgagee.

The plaintiffs then brought the present suit against the defendant for redemption of the mortgage.

The Court found that the plaintiffs had knowledge of the mortgage set up by the defendant at the time they brought the former suit, and held that the plaintiffs might and ought in the former suit to have claimed, as an alternative relief, the right to redeem the mortgage, and not having done so, the present suit was barred by S. 13, explanation II. of the Code of Civil Procedure.

Held, that the plaintiffs "ought" not to have made the mortgage they now seek to redeem, ground of attack in the former suit; and consequently that the present suit was not barred by explanation II, S. 13 of the Code of Civil Procedure. *Shri Dhar Vinavak* v. *Narayan* 11 Bom.. H. C., Rep., 224 followed.

A claim for possession of property as owner and as mortgagee are matters essentially different and their union is likely to lead to confusion and they cannot be united as grounds of attack or defence. Dissimilar matters, if their union does not lead to confusion, "ought," within the meaning of the explanation, to be united as grounds of attack or defence, as the case may be, but not otherwise. *Iman Khan* v. *Ayub Khan*, 19 All., 517, dissented from.—BALDI SINGH *v.* KALKA SINGH, **2 O. C. 139.**

448. S. 11.—*Expl. IV, O. II. R. 1 and 2—S. 13, Explanation II, 42 and 43—Claim. Splitting of*—Res-judicata-*Mortgage—Suit upon specific mortgage—Fresh suit on another mortgage on failure to prove the one in suit in the first case.*

The object of Section 42 of the Civil Procedure Code is to require the plaintiff to bring forward his whole case as to the matter of litigation on the question of right involved in the suit and not to require him to unite all the causes of action which he may have against the defendant in respect of the *corpus* or object matter of the suit, the expression 'the subjects in dispute' signifies the jural relation between the parties to the suit, for the determination of which the suit is brought It means the cause of action or the subject matter of litigation, that is, the right, which one party claims as against the other and demands the judgment of the Court upon.

It is not obligatory that every suit shall include every cause of action or every claim which a party has, but every suit shall include the whole of the claim aris-

ing out of the cause of action for which the suit is throught.

The penalty for non-compliance with Section 42 is provided for partly in Section 43 and partly by Explanation II to Section 13.

Section 43 requires that the whole claim which has arisen, at the date of the suit, out of the cause of action, should be included in the suit so as to avoid splitting of a claim or claims arising out of one and the same cause of action. And Explanation II to Section 13 enjoins that every ground which could and ought to have been urged in support of the claim actually made in the suit shall be deemed to have been adjudicated upon therein, whether it was actually urged or not. The explanation has introduced no innovation in the law of *res-judicata.*

The expression "matter directly and substantially in issue" includes not only the cause of action on which the suit is based but also all matters which are or ought to be put in issue for determination of the cause of action.

Sections 13 and 43 of the Civil Procedure Code are not exhaustive of the law of *res-judicata.*

The absence of the expression "cause of action" in Section 13 does not denote that every plaintiff is now required to exhaust in one suit all the causes of action which he may have at the date of the suit in respect of the property or the relief claimed by him of which he was then aware of.

A plaintiff who seeks to redeem a specific mortgage or to eject on a specific lease and fails in such suit because the mortgage or the lease is not proved is not precluded from seeking to redeem the same property or a portion thereof from another specific mortgage or to eject on the strength of his title the person in possession. RAMASWAMI AIYAR *v.* VYTHINATHA AIYAR. **13 M. L. J. 448.**

449 S. 11 *Expl. IV, O. II. R. 2.—S. 13, Expl. II, S. 43—'might and ought'—Suit for possession of whole dismissed—Subsequent suit for declaration of right—' Cause of action'.*

In consequence of a dispute between the parties, the criminal court acting under the provisions of the Code maintained the defendant in possession. The plaintiffs brought a suit for possession alleging that they were the owners of the whole. The court found that the parties were joint owners, but dismissed the suit on the ground that the plaintiffs had not asked for declaration of their right to a proportionate part. The plaintiffs brought this suit for declaration that they were entitled to collect their half share of rents from the land in dispute.

Held, that having regard to the nature of the two suits the relief claimed in the present suit would have been inconsistent with the relief claimed in the former suit and hence

the plaintiffs were not bound to make it a ground of attack in that suit. The present claim was, therefore, not barred by explanation II to S. 13 of the Code.

Held, further, that the suit *was not* barred by S. 43.—MAHANDAR SINGH *v.* JANKI SINGH. **2. A. L. J. 342.**

450. S. 11. *Expl. IV. O. II. R. 2.—S. 13. Expl. II, S. 43.—Matter which might and ought to have been made ground of attack in former suit.*

On a sale of land by plaintiff to defendant, part of the purchase money was paid and a mortgage was given by the defendant in plaintiff's favour for the balance of the purchase money, which balance amounted to ~~Rs~~ 100. Plaintiff sued on his mortgage, but that suit was dismissed by reason of its being unregistered. Plaintiff now brought the present suit for the amount, framing his claim as for the enforcement of a lien for unpaid purchase money:

Held that the suit was barred by expl. II of s. 13 of the Code of Civil Procedure. Plaintiff might have sued, in his former suit, on the basis of his lien for balance of unpaid purchase money, and he ought to have done so to avoid the necessity for a second suit in the event of the mortgage being held invalid for want of registration. *Kameswar Pershad* v. *Rajkumari Rutten Koer* (I. L. R., 20 Cal. 85), followed—AKAYI KUNHI *v.* AYISSA BI, **I. L. R., 26 M. 645.**

451 S. 11. *Expl. IV. O. II. R. 2—S. 13. Expl. II, S. 43. Former suit to redeem kanam, no bar to subsequent suit based on the kanam and title, so far as the latter is based on title.*

A previous suit to redeem four out of six items of land mortgaged under a *kanam* deed on the ground that the *kanam* was sp it up by a subsequent demise, and which suit was dismissed on the ground that such demise was not valid, will be a bar to a subsequent suit to redeem under the same *kanam* so far as such suit is based on the *kanam.* S. 13 of the Code of Civil Procedure will be a direct bar to any claim on the demise and S. 13, 43 of the Code of Civil Procedure will bar a claim on the original *kanam* as an alternative claim on it might have been made in the prior suit. But where in the subsequent suit, the plaintiff relies as well on his title, such title is a distinct cause of action, and neither S. 13 nor S. 43 of the Code of Civil Procedure will bar his claim on such title. A claim on a *kanam* is a claim arising *ex contractu* while a claim on title against a trespasser is found on tort. *Ramaswami Ayyar* v. *Vythinatha Ayyar,* (I. L. R., 26 Mad. 760) followed. 22 M. 250 dissented from 3. M. H. C. R. 320, 7 M. H. C. R. 160 referred to. PARAMBATH MANAKKAL *v.* PUTHANGATHIL MOOSAMU. **28 M. 406.**

452 S. 11 *Expl. IV. O. II. R. 2—S. 13. Expl. II. S. 43.*—Res-judicata *Cause of action. Splitting of.*

The plaintiffs instituted a suit for recovery of possession of a moiety of a certain house, cattle troughs and courtyard, on the

Sup: Govt. acts (V of 1908) *(Contd.)*

allegation that these premises had formed part of the property of a joint family and had been divided equally between themselves and the defendants; but that in 1899 the defendants had ousted them from possession. The cause of action in the suit was the alleged dispossession by the defendants in 1899. The suit was first decreed, but afterwards was dismissed on appeal. Thereupon the plaintiffs brought the present suit for partition asserting that the house and other premises are joint property of themselves and the defendants, and alleged that in 1899 the defendants had ousted them from possession They asked for a declaration that they were entitled to one-half the premises and for an order to give them possession on partition.

Held, that the plaintiffs' suit was barred under the provisions of section 43 and the 2nd explanation to section 13 of the Civil Procedure Code. DHANPAT RAM *v.* BALBHADDAR NATH. **A. W. N. 1903 P. 97.**

453. S. 11 *Expl. IV, O. II R. 2—S. 13 Expl II, S. 43.—Suit for possession of a portion of a house alleged to have been partitioned in proceedings before a Court of Revenue—Subsequent suit for partition of the same house in a Civil Court.*

The plaintiffs brought a suit to recover their share in certain house property, under a mistaken impression that the Revenue Court in a previous partition proceedings had partitioned the house property along with the *abadi* on which it stood. The suit was rejected on the ground that the house property was not partitioned by the Revenue Court, which had no power to do so The plaintiff brought the present suit in the Civil Court for partition of the same house property.

Held, that the plaintiff's claim was barred neither by S. 13 nor by S. 43 of the Civil Procedure Code.—BALBHADDAR NATH *v.* RAM LALL **A. W N. 1904, P. 89 = 1 A. L. J. 223 = 26 A. 501.**

454 S. 11. *Expl. IV, O. II R. 2.—S. 13 Expl. II, and S. 43 See Specific Relief Act 1 of 1877. S. 27—No. 59 Col. 411—6 C. W. N. 314.*

455. S. 11 *Expl. IV O. II R. 2—S. 13 Expl. II S. 43.* Res-judicata.

A, the maternal grand-father of the plaintiff and defendants No. 1 and 2, owned a share in a village. On his death, the defendand No. 1 took possession of the property. Some 18 years after this the plaintiff brought a suit for possession of one-third share in the property on the basis of a gift, alleged to have been made by A in favour of himself and defendants No. 1 and 2. That suit was dismissed on the ground that the deed of gift was not registered and was inadmissible in evidence. In that suit, defendant No. 2 filed a written statement in which he said that he had no right whatever to any of the property which, he said, solely belonged to defendant No. 1, Subsequently the plaintiff brought a suit for his share by inheritance in the property and in view of the relinquishment by defendant No. 2, he claimed a half-share in the property.

Held, that the suit was not barred by S. 13, explanation 2, nor by S. 43 of the Code. (7 N. W. P. H. C. R 60 and 11 B H C. refd. 224 refd.) MIR IHTISHAM HAIDER *v.* MIR BAQAR ALI, **9 O. C 235.**

456 S. 11 *Expl. IV., O. II R. 2, O. II. R. 4.5—S. 13 Explanation II and 43 and 44—Causes of action not the same.*

A usufructuary mortgagee sued to recover the mortgage-money by sale of the mortgaged land and the suit was dismissed as not maintainable. He had impleaded in the suit mortgagors and certain defendants alleged as his tenants in possession of the land claiming an interest in it. He brought the present suit for recovery of possession as mortgage.

Held, that the subsequent suit was not barred either by Section 13, Explanation II or Section 43 of the Civil Procedure Code, the causes of action in the two suits being different.—21 *Mad., 91, dissented from.* VEERANNA PILLAI *v.* MUTHUKUMARU. **13 M. L. J. 439 = 27 M. 102.**

457 S. 11. *Expl: IV, O. II. R. 2, O. XXIII. R. I.—S. 13 Expl II, 43, 373.—First suit for possession dismissed as not cognizable by Civil Court—Application for withdrawal rejected and appeal dismissed—Subsequent suit for declaration.*

A sued M., the predecessor in title of the present defendant, for a declaration of right in respect of the village which was awarded to M. by a decree of the Revenue Court under section 108, cl. 10, Oudh Rent Act. The prayer was amended to that for possession. The suit was dismissed on the ground that it was not cognizable by the Civil Court. In second appeal an application was made under section 373, Civil Procedure Code, for leave to withdraw the suit with liberty to bring a fresh suit. The application was rejected and the appeal was dismissed on the ground held by the Lower Court. The plaintiff then filed the present suit asking the prayer for a declaration of his right in the village.

Held, that the cause of action stated by the plaintiff was identical in both suits but the only matter which was finally determined in the former suit was that the Civil Courts could not give the relief therein sought; it was, therefore, doubtful whether sec. 13, Civil Procedure Code or Explanation II of that section could apply.

Held, also, that s. 43 of the Code barred the suit.

The "Cause of Action" has been defined to mean every fact which it is material to be proved to entitle the plaintiff to succeed and every fact which the defendant would have a right to traverse, and does not depend on the relief claimed. One test in deciding whether the cause of action in two suits is the same is whether the same evidence would support both.—*Shankar Bakhsh* v. *Daya Shankar*, 15 Cal. 422 (P. C.), (s. c.) L. R., 15 I. A.

Sup: Govt. acts (V of 1908). (*Contd.*)

66; *Chand Kour* v. *Partab Singh*, 16 Cal., 98, (s. c.) L. R., 15 I. A., 156; *Brunsden* v. *Humphrey*; L. R., 14 Q. B. D., 141; *Ramaswami Ayyar* v. *Vythinatha Ayyar*, 26 Mad. 760; *Rangayya Goundan* v. *Nanjappa Rao*, 24 Mad, 291 (P. C.); and *Partab Narain Singh* v. *Musammat Sarju Dei*, 5 O. C., 173; referred to—MOHAMMAD ASGHAR *v.* AMJED ALI. **8 O. C., 389.**

458. S. 11—*Expl. IV, S. 47—S. 13, Expl II, 244, cl. (c)—Partition of land—Rights of Co-sharer.*

A, the plaintiff and one B owned the village of *Syed Khanpur*. B. made a gift of some lands in the village to C, the defendant C. sued B. for a declaration of her title to the lands. The suit was adjusted by a compromise and she obtained a decree dated 21st Oct. 1881 for certain lands in the village, which were substituted for those originally given to her. After B's death C. brought a suit against his heirs and A. for possession of the land specified in the decree, and of certain other lands specified in the deed of gift. C. obtained decree dated 10th March 1891 for possession of the lands mentioned in the decree, dated 21st October, 1881, which was confirmed in appeal by the Judicial Commissioner. Before the last mentioned suit was brought, the heirs of B. applied for partition of the village as against A. The partition took place and under it 12 *bighas* and 4 *biswas* of the lands specified in the decree, dated 21st October, 1881, were allotted to A. He obtained possession of them in June, 1891. C. applied for execution of her decree, dated 10th March, 1891, against these lands. A. objected. The Court executing the decree dismissed the objection and A's appeal also was dismissed. Subsequently C obtained possession.

In February, 1896, A. instituted a suit against C. and the heirs of B. for possession of 12 *bighas* and 4 *biswas* of land. The Munsiff decreed the claim. The Subordinate Judge dismissed the appeal of C. On appeal by C., the Judicial commissioner;

Held, (1) that the question as to A.'s title to the lands was not *res-judicata* under sec. 13, Exp. II, Civil Procedure Code.

(2) A. was no party to the decree, dated 10th March, 1891. It was not passed against him but against the heirs of B, he must be deemed to have been released from the operation of the decree and he therefore ceased to have any interest or concern in the suit in which the decree was passed within the meaning of sec. 244, cl. *(c)*.

(3) that when the partition took place C. was representing B. as the owner of three-fifths of the land in dispute and her title was not affected by the partition to which she was no party.

(4) that C. held the lands awarded by the decree, dated 10th March, 1891, subject to such rights as B's co-sharer A. might acquire in them on partition of the village.

Sup: Govt acts (V of 1908) (*Contd*)

(5) that when the lands in dispute were allotted to A. under the partition C. ceased to have any right in them. WILAETI *v.* GHULAM ALI KHAN. **2 O. C., 51.**

459 S. 11—*Expl.-IV and VI—S. 13, Expl. II and V.*

In order to make section 13 applicable, it is not necessary that the matter of the subsequent suit should have been heard or have been fully decided by a competent Court in the former suit when the case is one to which Explanation II applies. 24 C. 711, 20 A. 110, 24 A. 429, 16 I. A. 107. *refd. to.* NGA CHIT MAUNG *v.* NGA PO KIN, NGA KYAN HLA, NGA PO GAUNG. **U. B. R. 1906 P. 46. (Civil Procedure).**

460 S. 11—*Expl. V., O. XXIII R. I.—S. 13 Expl. III, S. 373*—Res Judicata—*Future mesne profits, claims for—Withdrawal of claim —Subsequent suit.*

A suit for possession and for future mesne profits till delivery of possession was dismissed by the Court of first instance. The plaintiff preferred an appeal as to possession only and in his memorandum of appeal stated that future mesne profits would be made the subject of a seperate suit. The appeal was decreed. Subsequently the plaintiff instituted a suit for mesne profits from the date that the previous suit was instituted up to the delivery of possession.

Held that the second suit was not barred by the rule of *res-judicata* on account of the previous suit having been dismissed by the Court of first instance. Neither the suit was barred under s. 373 of the Civil Procedure Code. In a suit for future mesne profits, the plaintiff is not entitled to claim future mesne profits as of right and under section 211 of the Civil Procedure Code, it may be allowed or refused by the Court at discretion. The words of expl. *iii* "relief claimed in the plaint" mean relief which, assuming to the defence fails, the plaintiff is entitled to as of right. Provision for future mesne profits which the Court has discretion in any event either to make or to refuse is not "relief" within the meaning of the explanation. The word "claim" in section 373 means such a claim, as if the allegations on which it is based are true, gives the plaintiff a cause of action *quoad* that particular claim and not a claim which is not a cause of action and which the Court may in any event in the exercise of its discretion, either grant or refuse. KUPPUSAMY AIYAR *v.* VENKATARAMIER, **15 M. L. J. 462.**

461 S. 11—*Expt. V. S. 13, Expl. III—Claim for future mesne profits in the prior suit—No* res judicata.

Held, following the case law on the point, that a second suit for future mesne profits, though the claim was included in the prior suit, is not barred by reason of the decree in the prior suit which omitted to deal with it 17 C. 968; 21 A. 425; 1

Sup: Govt. acts (V of 1903) *(Contd.)*

B. 532; 14 M. 328 foll. HAYS *v.* PADMANAND SINGH. **32 C. 118, at 112.**

432 **S. 11**—*Expl. V.—S. 13 Expl. III*—Res-judicata—*Mesne profits claimed in a redemption suit not granted—Effect of.*

Held, that a fresh suit for mesne profits for a period prior to the plaintiff's previous suit is barred when the profits were claimed in that suit which was for possession by redemption of the mortgage, and the judgment was silent as to them. KACHU *v.* LAKHSMANSINGH. **2 B. L. R. 781 = 25 B. 115.**

433. **S. 11.**—*Expl. V—S. 13. Expl III*—Res-judicata—*Mortgage—Sale of mortgaged property—Suit by purchaser for redemption—Mortgagee entitled to pre-empt—Claim to pre-empt not put forward in redemption suit—Subsequent suit for pre-emption.*

The owner of a certain share in a village mortgaged three-quarters of that share to R. C. and afterwards sold the entire share to D. P. D. P., the purchaser, sued the mortgagee, R. C. for redemption, and obtained a decree. Subsequently R. C., who was a co-sharer in the village, brought a suit for pre-emption of the share against D. P. and the original mortgagor.

Held, that the fact that R. C. had not advanced his claim to pre-empt as a defence to D. P.'s suit for redemption did not have the effect of making R. C.'s claim in his suit for pre-emption *res-judicata*. *Baldeo Shai* v. *Bateswar Singh*, (I. L. R., 1 All. 75), *Jadu Lal* v. *Ram Gholam*, (I. L. R., 1 All. 316), *Narain Dat* v *Bhairo Bukshpal*, (I. L. R., 3 All. 189), and *Pulandar Singh* v. *Jwala Singh*, (I. L. R., 20 All. 519), overruled. *Srimut Rajah Mootoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver* v. *Katama Natchior* (11 Moo., 1 A., 50), and *Deokinandan* v. *Sri Ram*, (I. L. R., 11 All. 234), referred to. RAM CHAND *v.* DURGA PRASAD. **A. W. N. 1903 P. 196 = 26 A. 61 (F. B.)**

434. **S. 11**—*Expl. V—S. 13, Expl. III.*—Res-judicata.

Explanation III to Section 13, Civil Procedure Code, is no bar to an application for execution to recover mesne profits adjudged by the decree, when upon a previous application for delivery of possession and award of mesne profits the Court had dealt with the prayer for possession only. NITYANANDA GANTAYAT *v.* GAJAPATI VASUDEVA DEVU. **11 M. L. J., 1901 p. 313. = 24 M. 681.**

435. **S. 11.**—*Expl. V—S. 13.—Expl. III*—Res-judicata—*Cause of action—Suit on mortgage—Taking money decree on mortgage—Refusal of relief—Relief claimed, but not granted—Second suit for sale—Civil Procedure Code (Act XIV. of 1882) s. 13, expl. (3).*

Where a mortgagee had previously instituted a suit to enforce his security and was content in that suit to take merely a money decree, but failed to obtain satisfaction of the decree.

Sup: Govt. acts (V of 1903) *(Contd.)*

Held, that having regard to s. 13 expl. (3) of the Code of Civil Procedure, the decree operated as *res-judicata*, and he was not entitled to bring another suit to realize the debt by the sale of the mortgaged property. *Jonmenjoy Mallick* v. *Dossmoney Dossee*, (I. L. R., 7 Cal. 714) and *Rajkishore Suhai* v. *Bhadoo Noshoo* (I. L. R., 7 Cal. 78), distinguished. SHIBU BERA *v.* CHANDRA MOHUN JANA. **33 C. 849.**

436. **S. 11.** *Expl. VI.—S. 13. Expl. V.*—"*Bona fide litigating.*"

Where a Karnavan brought a suit to have a decree passed against his predecessor set aside, and it was dismissed and a fresh suit was brought by the junior members of the tarwad for the same relief—

Held, that in the absence of fraud or collusion in the conduct of the previous suit the present suit was barred. The previous decree operated as *res-judicata* notwithstanding the fact that certain material documents were not produced by the plaintiff in the previous suit. Non production of the documents was not sufficient to show that the suit was not conducted *bona fide*. MADHAVAYA *v.* KERALA VARMA ARSAN. **13 M. L. J. 68.**

437. **S. 11**—*Expl. VI—S. 13. Expl. V*—Res-judicata—*Parties litigating under the same title—Plaintiff in first suit representing plaintiff in second suit—Right to any relief—Defendant having no interest in relief claimed.*

The plaintiff in the first suit can be held to represent the plaintiff in the second suit under explanation 5 to section 13 of the Civil Procedure Code only if the latter has any "right to any relief" claimed in the first suit.

The defendants Nos. 2 to 5, sons of one *S.*, were divided brothers and were alleged by the plaintiff to be reversioners of their uncle *M.*

The plaintiff as purchaser of the share of defendant No. 5 sued for partition and to recover possession of that share from defendant No. 1 who denied that defendant No. 5 was reversioner and set up his own title as the adopted son of the deceased *M.* In a previous suit defendants Nos. 2 to 4 sued as reversioners of *M.* to recover his entire property including the fifth defendant's share from the first defendant who set up the same plea of adoption now put forward by him. Defendant No. 5 was made a defendant on account of his refusal to join as plaintiff and allowed the suit to proceed *ex-parte*. The first defendant's alleged adoption was declared invalid.

Held, that the first defendant was not barred from raising the plea of adoption in the second suit. 14 *Mad.*, 324 *overruled*, 21 *Mad.*, 373 (383) *approved*. SOMASUNDARA MUDALI *v.* KULANDAIVELU PILLAI. **S C., M. L. J. 1904 p. 404 = 28 M. 457 (F. B.)**

See also 14 *M. L. J.* 251 *No.* 442 *supra.*

Sup: Govt. acts (V of 1908) *(Contd.)*

468 S. 11 *Expl: VI, O. I. R. 8 (1)—S. 13- Expl: V and S. 30—Procedure*—Res-judicata.

S. 13 Expl: V of the Code of Civil Procedure has no application where the procedure prescribed by section 30 has not been followed. 8 M. 496, 14. M. 57, 23 M. 28 followed. 56 L. J. Ch. 313, 62, L. J. Ch: 708. 18. M. 164, 6 C. 31 *refd to.* UCHHABO BARIK *v.* BAMMALI and others. **16 C. P. L. R. 1903 P. 161.**

469 11.—*S. 13, S. 21.—Emoluments of office—Collector's jurisdiction—Suit in a Civil Court.*

Under S. 13 of Act III of 1895 the Collector can try whether certain lands are emoluments of office or not. The parties are debarred, by the express provisions of S. 13 of the Code of Civil Procedure and the general principles of *res-judicata*, from reopening the same question in suit before a Civil Court. In such a case, it is not necessary to have recourse to the provision of S. 21 of the Code, which it would only be necessary to look to, if the question had not already been decided in a suit under S. 13 of the Act III of 1895. (30 M. 123, 13 M. 41 and 17 M. 302 refd). BALIJEPALLI SESHAYYA *v.* BALIJEPALLI SUBBAYYA, **30 M. 320.**

470. S. 11-*O. II R. 2—S. 13, 43. Previous suit for possession--Subsequent suit for declaration of title—Relief claimed in subsequent suit which could have been claimed in previous suit—Suit barred.*

A, a Taluqdar, caused a notice of ejectment to be served on B., the *thekadar* of a village, under s. 54 and 55, Oudh Rent Act. B. brought a suit against A. to contest his liability to be ejected, denying that he was *thekadar* and claiming that he was an under-proprietor. The notice being set aside, A sued B in the Court of the Sub-Judge for possession of the village, alleging that B. was *thekadar* and liable to be ejected by the Revenue Courts. This suit being dismissed, A. subsequently instituted the present suit against B. in which he alleged that B. was *thekadar* of the village and claimed a declaration that he was the absolute proprietor of the village, that the only rights which B. had was to receive $\frac{1}{10}$ of the produce of the village, and that B. was liable to be ejected by the Rent Court. The Sub-Judge dismissed the suit as barred by S. 43, Civil Procedure Code, and the District Judge confirmed the decree holding that the suit was barred by that section or S. 13 of the same Code.

Held, that the present suit was not barred by S. 13, Civil Procedure Code, for it could not be said that A. claimed the same relief in the first suit, and the Courts refused to grant him the same. The suit was, however, barred by S. 43, Civil Procedure Code. The causes of action in the two suits were the same. The Court which heard the former suit was competent to grant the appellant A a declaration of his title. The appellant had an opportunity of obtaining in the

Sup: Govt. acts (V of 1908) *(Contd)*

former suit the relief which he now sought for. Having omitted to ask for it in the former suit, he could not sue for it in the second—PARTAB NARAIN SINGH *v.* MUSAMMAT SARJU DEI, **5 O. C. 173.**

471. S. 11-*O. II R. 2—S. 13, 43—Prior and puisne mortgage—Sale of mortgaged property—Redemption by vendee of the prior mortgage—Suit for sale by puisne mortgagee —Dismissal of suit on the ground that previous mortgage not offered to redeem—Second suit for redemption of prior mortgage and sale*—Res-judicata—*Transfer of Property Act (IV of 1882), S. 89.*

The owner of a village mortgaged it to A for Rs. 7,000 and put him in possession. The owners afterwards mortgaged X and other property to B's father for Rs. 2,400 without possession. Some 7 years afterwards the owners sold X to the defendant for Rs. 14,000, of which Rs. 7,000 was left with the purchaser in order to redeem the first mortgage. The defendant redeemed the mortgage and obtained possession.

After this B sued for recovery of the amount due on his mortgage impleading the owners, the defendant and other persons describing them in the plaint as transferees of the mortgaged property, but he did not offer to redeem any mortgages. He prayed among other reliefs that the Court should make all orders that might be necessary to give him the main relief, *i. e.*, sale of the property. The Court held that the plaintiff could redeem the village X but he could not bring it to sale without first redeeming it. It therefore declared that the village was not saleable for plaintiff's money. A decree for the sale of other property was, however, passed in favour of the plaintiff.

Now the plaintiff sued for redemption of the first mortgage and for the sale of X to recover the costs of redemption and the balance due at the date of suit on the former decree.

(Per Chamier, A. J. C.) Held, that the plaintiff's cause of action for the present suit was exactly the same as his cause of action for the former suit, *viz.*, mortgage to him and non-payment of the mortgage money. In the former suit, he might and ought to have offered to redeem the prior mortgage. The Court, which decided the former suit, did not mean to decide that the suit was premature. The suit should therefore be dismissed as barred by S. 13 and 43 Civil Procedure Code 24 M. 491 P. C. refd.

(Per Scott, J. C.) Held, that the decision in the first suit was in fact that the suit was premature, and this decision being on a question of law was *res-judicata* between the parties.

Held, further, that the words "ground of defence or attack" in S. 13, Civil Procedure Code, do not include a ground of defence or attack, which may come into existence by some act of the plaintiff, such

Sup: Govt. acts (V of 1908) *(Contd.)*

as the payment of money to another. They refer to the condition of things at the time the former suit was instituted.

Held, also, that the suit was not barred by either S. 13 or 43, Civil Procedure Code (1 O. C. 105, 8 O. C. 37 refd.)

(*Per Evans, A. J. C.*) *Held*, that the plaintiff was bound to sue for redemption of the prior mortgage in his first suit and ought to have made the offer to redeem a ground of attack. He is, therefore, barred from bringing a fresh suit on the same cause of action.

Held further, that the plaintiff having obtained a decree for sale on his mortgage and the decree for sale having been made absolute, the security had been extinguished under S. 89, Act IV of 1882, and the plaintiff had therefore no title to maintain the present suit 2 A 429 P. C. 20 A 110 refd. CHAUDHRI GANGA SINGH *v.* LACHMI NARAIN, **10 O. C. 145.**

472 S. 11—*O. II. R. 2—S. 13, 43—First suit for a share in inheritance—Subsequent claim for dower.*

Held, that the cause of action for a claim for dower is distinct from the cause of action for a share in the inheritance

Held, further, that there is no legal obligation to include a claim for dower in a suit for inheritance, and the second suit is not barred. (20 A 81 and 21 C. 157 disting.) KISAR BEGAM *v.* NIZAM AHMED, **11 O. C. 69.**

473 S. 11 *O. II. R. 2—S. 13, 43 Res-judicata—Splitting of claims—Suits on distinct mortgages.*

Held, by the Full Bench, that a previous suit on an alleged mortgage dismissed on the ground that the plaintiff had failed to prove the mortgage set up by him does not bar a subsequent suit based on an alleged mortgage of a different date, though the property concerned in both the suits is identical. TRIKKAIKKAT MADATHIL RAMAN *v* THIRUTHIYIL PARAMAL KRISHNAN NAIR. **16 M. L. J. 48=29 M., 153 (F. B)**

474 S 11 *O. II, R. 2.—s. 13. 43—Judgment not inter partes—Admissibility of the judgment in subsequent proceedings—Particular instances in which the right was claimed.*

A relying on a registered sale deed passed to him by his father, sued to his brother, brother's wife and the wife of a deceased brother for possession of the property.

A. year after the alleged sale certain mortgagees had filed a suit against the plaintiff, his father and mother on a mortgage bond executed by the father. In that suit, the Court of first instance, as also the District Court, held the plaintiff's sale to be a sham transaction. The plaintiff at that time paid off the mortgage debt.

The defendants relied upon the judgment in suit of 1886, to show that the sale relied upon by the plaintiff was colourable:

Sup: Govt. acts (V of 1908) *(Contd.)*

Held, by Russell, Ag. C.J., (1) that the proceedings in the suit of 1886 should be admitted as relevant evidence in the present suit, for, the present plaintiff and the defendants, either by themselves, or their predecessors, were parties to the suit of 1886.

(2) that the judgment in the suit of 1886 would come within the purview of Cl. 2 of S. 13 of the Evidence Act, 1872.

Held, by Beaman, J. (1) that the party who has been allowed to put in a previous judgment not *inter partes*, for the purpose of S. 13 of the Indian Evidence Act. 1872, cannot be allowed to use its contents *qua* judgment, virtually thereby converting it into a *res-judicata*.

(2) that, therefore, conceding that the judgment in suit of 1886 was admissible to prove that in 1886 there was dispute about the genuineness of this sale-deed, it could not be used for any ulterior purpose. 2 Beng. L. R. (P. C.) III, 10 B. 439 2 B. L. R 386, 2 B. L. R. 651, 5 B. L. R, 239 *Referred to.* MAHAMED AMIN *v.* HUSAM MAHAMED, **9 B. L. R. 65=31 B. 143.**

475. S. 11. *O. II. R 2, Ss. 13, 43-Cause of action splitted—Mortgagee declining to accept tender but remaining in possession of property —Suit for redemption—Second suit to recover mesne profits from the date of tender to the date of delivery of possession—Transfer of Property Act Ss. 62, 83.*

A made a usufructuary mortgage in favour of B. and placed him in possession. Some 7 years afterwards A. tendered the amount of the principal to B. but it was not accepted. A. then filed a suit under S. 62 of the Transfer of Property Act to recover possession of the mortgaged property, and also under S. 83 of the Act deposited the amount of the principal in Court as the amount payable on the mortgage. The Court passed a decree for possession. He brought another suit to recover mesne profits from the defendant from the date of the deposit to the date when he recovered possession of the mortgaged property in execution of the redemption decree in the first suit. The Lower Appellate Court disallowed the claim on the ground of *res-judicata.*

Held, that the present claim was barred either under S. 13 or S. 43 of the Civil Procedure Code, for, the profits derived by the mortgagee after a proper tender made or after the amount due had been deposited in Court were profits for which he had to account to the mortgagor in virtue of a liability tacked on, so to say, by the statute to the mortgage contract, and, as such, a claim to them by the mortgagor was one arising from and connected with his right to redeem or recover possession of the property. It was all one cause of action which might and ought to be alleged by the mortgagor in his suit to recover possession.—RUKHMINI-BAI SUBRAYA *v.* VENKATESH BAB PRABHU. **9 B. L. R. 958=31 B. 527.**

Sup: Govt. acts (V of 1908) (*Contd.*)

476. S. 11. *O. II R. 2–S. 13, 43. Suit for possession of land as Khewatdar without claiming shamilat.*

Held, that a decree for possession of land in favor of plaintiffs as *Khewatdars* impliedly included proportionate share of *shamilat* although no claim was specifically made in respect of it.

In partition proceedings objection was taken that the decree-holders had no right to a share in the *shamilat* and they were referred to a regular suit, *held*, that the suit brought by the decree-holders was not barred by section 13 or section 43 of the Code of Civil Procedure. BURA *v.* JHANDA. **P. L. R. 26 of 1901 - P. 113 of 1900.**

477. S. 11. *O. II. R. 2, O. II. R. 4, 5 Ss. 13, 43 and 44—Joinder of causes of action—Presumption of correctness of a genealogical table prepared at Settlement—Custom—Inheritance—Escheat to the proprietary body—New case set up in appeal.*

A. and B. sued in the Court of a Munsiff, 1st class, to contest the validity of the adoption of C. by D. Their suit was dismissed on the finding that they were not collaterals of D, and so could not object; and, secondly, that the adoption was valid.

After C s death without issue, A. and B. sued for possession of the moveable and immoveable property of C, as collaterals of his adoptive father D. Others proprietors of and in possession of the land, also filed another suit for declaration of their title to succeed as the proprietary body denying the relationship of A. and B. with D.

Held—(I) That the question, whether A. and B. are collaterals of D. or not, is not barred by *res-judicata* by reason of its being decided in the previous suit as

(*a*) The Court trying the first suit, a Munsiff with jurisdiction up to Rs 1,000 only, had no jurisdiction to try the subsequent suit which was valued at more than Rs 1,000.

(*b*) A. and B. C. cannot be said to be suing as representatives of D. and C., who were defendants in the previous suit. The claim is simply a claim founded on the custom of escheat in favour of the proprietary body who no more represent the deceased than the crown does in cases in which property lapses to the crown for want of heirs.

(II) A party claiming as an heir can and should sue for the whole of the estate, both moveable and immoveable, in one and the same suit. (10 M. 375 followed).

(III) Although a presumption exists by law in favour of the correctness of the pedigree table as prepared at a settlement such presumption is greatly weakened, if the contents of that document are vague.

(IV) The contention of A. and B. that they were also members of the proprietary body, along with others, could not be entertained in the Chief Court, where it was raised for the first time on appeal.

Sup: Govt. acts (V of 1908) (*Contd.*)

RAM SINGH *v.* DULA SINGH, **58 P. W. R. 1908.**

478 S. 11—*O. II. R. 2, 3, 6—S. 13, 43 and 45—Different cause of action—No* Res-judicata *—Plaintiff not bound to unite in a suit—Several causes of action.*

On the death of a Mahomedan owner of a permanently settled estate his two widows held possession of the estate for more than twenty years to the exclusion of his residuaries. On the death of one of them, her brother and sister brought a suit and obtained a decree for possession of half the estate. The other widow died leaving behind her three brothers, and one sister, the present plaintiff. Before the present suit, the plaintiff had brought two other suits. One was against one of her brothers and sons of another brother, for maintenance alleged to be due upon an agreement given by her three brothers, on the death of her father, and this suit was compromised; the other was against the same persons for her legal share, as a sister, in the property left by Bhagbhari and in which she obtained a decree. In the present suit, she claimed the whole share, which her other brother had inherited from his sister, Bhagbari, and the whole of the property which he inherited from his father, on the allegation that his widow and daughters were excluded by custom and that his nephews were, by her, rendered *mahjup-ul-irs*. The Subordinate Judge dismissed the suit on the ground that the plaintiff had, by her conduct, renounced her right to the property in suit and was also, by that conduct, estopped from putting forward her claim.

Held, on appeal, that the plaintiff had not, by her conduct, relinquished her rights. Her present claim and the maintenance claim were totally dissimilar and the joinder of the two claims would have been very inconvenient. Nor need she have joined this claim with her claim in the second suit. It would not be right to infer, from the plaintiff's inaction in the two suits, that she intended to abandon her claim to a share in the property, which had devolved upon her brother on the death of Bhagbhari. Before a *pardanashin* lady, like the plaintiff, can be held by implication to have renounced her rights, it must be shown that she was aware of them. Her failure to claim her brother's property in the second suit is of little value as indicating renunciation, for she was then claiming a sister's share in her sister's property. So, neither of her claims in the present suit were barred by either S. 13 or 43, C. P. C., and plaintiff was not bound, by S. 45, C. P. C., to include in any suit several causes of action arising on different dates and relating to entirely different properties. MUSSAMMAT IMTIAZ FATIMA *v.* MOHAMMAD KAMIL, **8 O. C. 65.**

479. S. 11, *O. II. R. 2, O. XXI R. 29, 13, 43, 244. Suit for value of trees standing on*

Sup: Govt. acts (V of 1908) (*Contd.*)

land may not be substantially in issue in a suit for ownership of land—Custom as regards standing crops and trees on land.

A sued B for the value of 110 *tari* trees standing on a land which in a previous suit B *v.* A's husband, B had been allowed to redeem. The Court of first instance dismissed the suit under Sections 13 and 43 C. P. C., but in appeal the suit was remanded for trial as not barred. The Court of first instance found that the trees were planted by A when the land was in her possession under mortgage. The value of the trees was found to be Rs. 160 and by the Dhammathats custom she was allowed half the value *i. e.* Rs. 80. The Lower Appellate Court concurred in the same decree. She preferred a second appeal for the half not allowed. B filed objections as to the half allowed and set up Sections 13, 43 and 244 as barring the suit. Possession was given to B in execution and the present suit arose out of B's objecting to A afterwards pruning the *tari* trees. It was pointed out that as an ordinary rule standing crops go with the land. But in parts of Burma at least, it is recognised that trees and specially *tari* trees, frequently belong to a different person from the owner of the land and the custom has to be proved.

Held, that the matter in issue namely the ownership of the *tari* trees was not substantially in issue in the previous suit, though the parties were the same within the meaning of S. 13 C. P. C. It was not alleged by one party nor admitted or denied by the other. S. 43 was inapplicable. A was not bound to raise the claim for the value of the trees in the execution proceedings. The evidence showed that trees might belong to a person different from the owner of the land. S. 244 therefore did not apply. 2 U. B. R. 1892-1896. P. 548 and of 1899. P. 69. Civil appeals 254 of 1898, 169 of 1899, and 212 of 1900 *referred to.* MA MO YWE *v.* MAUNG LUTHA. **U. B. R. 1901 P. III (C. P.)**

480. s. 11. *O. IX R. 9 O XXVI. R. 13, 14—S. 13, 103, 396.—Partition, suit—Preliminary consent decree, not given effect to—Fresh suit for partition.*

The plaintiff in 1890 brought a suit for partition. The suit was compromised, and it was settled that the plots 1, 2 and 3 were to be divided in a certain manner. An *Ameen* was appointed to effect the partition, but he did not partition the disputed plots. Subsequently the parties did not appear and the execution proceedings then pending were dismissed for default on the 10th June 1894.

The present suit was instituted on the 24th January 1903 for partition of plots 1, 2 and 3.

Held, that the suit is not barred under sections 13 and 103 Civil Procedure Code. There was no final decree passed in the previous suit. The decree that was passed on the compromise was a preliminary one which never reached the stage of a final decree under section 396, Civil Procedure Code.

Sup: Govt acts (V of 1908) (*Contd.*)

That section 103, Civil Procedure Code, has no application to execution proceedings and the previous suit was not dismissed under section 103.

When a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent for the parties or any of them, if they still continue to be interested in the joint property, to bring another suit for a declaration of a right to partition in case their right to partition is called in question at a time when by reason of limitation or otherwise, they cannot put into effect the decree first obtained *13 All., 313 followed. 3 Bom., L. R., 94 distinguished.* MADAN MOHON MONDUL *v.* BAIKANTA NATH MONDUL. **10 C. W. N., 830.**

431. s. 11.—*O. XXI R. 22, and 53—S. 13, 248, 273—Attachment by a decree holder against the mortgagee decree-holder before the execution of his decree by the latter—Attaching creditor how should execute it when substituted in place of the mortgagee—Irregularity not affecting the jurisdiction of the Court—Acquiescence of the judgment-debtor, if cures it—Omission to prefer objection, if creates the bar of 'res-judicata'*

A mortgage decree is not a decree of money within the meaning of s. 27 of the Code of Civil Procedure. (O. XXI R. 53). The proper course for a decree-holder attaching a mortgage decree is to ask for a sale of it, and, if he succeeds in being the purchaser to apply for execution as purchaser of the interest of the morgagee decree-holder. Where a holder of a decree against a mortgagee attached the mortgage decree before its execution, got himself substituted in place of the martgagee decree-holder, executed the mortgage-decree, and sold the property in execution, and the sale was confirmed, and where the judgment-debtor did not object to the substitution, or to the execution of the decree by the substituted decree holder, but allowed one execution to proceed, and pleaded payment to the substituted decree-holder:

Held, that although there was an irregularity in the procedure, it was cured by the long acquiescence of the judgment-debtor, and the judgment-debtor is estopped by his own conduct from upsetting the whole procedure. That the judgment-debtor is also barred by the law of *res-judicata* from putting forward his present plea, *viz.*, that the substitution could not be made and that the decree could not be executed by the substituted decree holder in the way he did it which he ought to have taken as a ground of his defence when notice under S. 248 was issued on him to shew cause why the decree should not be executed. That the substitution of the decree-holder was merely an irregularity and not an illegality which did not affect the jurisdiction of the Court.—JOGENDRA NATH BHATTACHARYA *v.*

Sup: Govt. acts (V of 1908) (*Contd.*)

HIRANYAKUMAR MUHURI. 2 C. L. J. 499.

482. S. 11, *O. XXI R. 66, 70—S. 13, 287—* Res-judicata—*Execution of decree—Decree for sale of property not liable to attachment or sale—Objection not raised in original suit but raised against application for execution—Estoppel—Landlord and tenant—Occupancy holding—Sale in execution of decree.*

The decree-holders obtained a decree upon a compromise for payment of a certain sum of money and, in default, or the sale of certain properties.

Amongst the properties specified as liable to sale under the decree were a number of fields described as held by the judgment-debtor on a permanent tenure (*istimrari patta*).

Default having been made, the decree-holders (appellants) applied for execution of the decree by sale of the property mentioned therein. The judgment-debtor objected that certain lands, the sale of which was asked for, were occupancy holdings and that the prayer for the sale of these lands was illegal. Both the executing and the first appellate Courts sustained the objection and disallowed the decree-holders' application for the sale of these lands. On appeal to the High Court

Held, that the judgment-debtor was not justified in raising the objection at this stage of the suit, for the objection could have been validly raised in the original suit in which the decree was passed. That the decree and the sale would not bind third parties. *W. N All., 1892 p. 5 followed.*

Burkitt J—According to section 287 of the Civil Procedure Code, it is the duty of the execution Court, should it have reason to believe that property prayed for to be sold, is an occupancy holding, to enter that fact in the proclamation of sale as a warning to the intending purchasers. BASDEO PRASAD *v.* JUTHAN RAM. 2 A. L. J. 401=A. W. N. 1905 P. 138=27 A. 584

483 s. 11, *S. 47, O. XXI P. 58, 63—s. 13, 244, 278-283—Execution of decree against legal representative—Attachment. Objection against, by heir as trustee not preferred—Heir may resist possession by auction-purchaser*—Res-judicata.

When property in the possession of the legal representative of a judgment-debtor as a trustee for a religious purpose is attached as the property of the judgment-debtor, it is not obligatory on the legal representative to file an objection against the attachment. He is not debarred by sections 13, 244 and 278 of the Civil Procedure Code to oppose the auction-purchaser's suit for possession by pleading his right and title to hold the property as trustee. *12 All., 313; W. N., All., 1906 p. 157 referred to.* RANI INDOMATI *v.* JAGESHAR. 3 A. L. J., 565=A. W. N. 1906 P. 158=28 A. 144.

Sup: Govt. acts (V of 1908) (*Contd.*)

484. s. 11, *47—S. 13, 244—'Might and ought'—Different suits on different causes of action with regard to the same subject-matter—Questions to be decided in execution.*

In execution of a mortgage decree against the mother of D and B certain property was purchased by R. The same property was again sold in execution of a decree for rent obtained by the landlord against the recorded tenant (father of D and B), and was purchased by R in the *benami* of his son in-law, and he took possession in execution of both the decrees. D and B then instituted two suits for recovery of possession. One was on the ground that the rent-decree, being fraudulent, was inoperative against them; and the other on a declaration that the mortgage executed by their mother was without legal necessity and that the sale in execution of the mortgage decree was not binding on them. The first suit was decreed and the second suit dismissed. D and B then transferred their right to possession under the decree in the first suit to the present defendant, who recovered possession in execution. An objection on behalf of R that he was in possession under the purchase in execution of the martgage-decree was disallowed.

R then brought the present suit for recovery of possession on the ground of his purchase in execution of the mortgage-decree.

Held, that the suit was not barred either under S. 13 or under S. 244 of the Code.

Where a plaintiff brings two suits based on different causes of action with regard to the same property, it is not obligatory on a person who is a defendant in both the suits, to plead as a defence to each suit what is properly a defence to the other. KAILASH CHANDRA MANDAL *v.* RAM NARAIN GIRI. 4 C. L. J. 211.

485. s. 11, *47—S. 13, 244*—See Mortgage. AHMAD BAKSH *v.* RAGHUBAR DAYAL 3. O. C. 371, (372).

486. s. 11, *47—S. 13, 244.* Res-judicata.

A sued B and others in the sub-judge's Court for cancellation of a deed of gift and for possession. B defended the suit on the basis of the deed of gift. Some of the defendants filed written statements in which they disclaimed title to the property in dispute and denied that they were in possession. It was subsequently discovered that the suit was beyond the jurisdiction of the Sub-Judge and the plaint was returned and filed in the Court of the District Judge. In the latter Court B. alone defended the suit, the other defendants did not file written statements in that Court and proceedings were made *ex parte* as against them. The District Judge dismissed the suit, holding that the gift was valid and that the suit was barred by limitation. The plain-

Sup: Govt acts (V of 1908) *(Contd.)*

tiff appealed to the Court of the Judicial Commissioner making all the defendants in the suit respondents in the appeal. A compromise was effected between the plaintiff and B. to the effect that the suit should be decreed on payment to her of Rs. 10,000. When the appeal was called on for hearing, six of the respondents stated that full effect had not been given to the deed of gift and that they were in possession of the property and asked to be heard in support of the decree of the District Judge. The appellant withdrew his appeal as against these six respondents. The Court then dismissed the appeal against them and other absent respondents but decreed the claim for possession in accordance with the terms of the compromise.

The appellant applied to be formally placed in possession. He alleged that he was then already in possession and merely wished to formally execute his decree. The respondents to the present appeal filed objections under section 244, C. P. C., in which they claimed title to two-thirds of the property, asserting that they were in possession of the same and pleaded that they were not liable to be disturbed in execution of the decree.

It was proved that the respondents were in possession of the property in question.

The Lower Court accepted these objections and dismissed the application for execution. The appellant's counsel urged in appeal that some of the respondents, having in their written statements filed in the Court of the Sub-Judge, disclaimed title and denied that possession was with them, were estopped from pleading the contrary and that others of the respondents did not defend the suit, thereby tacitly admitting the claim and they could not be permitted at various stages of the same suit to adopt contradictory attitude, and that objections now made by the respondents might and ought to have been made grounds of defence to the suit on the analogy of explanation II to section 13, C. P. C., and that these matters were now *res-judicata.*

Held, that it is not necessary for the application of section 13, explanation II that the matter in question should have been finally heard and decided in the previous suit.

Held, that explanation II to section 13 or the analogy of that section did not apply to this case. All the cases to which, notwithstanding that the matter in question had not actually been heard and finally decided in the previous suit, that explanation applied are the cases in which the party, against whom it was sought to apply the rule of explanation II was unsuccessful in the previous suit. It cannot be applied against a person who, in the previous suit, has been successful.

Sup: Govt. acts (V of 1908) *(Contd.)*

Held, further, that disclaimer of title will not *per se* operate as an estoppel.

Held, also, that, under section 244, Civil Procedure Code, it is the duty of a Court to construe the decree and give effect to it, not to re-try the suit.—EWAZ ALI KHAN *v.* BAKAR KHAN. **1 O. C. 22**

487 S. 11. *O. VII. R. 2 Cf. O. VI. R. 18—S. 13 and 54 (d)*—See S. 11—Parties.—**4 O. C. 103.**

488 S. 11, *47, O. XXI. R. 60, 99—S. 13, 244, 280, 331—See s. 11—13—90 P. R. 1902—20 P. L. R. 1903 No 197 supra.*

489 s. 11, *47—13, 244 and 257 A*— Res-judicata—*Decree—Satisfaction—Sanction of Court—Succession Act (X of 1865), Section 282—Decree against one administrator is binding on his successor—Decree against deceased's estate. Form of—Administration suit.*

The defendant brought a suit in 1888 against the then administrator of a deceased person's estate and obtained a decree. In satisfaction of the decree, the administrator executed a sale deed of some property of the deceased with the sanction of the Court obtained under section 257 A of the Civil Procedure Code. The management of the estate then passed into the hands of the present plaintiff, who brought a suit in 1901 to set aside the decree and sale thereunder.

Held, that the decree obtained and the execution had against the former administrator in whom the aggregate of rights and obligations of the deceased were vested as the legal representative of the estate were binding upon the plaintiff as successor as long as that decree and sale consequent upon it were not the the result of fraud or collusion.

It was contended that the only execution of the decree allowed by law was that authorised by section 282 of the Indian Succession Act, 1865.

Held, that whatever might have been the proper way of executing such a decree as a matter of fact it was executed rightly or wrongly under section 257 A of the Civil Procedure Code. According to sections 244 and 13 of the Code such execution bound the parties to the decree and all persons claiming under them; the question was therefore res-judicata.

The executors and administrators of a deceased person form a continuing representation of the deceased's estate and therefore a decree obtained and execution had against them must bind their successors in the absence of fraud or collusion.

The mofussil Courts must bear in mind the necessity of treating a creditor's action against a deceased person's estate as an administration suit and insisting upon the amendment of the plaint in such a suit on that basis. Where the plaintiff is not willing to amend, the Court if it finds the claim proved, should pass a decree simply giving him a declaration of the debt due and a declaration besides that he is entitled

Sup: Govt. acts (V of 1908) (*Contd.*)

to its satisfaction according to law in due course of administration and not otherwise. It is the duty of Court to see in such actions that one creditor is not enabled to gain advantage over other creditors by getting an unconditional decree for full payment and executing it against the deceased's estate to the prejudice of other creditors. BAI MEHERBAI *v.* MAGANCHAND MOTIJI. **6 B. L. R. 853=29 B. 96.**

490 s. 11, *47, O. XXI. R. 99—S. 13, 244, 331—Objection to execution by reversioner, decree holder directed to get a declaration against the reversioner—Reversioner brought upon the record as judgment debtor—Former order no bar.* See Hindu Law (widow) LACHMI NARAIN *v.* RAM CHANDRA. **4 A. L. J. 117=A. W. N. 1907 P. 64.**

491. s. 11, *O. XXIII R. 2—S. 13, 373—Application for withdrawal of suit—Notice of application to defendant.*

A sued B for possession of certain property, but after the institution of the suit, he applied to the Court under section 373, Civil Procedure Code, for permission to withdraw from the suit with liberty to bring a fresh suit. On the application the Court passed the following order :— 'Let the plaintiff's claim be *kharij* with costs; and let notice be given to the opposite party, the plaintiff has liberty to institute a fresh suit."

Subsequently the plaintiff brought another suit in respect of the same property. The defendant contended that the effect of the order was a dismissal of the suit and therefore the second suit was barred and that the notice mentioned in the order was not issued.

Held, that the order was one of withdrawal with liberty to bring a fresh suit under section 373, Civil Procedure Code, and not a decree dismissing the suit.

Held, further, that as the validity of the order was not objected to in appeal, or revision, it could not be questioned now on the ground that no notice, as mentioned in the order, was issued to the defendant. LALTA PERSHAD *v.* CHHUTKO. **1 O. C. 97.**

492. s. 11. *O. XXVI. R. 13, 14. S. 96–13, 396 and 540—Suit for partition—Preliminary order not appealed against—Appeal against final decree not barred—Punjab Courts Act, 1884, as amended by Act XXV of 1899, Section 70 (1) (b)—Revision. Second application for—Fresh security.*

When an application under Section 70 (1) *(b)* of the Punjab Courts Act, as amended by Act XXV of 1899, was dismissed for default of appearance before it was admitted to a hearing, and a second application was filed by the petitioner, *held*, that the second application was admissible under *Punjab Record*, 54 *of* 1901 ; *S. C.*, 45 *Punjab Law Reporter*, 1901.

Held, also, that it was not necessary for the petitioner to file fresh security.

Sup: Govt. acts (V of 1908) (*Contd.*)

An appeal against a final decree passed in a suit for partition is not barred by reason of no appeal having been filed against the preliminary order passed in the suit adjudicating on the rights of the parties.—23 *Cal.*, 279 ; 19 *Cal.*, 463 ; 23 *Cal*, 406 ; *P R*, 62 *of* 1897, *referred to.* RUSTAM KHAN *v.* LATIF KHAN. **56 P. L. R., 1902=49 P. R. 1902.**

493. s. 11. *O. XLI. R. 23-S 13, 562.* Resjudicata—*Remand—Suit in Civil Court for dispossession of defendant as a trespasser—Previous litigation. Effect of.*

The plaintiffs applied to a Rent Court for dispossession of the defendant, alleging that he was their tenant, but ultimately it was found by the appellate Court, that the defendant was either the owner, or a rent-free tenant of many years' standing, and that he could not be ejected. The plaintiffs then made an application to have rent assessed on the same land in respect of which they had previously sought to eject the defendant, but this application also was rejected on the finding that the defendant was in adverse possession. Subsequently, the plaintiffs brought the present suit in a Civil Court to eject the defendant as a trespasser from the land under previous litigation and from some other fields. It was urged, on behalf of the defendant, that the suit was barred as *res-judicata* under section 13 of the Civil Procedure Code.

The appellate Court confirmed the decision of dismissal of the lower Court relating to the land under previous litigation, but remanded the case under section 562 of the Civil Procedure Code as regards the other fields.

Held, on second appeal, that the suit in the Civil Court was not barred as *res-judicata*, for section 13 of the Civil Procedure Code only applies in cases where the Court whose decision is cited as *res-judicata* was competent to try the second case, and this suit, being a suit in ejectment for dispossession of a trespasser, was one which no Rent Court could try. 15 *All.*, 189 *distinguished.*

Held, also, that the order of remand was bad, for section 562 of the Civil Procedure Code authorizes a remand only where the entire suit, and not merely a portion of it, has been disposed of by the original Court on a preliminary point. *11 All.*, 483 *followed.* MAHESH PRASAD *v.* RANJOR SINGH. **A. W. N., 1904, P. 202=27 A. 133.**

494 s. 11, *O. XXI 53—S. 13, 273—Dismissal of suit for default after partial evidence adduced. Effect of.*—See Resjudicata. ROMA NATH DAS *v.* MOHESH CHANDER PAL. **9 C. W. N 679.**

495. s. 11, *O. XXI R 66, 70—Section 13, 287—*Res-judicata—*Execution of decree—Decree for sale of property not liable to attachment or sale—Objection not raised in original suit but raised against application for execution—Estoppel—Landlord and tenant—Occupancy holding—Sale in execution of decree.*

The decree-holders obtained a decree upon a compromise for payment of a certain

Sup: Govt. acts (V of 1908) *(Contd.)*

sum of money and, in default for the sale of certain properties.

Amongst the properties specified as liable to sale under the decree were a number of fields described as held by the judgment-debtor on a permanent tenure (*istimrari patta*).

Default having been made, the decree-holders (appellants) applied for execution of the decree by sale of the property mentioned therein. The judgment-debtor objected that certain lands, the sale of which was asked for, were occupancy holdings and that the prayer for the sale of these lands was illegal. Both the executing and the first appellate Courts sustained the objection and disallowed the decree-holders' application for the sale of these lands. On appeal to the High Court—

Held, that the judgment-debtor was not justified in raising the objection at this stage of the suit, for the objection could have been validly raised in the original suit in which the decree was passed. That the decree and the sale would not bind third parties.—*W. N. All.*, 1892, *p.* 5, *followed*.

Per Burkitt, J.—According to section 287 of the Civil Procedure Code, it is the duty of the execution Court, should it has reason to believe the property prayed for to be sold, is an occupancy holding to enter that fact in the proclamation of sale as a warning to the intending purchasers. BASDEO PRASAD *v.* JUTHAN RAM. **A. W. N., 1905, p. 183 = 27 A. 684.**

496. S. 11—*S. 13, 314*—Res-judicata—*Insolvency proceedings.*

An application under section 344 of the Civl Procedure Code is not a "suit" within the meaning of section 13 of the Civil Procedure Code.—*P. R., 115 of 1884, followed.*

The rejection of such an application is not a bar to a subsequent application on arrest at the instance of the decree-holder who previously caused applicant's arrest or at the instance of another decree holder. RAMLAL *v.* LABHU. **122 P. L. R., 1903.**

497. S. 11, *O. XXI R. 23, Ss. 99, 100—Ss. 13, 562, 578, 584—Judgment not operating as* res-judicata—*Value as evidence—Second appeal—Finding of fact—Act VIII of 1885 (Bengal Tenancy), S. 149—Onus—Suit for rents in deposit—Question of title.*

The Remand order by the lower appellate Court was not strictly in accordance with the provisions of S. 562, C. P. C.

Held, that this irregularity was covered by the provisions of S. 578 of the Code (28 C. 324 followed, 14, C. 537, 17 C. 829, 8 C. W. N. 248 ref).

In a second appeal, the question was whether certain lands appertained to plaintiff's tenure.

Held, that a finding of the lower appellate Court thereon, which amounted merely to an expression of opinion, could not be accepted as a finding displacing the finding of the first Court, and further, that the lower appellate Court had erred

Sup: Govt. acts (V of 1903) *(Contd.)*

in law in disregarding certain evidence without giving sufficient reasons for rejecting it.

Where a suit was brought under the provisions of S. 149, cl. (3) of the Bengal Tenancy Act, and the plaintiff made out a very strong case in support of his title to the rents in deposit,

Held, that the onus was then shifted on the defendant, and that plaintiff was entitled to succeed, although he was not in a position to prove realisation of rents from the tenant, the plaintiff's case being that the defendant had been preventing her from realising them.

Although the matter relating to the title of the plaintiff was not *res judicata* against the defendant, still the matter having been in issue in a suit, in which the defendant was a party, and that suit having been decided in favour of the plaintiff, and, in accordance with the decree passed in that suit, a conveyance having been executed in favour of the plaintiff's predecessor-in-title.

Held, that this constituted a strong case in favour of the plaintiff's title and possession, which it lay heavily on the defendants to displace. TRAILOKYA MOHINI DASI *v.* KALI PROSANNA GHOSE, **11 C. W. N. 330.**

498 S. 11, *102—S. 13, 586*—Res-judicata—*Claim for rent—Previous suit decided by* Munsif *in regular side determining rate of rent—Subsequent suit on small cause side.*

When the previous suit in which the rate of rent payable by the defendant to the plaintiff was determined was decided by the *Munsif* in regular side, and the subsequent suit for rent was filed by the plaintiff on the small cause side:—

Held, that the decision in the previous suit was clearly *res judicata* as to the rate of rent claimed, and the fact that by virtue of section 586, Civil Procedure Code, no second appeal lay to the High Court, did not make the decision inoperative.

Held, also, that the contention that the former suit being a regular suit, and the present only a small cause suit, the decision in the former suit could not operate as *res-judicata* was not sound. *Raja* SIMHADRI APPA ROW *v.* RAMACHANDRUDU. **13 M. L. 23 = 27 M. 63.**

Over-ruled by 16 M. L. J. 41 = 29 M. 195 (F. B.) supra.

See S. 11—13—Under heading Litigation under the same title.

499. S. 14-*S. 13, Expl. VI—Presumption of jurisdiction, its Rebuttal.*

Held, that the presumption that a foreign court had jurisdiction to pass a judgment and satisfied itself that the judgment was amenable to its jurisdiction can be rebutted by evidence that the foreign court decided wrongly on the facts which gave it jurisdiction.—2 *Camp R p.* 502 re to KASI MAMMOOJEE *v.* ISAP MAHOMED SULAI-

Sup: Govt. acts (V of 1908) *(Contd.)*

MAN. **6 C. W. N. 829 at 833; 29 C. 509.**

500. S. 14—*S. 13, Expl. VI.*

Held, that the court in which the suit on a foreign judgment is brought cannot go into the merits of the action which resulted in the foreign judgment.—SYED MOAZIN HOSSEIN KHAN BAHADUR *v.* RAPHAEL ROBINSON. **5 C. W. N. 791.**

501. s. 15—*Pecuniary limits of jurisdiction—Court executing decree 1. P. L. R. 1901—9. P. R. 1901—See S. 6 supra.*

502. s. 15 *—S. 15—Jurisdiction of Court—Valuation of suit—Partnership—Accounts—Suit for dissolution of partnership and settlement of accounts.* MUNNA LAL *v.* SAMANDU. **94 P. L. R. 1906=46 P. R. 1906**—*See Act VII of 1887, S. 8 Col. 759.*

503. s. 15—*O. XXI R. 58, 62—S. 15, 278, 282—Jurisdiction value—Objection against attachment—Declaratory suit.*

Held, that the value of a suit for a declaration that the property attached by the decree holder does not belong to the judgment debtor, when the amount of the decree is less than the value of the attached property, is the amount of the decree and not the value of the property 55, P. R. 1906—71 P. L. R. 1906 referred to. ZORAWARSINGH *v.* DEWA SINGH. **63 P. L. R., 1907=11. P. W. R., 1907=142. P. R. 1906.**

503. (a) s. 15—*S. 15-Jurisdictional value—Partnership accounts Dissolution.* **46 P. R. 1906.** *See Act VII of 1887 S. 8. Col. 759.*

504. s. 15—*S. 15—Jurisdictional value—Attachment—Declaratory suit.* BISHNU *v.* LALSINGH. **71 P. L. R 1906=55 P. R., 1906.** *See Act VII of 1887, S. 11 Col. 781, and other cases Col. 758 to 766.*

504 (a) s. 15—*S. 15—Consent of parties can not give jurisdiction to a court.* **8 C. W. N. 705=31 C. 849.** *See Act. VII of 1887 Col. 762.*

505. S. 15—*61, 20—S. 15, 16, 17—Suit for rent of putni tenure—Order on appeal returning plaint for presentation to proper Court—Appeal to High Court*—See Bengal Tenancy Act VIII of 1885 S. 144—CHOWDHRY FAZLUR RAHIM *v.* DOWARKA NATH CHOWDHRY. **7 C. W. N., 402=30. C. 453**

506. s. 15, *47—S. 15, 244.*

A suit by a party to execution proceedings to have a Court sale set aside on the ground of the fraud will lie when the decree has ceased to be capable of execution, and it is no longer open to the plaintiff to apply under section 244, Civil Procedure Code, to the Courts executing the decree—Upper Burma Civil Courts Regulation, 10; Specific Relief 39; Limitation 11, 12, 91, 95, 178—Where a sub-Divisional Court having jurisdiction entertains in contravention of S. 15. C. P. C. a suit which should have been instituted in the Township Court.

Held that this is a mere irregularity which does not vitiate the proceedings—22 B. 267, 10 C. 538, 19. C. 683, 25 C. 718, 20 M. 349, 16 W. R. 269 referred to. NGA SA GYE *v.* NGA YE BAN. **U. B. R. 1905 P. 36. (Civil Procedure.)**

507 S. 16—*S. 16—Letters Patent art. 12—"Suit for land or other immoveable property"—Suit for sale of mortgaged land—Land situated outside jurisdiction of High Court—Jurisdiction.*

A "suit for land" (within the meaning of art. 12 of the Letters Patent) includes any suit in which a decree is asked for operating directly upon the land, and therefore includes any suit brought to enforce a security upon land, such as a suit for the sale of land equitably mortgaged by deposit of title-deeds.

Semble, that the phrase suit for "land or other immoveable property" (as used in art 12), includes all suits mentioned in cl. (*a*), (*b*). (*c*), (*d*), (*e*), and (*f*) o section 16 of the Code of Civil Procedure, 1882. Plaintiffs in their plaint, prayed, *inter ali* , that certain lands the title deeds relating to which had been deposited with them by the defendants, might be sold, and the proceeds applied to the payment of the debt due to plaintiffs by defendants. All the lands were situated outside the original jurisdiction of the High Court.

Held, that the suit was one for land or other immoveable property, within the meaning of art. 12 of the Letters Patent and the Court had jurisdiction. *In the matter of the Petition of S. J. Leslie*, (9 B. L. R. 171), followed. NALUM LAKSHMIKANTHAM *v.* KRISHNASAWMY MUDRIAR, **27 M. 157.**

508 S. 16 (d)—*16 (d)—Mortgage—Sale decree for.*

A suit for a declaration that a decree for the sale of mortgaged property is the joint property of the plaintiff and the defendant is not governed by s. 16 (*d*) of the Civil Procedure Code, inasmuch as it is not a "suit for the determination of any right to or interest in immoveable property." *Abdul Majid* v. *Mohammad Faiz-u-lah* (I. L. R., 13 All. 89) and *Gous Mahomed* v. *Khawas Ali* (I. L. R., 23 Cal. 450) referred to. AHMAD KHAN *v.* ABDUL RAHAMAN KHAN, **A. W. N., 1904, p. 148=26 A 603.**

509 S. 16 (d)—*16 (d)—Suit for determination of any right to, or interest in, immoveable property—Suit for recovery of purchase-money under contract for the sale of land—Jurisdiction.*

A suit for the recovery of unpaid purchase-money under a contract for the sale of land is a suit "for the determination of any right to, or interest in, immoveable property," within the meaning of section 16, clause (*d*) of the Civil Procedure Code. *3 M. H. C. R., 125; 14 Bom., 353 referred to and distinguished.* MATURI SUBBAYYA *v.* KATA KRISHNAYYA, **28 M. 227.**

510 S. 16, *20, 17 O. VII. R. 10,—S. 16, 17, 19, 57—Appeal, order of—Return of plaint.*

Sup: Govt acts (V of 1908). *(Contd.)*

A plaint was returned to the plaintiff to be presented to the proper Court.

Held, that it was not open to him to appeal from the order of return, after he has taken back the plaint and refiled it in the Court directed.—BENI MADHUB DAS *v.* JOTINDRA MOHAN TAGORE. **5 C. L. J. 580=11 C. W. N. 765.**

511 S. 16, *47—s. 16, 244—Suit to set asid a decree as fraudulent.*

A suit lies to have it declared that a decree and a sale in execution thereof were fraudulent and to obtain possession of the property sold—21 *Cal.*, 605, and 21 *Cal.*, 546. Such a suit can be brought in the Court within the local limits of whose jurisdiction the property is situate. KEDAR NATH MUKERJI *v.* PROSONNA KUMAR CHATTERJI. **V. W. N. C., 1901, p. 559.**

512 S. 17—*S. 19—See S. 16, 20, 17—11 C. W. N. 765—No 510 supra.*

513 S. 18—*S. 16. A. (2).*

In a suit by the proprietors of village B in the Muzaffargarh District for a declaration that certain land awarded to the proprietors of village K in the Multan District by the Settlement authorities in a boundary dispute belongs to them, and should be included in their village, the Munsiff of Muzaffargarh, In whose Court the suit was filed, not being certain whether he had jurisdiction to try the case, determined the question before the merits were gone into, and decided that he possessed jurisdiction. The Divisional Judge on appeal set aside the decree passed by the Munsiff holding that it was passed without jurisdiction, as the land was situate within the boundaries of the Multan District settled by the Revenue authorities, and that the Civil Courts cannot question the boundaries so settled.

Held, that Revenue officers have not complete power to settle the boundaries of districts. Civil Court can question boundaries so settled, and the Divisional Judge was wrong in setting aside the decree passed by the Munsiff for want of jurisdiction, ignoring the provisions of section 16 A (2) of the Civil Procedure Code. ALLAH DITTA *v.* ABDUL QADIR KHAN. **P. R. 1 of 1901=25 P. L. R. 1901.**

514 S. 19 *S. 18—Place of suing—Suit for compensation for wrong—Jurisdiction.*

Plaintiff sued defendants, who all resided in Pyapon, for damages for wrongful seizure of boats under an order of a Magistrate at Pyapon acting at the instance of 3rd defendant. The boats were seized in Rangoon, and the question was whether, in view of the terms of section 18 of the Code of Civil Procedure, the suit might be brought in the Chief Court, which had original jurisdiction within the limits of Rangoon Town.

Held, that the suit might be brought in the Chief Court. LUDDY *v.* JOHNSON, (1871) 6 B. L. R., 141, referred to.

Sup. Govt acts (V of 1908) *(Contd.)*

MA MYIT *v.* SHWE THA. **3 L. B. R. 1906 P. 164.**

514 (a)—*70 P. R. 1906 See* S. *20, 19 No. 524 infra.*

515. S. 20—*S. 17—Suit to set aside decree obtained by fraud—Jurisdiction of High Court.* NISTARINI DASSI *v.* NUNDO LAL BOSE. **7 C. W. N. 353=30 C. 369.**

516—S. 20—*S. 17—Cause of Action—Jurisdiction—Suit for a declaration that a compromise and a decree founded thereon are null and void as against the plaintiff, and for an injunction restraining execution.*

Held, that the term "cause of action" as used in S. 17 of the Code of Civil Procedure does not necessarily mean the whole of the cause of action, but a suit to which S. 17 applies may be instituted where some material portion of the cause of action arises. *Murti* v. *Bhola Ram* (I. L. R. 16 All. 165); *Read* v. *Brown* (L. R., 22 Q. B. D., 128): *Llewhellin* v. *Chunni Lal* (I. L. R. 4 All. 423); *Bishunath* v. *Ilahi Bakhsh*, (I. L. R. 5 All. 277); *Gopi Krishna Gossami* v. *Nilkomul Banerjee*, (13 B. L. R., 461); *Hills* v. *Clark*, (14 B. L R, 367); *Laljee Lall* v. *Hardey Narain*, (I. L. R., 9 Cal. 105); *Jackson* v. *Spittal*, (L. R., 5 C. P., 542) and *Haramoni Dassi* v. *Hari Churn Chowdhry*, (I. L. R. 25 Cal. 833 at p. 840), referred to. The plaintiff came into Court alleging that he was the adopted son of Balmakund, having been adopted to him by Balmakund's widow, and that th defendants, who were trustees of the will of Balmakund, had entered into a collusive suit, which they had fraudulently compromised, with the result that one defendant had obtained from the Court a decree for a considerable sum payable out of the property left by Balmakund, which property the plaintiff claimed as his own. The decree-holder got the decree sent for execution to Cawnpore, and was seeking to execute it against the estate of Balmakund within the limits of the jurisdiction of the Subordinate Judge of Cawnpore. The plaintiff filed his suit in the Court of the Subordinate Judge of Cawnpore, and asked, in effect, that the compromise and the decree founded thereon might be declared to be null and void as against him, and that an injunction might be issued restraining execution of the decree.

Held that, although the decree was passed in Calcutta, yet inasmuch as the property affected by the decree was in Cawnpore, and execution was being taken out there, a material portion of the plaintiff's cause of action arose in Cawnpore, and the Subordinate Judge of that place had jurisdiction to try the suit. *Nistarini Dassi* v. *Nando Lall Bose*, (I. L. R., 26 Cal. 891), and *Hadjee Ismail* v. *Hadjee Mohammad*, (13 B. L. R., 91), referred to *Solomon* v. *Abdool Aziz*, (4 C. L. R., 366) distinguished. BANKE BEHARI LAL *v.* POKHE RAM, **25 A. 48.**

517. S. 20—*S. 17—Jurisdiction against resident of foreign State—Cause of action.*

The courts in British India are empowered to pass a judgment against a non-resi-

Sup: Govt. acts (V of 1908) (*Contd.*)

dent foreigner, provided that the cause of action has arisen within the jurisdiction of the Court pronouncing the judgment.

12 *Bom.* 507: 9 *Bom. H. C. R.*, 429; 17 *Bom.* 662; 20 *Bom.* 133; 22 *Cal.*, 238 *S. C. L. R.* 21 *I A.* 171; *L. R.* 1892, 2 *Q. B.* 358; 12 *Ch. D.*, 225, *referred to.* RAMBHAT *v.* SHANKAR BASWANT. **3 B. L. R., 82=25 B. 528.**

518. S. 20.—*S. 17—Contract by correspondence where completed—Suit for damages for breach of contract where to lie.* SITARAM MARWARI *v.* THOMPSON. **2 C. L. J. 63 =32 C. 884.**

See Act IX of 1872. S. 8, 10, 25—Col: 253.

519. S. 20.—*S. 17—Custom of Motap—Competency of Court of first instance and not of appeal.*

Held that among the Curasama Garasias of the Kharad village in the Dhandhuka taluqs the custom of Motap exists.

To see whether a decision is *res-judicata* one must look to the power of the Court in which the suit was instituted and not to the power of the Court by which the appeal was decided 5 C. 832 followed 23 C. 415 referred to. MALUBHAI LUDHABHAI *v.* SURSANGJI JALUM SANGJI. **7 B. L. R. 821=30 B. 220.**

520. S. 20.—*S. 17—Jurisdiction—Subjects of protected Native States may be sued in British Indian Courts if cause of action arises within the jurisdiction—Contract. Suit based on.*

A subject of a protected Native State may be sued in a Court of British India, if the cause of action arose within the jurisdiction of any such Court.

Apart from the provisions of section 17 of the Code of Civil Procedure, the cause of action in the case of contracts arises at the place of performance. *26 Mad. 544, followed.* TADEPALLI SUBBA RAO *v.* NAWAB SAYED MIR GULAM ALLIKHAN OF BANGANAPLLAI. **29 M. 69.**

521. S. 20.—*S. 17 (c)—Jurisdiction—One of the defendants not residing within the jurisdiction of the Court—Leave given after institution of the suit.*

Where one out of three defendants did not reside within the jurisdiction of the Court and leave to sue was given after the institution of the suit:

Held, that under S. 17, cl. (*c*) of the Civil Procedure Code, it was not necessary that the leave of the Court must have been first given. The leave, though subsequent, was good.—NARAYAN *v.* SECRETARY OF STATE, **8 B. L. R. 543= 30 B 570.**

522. S. 20.—*S. 17—Place of payment—When Debtor to follow his creditor—Principal and agent.*

Held, that, where no place of payment is specified either expressly or by implication the debtor must follow his creditor and pay where his creditor is.

Sup: Govt. acts (V of 1908) (*Contd.*)

Held, further, that the same rule applies to the case of an agent who has to pay money to his principal 20 Q. B. D. 152; 1 Q. B. 753; L. R. (1893) Probate, 119; L. R. (1898) A. C. 524;—2 K. B. 485, Ref. 27 M. 355, Distinguished. SURAJ KUMAR *v.* GOKUL CHAND. **11 O. C. 191.**

522 a. S. 20.—*O. VII. R. 10—S. 17, 57—Section 17, 20 and 57—Suit not triable without leave of Court—Leave of Court not obtained—Acquiescence—Procedure.*

When a cause of action for a suit has not arisen within the local limits of the jurisdiction of the Court in which it is filed, and one or more of the defendants reside outside such limits, and objection is taken in the written statement filed by the defendants that the plaintiff not having obtained leave to file the suit under section 17 of the Code of Civil Procedure, the Court has no jurisdiction to try it—

Held, that in such a case plaint may be returned by the original or the Appellate Court for presentation to proper Court, as the objecting defendants cannot be held to have submitted to the jurisdiction of the Court by not putting the provisions of section 20 in force.—*6 Mad., 344 and 8 Mad. Law Journal, p. 38, dissented from; 9 Bom., 266, referred to.*

Section 20 of the Civil Procedure Code applies to those cases only in which a suit may be instituted in more than one Court without any special permission or acquiescence. NAND LAL *v.* GOPAL SAHAI.—**86 P. L. R. 1903=27 P. R. 1903.**

523 S. 20—*S. 17—Jurisdiction—Small Cause Court—Defendant not residing within jurisdiction.*

Held, that a Court of Small Causes has jurisdiction to entertain a suit against a military officer not residing within the jurisdiction of such Court when the cause of action arose within such jurisdiction.

P. R. No. 1 of 1893 F. B. has become obsolete by the repeal of section 151 of the Army Act 1881. PHELPS & Co. *v.* CAPTAIN H. S. HAMMOND, **P. L. R., 37 of 1901=P. R. 93 of 1900.**

524 S. 20, *19—S. 17, 18—Jurisdiction of Court—Cause of action—Contract Act (IX of 1872), sections 151, 161—Bailor and bailee—Principal and Agent—Post Office.*

The plaintiff was a jeweller of Lahore and the defendant a firm which carried on a similar business in Calcutta. The plaintiff's and the defendant's method of doing business was that the plaintiff took articles for repair from customers and sent them to the defendant by post, uninsured, whereupon the defendant did the necessary work and returned the articles by V. P. P. to the plaintiff, uninsured, the sum to be recovered being the defendant's charge for repairs. In December 1904 the plaintiff sent the defendant in the ordinary way a parcel of ornaments for repairs with request for return by first post. The defendant despatched the parcel from Calcutta accord-

Sup: Govt. Acts (V of 1903) *(Contd.)*

ing to practice, by V. P. P., unin ured, the sum to be recovered being what was due from the plaintiff. The parcel was rec ived in the Lahore Post Office and a peon took it to the plaintiff's shop The plaintiff did not find it convenient to pay thee and take delivery. and told the peon he would send for it later. The parcel was thereafter lost in the Post Office. The plaintiff sued the defendant in Lahore for r c v ry of the value of ornaments and contended that the parcel should have been sent insured and the loss was due to his negligence. The defendant pleaded that Lahore Court had no jurisdiction, that he was not responsible for the loss and that in any case, the plaintiff was estopped from urging that the parcel should have been sent insured.

Held, (1) That the Lahore Court had jurisdiction, for the case fell within Explanation III *(ii)* to section 17 of the Civil Procedure Code inasmuch as a part of the performance of the contract between the parties consisted in the payment by the plaintiff of a sum of money to the Post Office at Lahore for the defendant.

(2) That the defendant was not liable for the loss, since the Post Office was at the time of the loss of the parcel agent of the plaintiff and not of the defendant.

(3) That the plaintiff was estopped by his previous course of conduct from urging that the parcel should have been sent insured. BOSECK & Co. *v.* MANDLESTAN. **70 P. R. 1906.**

525. S. 20. *S. 17, (20).*

The Subordinate Judge upon an application under Section 20, Civil Procedure Code, ordered that the plaint be returned to the plaintiffs for the reason that justice was more likely to be done in another district.

Held, on appeal, that the order was bad. The order which Section 20 allows a Court to pass is an order staying proceedings either temporarily or finally.

Held, also, that the contention that the suit was not cognizable by the Subordinate Judge except with his leave was not open to the plaintiff on appeal. MAHIPAT SINGH *v.* TEJ KUNWAR. **W. N. A. 1901, P 136.**

526 S. 20. *S. 17, (20)—Jurisdiction of Civil Court—Suit instituted against defendants some of whom lived outside the local jurisdiction of Court—Acquiescence—Defendants not taking action under section 20, C. P. C.*

A suit was brought in the Sarsi Court against three defendants of whom one resided within the local limits of the Barsi Court jurisdiction, and the other two within that of the Sarsi Court. It was contended on behalf of the Barsi defendants that as the plaintiff did not obtain leave of the Sarsi Court under section 17 of the Civil Procedure Code, the Court had no jurisdiction so far as they were concerned. In their written statement they took the objection as to jurisdiction; but had made no application under section 20 of the Civil Procedure Code.

Held, that the plaintiffs must be deemed to have acquiesced in the institution of the suit, and the suit could not be said to have been improperly instituted against them in the Sarsi Court. RAMAPPA BHIKAPPA *v.* GANPAT ABA. **7 B. L. R. 289 = 30 C. 81.**

527 S. 20, *O. VII. R. 10—S 17, 57—Jurisdiction of Court—Suit based on contract—Place where payment to be made—Return of plaint to be presented to proper Court—Contract Act (IX of 1872), Section 49.*

In India, the rule as to the place of performance of a contract whether it be payment or any other mode of performance, is to be determined by section 49 of the Contract Act.

The plaintiff basing his claim on a contract, and alleging that the payment was to be made to him at Sirsi brought a suit in the Sirsi Court. The defendant objected that the Court had no jurisdiction inasmuch as the defendant did not reside within the jurisdiction of the Court. The objection failed in the first Court. On appeal the District Judge dismissed the suit "subject to the condition that if the plaintiffs so desire, the plaint may be returned to them for presentation in the proper Court."

On second appeal—

Held, that the District Judge in proceeding to dismiss the suit was wrong; inasmuch as there was no jurisdiction to institute the suit in the Sirsi Court, the proper order was, as indicated by section 57 of the Civil Procedure Code, to direct that the plaint should be returned to be presented to the proper Court. PUTTAPPA MANJAYA *v.* VIRABHADRAPPA N. **7 B. L. R. 993.**

528 S. 20. *115—S. 17, 622—Jurisdiction—Chief Court's power to consider findings of fact—Cause of action—Suit for articles supplied to commission agent for sale.*

The Chief Court may look into the grounds on which the question of jurisdiction has been decided in order to see if there is ground for interference on the revision side, but this ought to be done under very special circumstances. Ordinarily the findings of fact on which jurisdiction is decided ought to be accepted.

Under the Contract Act there is no liability of the commission agents to render accounts at the principal's place of business. This can only be established on the special contract between the parties, or upon inferences properly deducible from the nature of their dealings. DEVI DYAL *v.* HARI CHAND. **79 P. R. 1902.**

529 S. 20 *Expl II: —17 Expl. II & III—Cause of action—Negotiable instrument dated and signed within the jurisdiction of one court and sealed and countersigned at another place.*

The plaintiff, endorsee of a negotiable promissory note, purporting to have been executed to the Official Assignee, Madras

Sup: Govt. Acts (V of 1908) *(Contd)*

on behalf of the Madura Meenakshi Ginning and Pressing Company (Limited) instituted the present suit in the District Court of Bellary. It appeared that after the promissory note was signed by the Secretaries and Treasurers, the same was sealed with the Company's seal and countersigned by another officer called the 'Agent" working under the supervision of the Directors at the head office in Trumangalam in the Madura District, while the Secretaries and Treasurers stayed in Ballary in the subordinate office in that station.

Held, that the Bellary Court must be held to have had jurisdiction under the provisions of section 17 explanations II and III of the Civil Procedure Code.

A statement of the place of execution is not essential to the validity of a negotiable promissory note, nor are the parties precluded from dating the note at a place different from that at which it is actually made, if for any purpose of theirs they consider it necessary to do so. When, therefore, a negotiable note is dated with reference to a specified place and the justice of the case does not necessitate a different conclusion, the parties should be presumed to have agreed to that place being taken to be the place of the contract. MEENAKSHI GINNING AND PRESSING COMPANY (LD), *v.* MYLE SREERAMULU NAIDU. **28 M. 19.**

530 S. 20—*Expl ; II-S. 17, Explanation 111 -Suit for damages for breach of contract of sale—Jurisdiction of Court—Cause of action.*

A court within whose jurisdiction it was the intention of the parties to a contract of sale that the contract should be performed has jurisdiction to entertain a suit for damages for breach of the contract. W. SHERIFF *v.* H. MANNERS. **7 C. W. N. 912.**

531 S. 20 *Expl II: —S. 17. Explanation III: Clause 1—Cause of action*—Hundis.

When the plaintiff, at the defendants' request remitted Rs. 5,000 from Delhi to Ajmere, and received from defendants *hundis* drawn on their firm at Bombay in satisfaction of the loan, and on the *hundis* being dishonoured brought a suit in the Court of the District Judge of Delhi for refund of the amount due—

Held that the Court was competent to try the suit. Since the plaintiff expended money on the defendants' behalf at Delhi, he was entitled to be reimbursed there, and the defendants' forwarding him *hundis* on Bombay made no real difference ; and further, that as the *hundis* were accepted at Delhi, that place must be regarded as the place of contract giving jurisdiction to the Court at Delhi. MINA MAL *v.* KANAK MAL. **42 P. L. R. 1903=10 P. R. 1903.**

532 S. 20 *Expl: II—S. 17 Expl: III Contribution—Decree for costs—Joint tort-feasors —Jurisdiction.*

A suit for possession of a plot of land

Sup: Govt Acts (V of 1908) *(Contd)*

and for damages for demolition of a wall and removal of building materials was decreed with costs against the parties to this suit. The decree was executed for costs against the present plaintiff, and he sued his co-defendants in the previous suit for contribution.

Held, that the suit would not lie.

Held, also that as the costs were realized from the plaintiff within the jurisdiction of the Small Cause Court the cause of action arose within the jurisdiction of that Court and it was, therefore, competent to try the suit. 24 *Cal., 330* ; *7 Mad., 89; 19 All., 462; referred to.* SUDHU SINGH *v.* LEHNA SINGH. **P. L. R. 1900 p. 525=7 P. R. 1901.**

533 S. 20 *Expl: II—S. 17 Expl. III cl. I—"Place where contract made"—Contract Act S. 4, 5 and 6.*

A contract, under the Contract Act, is made at the time and at the place when and where the letter of acceptance is posted, though the contract is voidable under the Act at the instance of the acceptor by communication of his revocation before the acceptance has come to the knowledge of the proposer. The difference in the English Law pointed out. KAMISETTI SUBBIAH *v.* KATHA VENKATASAWMY. **27 M. 355 at 359.**

534 S. 20 *Expl. II—S, 17, Expl. III—Contract Act, S 212—Suit for—By Principal against agent for compensation—Agent not bound to seek out Principal for payment :*

A suit brought under S. 212 of the Contract Act for compensation which the agent is bound to make to his principal in respect of the direct consequences of his own neglect or want of skill or misconduct is a suit not for an amount payable "in performance of," but in breach of the contract; and consequently, it is not governed by Cl. III of S. 17 C. P. C. There is no authority for the position that a party committing a breach of contract should seek the other party to the contract and pay him at his residence compensation or damages for such breach of contract. KAMISESTI SUBRIAH *v.* KATTA VENKATASAWMY. **27 M 355 at 358.**

535 S. 20 *Expl. II—S. 17 Expl. III—Place where contract was to be performed or performance thereof completed—Jurisdiction.*

A resident of Lahore made a contract under which B, a resident of Cochin was to supply A with certain goods and send them off for Lahore within one month. A paid, in advance, a part of the price fixed, and the balance was to be paid by a bill drawn by B, on A's firm at Lahore.

The goods were not despatched, and A sued B for the recovery of the money paid in advance and for damages, and the question was whether the Lahore Court had jurisdiction.

Held, the suit lay at Lahore as that was the place where the contract was to be performed or performance thereof com-

Sup: Govt. Acts (V of 1903) *(Contd.)*

pleted, within the meaning of Expl. III (2), S. 17, C. P. C. (27 M. 355, 70 P. R. 1906, 1 B. L. N. 75, *referred to.)* PREMJI KHETSEY *v.* GHULAMSARWAR KHAN. **36 P. R. 1908.**

536 S. 20--*Expl. II--S. 17, Expl. III--Promissory note payable on demand executed within jurisdiction of one Court—Place of payment not specified--Cause of action where arises--Jurisdiction.*

B executed a note in favor of C at T, of which B was a resident, C sued B within the local limits of the jurisdiction of another place S. It was payable on demand, no place of payment being fixed in it. The plaintiff claimed the right to sue at S on the ground that the debt was impliedly payable there, (S. 17, Expl III (iii) Civ. Pro. Code). The defendant objected that the Court at S had no jurisdiction.

Held that the general rule, that, where the place of payment is not specified, expressly or by implication, in a promissory note, the debtor must seek his creditor to pay him, cannot be relied on as controlling the express words of a statute prescribing the conditions which give a Court local jurisdiction *viz.*, of S. 17, Expl. III, Civ. Pro. Code. The place where the cause of action arises is governed, not by any general rule of law, but by S. 17 of the Code of Civil Procedure, and it is the place where, in performance of the contract, any money to which the suit relates is, expressly or impliedly, payable.

Held, further, that as in the present case the only fact, either with reference to the terms of the contract, or with reference to the circumstances in which the contract was made which can be said to raise an implication that the money was to be payable at S. is the fact that the plaintiff resides there, and as this fact is not sufficient to raise this implication and as there is no evidence that it was the practice, in the ordinary course of business, for money to be paid at S. the Court at S. had no jurisdiction to entertain the suit against the defendant. RAMAN CHETTIYAR *v.* GOPALACHARI. **31 M. 223.**

537 s. 20 *Expl. II. VII R. 10, S. 115 —ss. 17, 20, 57, 622—High Court Rules 1. 3 and 4, Ch. XII--Cause of action--Plaint, return of—Jurisdiction, illegal exercise of.*

When a petition to the High Court states facts which are matters of record and which are supported by copies of the order passed by the Court below. such a petition need not be supported by an affidavit. *A* brought a suit for dower in the Court of the Subordinate Judge of Saran alleging that the marriage as well as the divorce took place in that district. The defendant objected to the suit on the ground that he worked and resided at Calcutta. The Subordinate Judge returned the plaint to be presented in the Presidency Small Cause Court. The District Judge, on appeal, declined to interfere with the order of the first Court.

Held, that s. 17, cl. (*a*) of the Civil Procedure Code applied to the case; and the order returning the plaint was bad in law, the cause of action having arisen in the district of Saran.

Held, further, that inasmuch as the Subordinate Judge had failed to exercise jurisdiction vested in him by law by refusing to accept the plaint, and the District Judge erred in law in confirming the decision of the first Court, the High Court had authority to interfere, under S. 622 of the Civil Procedure Code. ZAMIRAN *v.* FATEH ALI **32 C. 146.**

538 S 23—*S 24--Decree-holder applying for transfer—Application by judgment-debtor to be declared insolvent—Jurisdiction.*

Held, that proceedings under Chap. XX of the Code of Civil Procedure are necessarily proceedings in execution of a decree and the judgment-debtor throughout such proceedings is in the position of a defendant.

Held, further, that the Court has no jurisdiction to pass an order for transfer under S. 24. Civil Procedure Code, on an application made by the judgment-creditor. 22 B. 778 distinguished. RAMA MONI DASI *v* NITYA GOPAL SARKHEL. **10 C. C 139.**

539 s. 24—*S. 25--Transfer of case—Grounds for.*

A case may be transferred from one Court to another on the ground that the petitioner apprehends that justice might not be done by the Court in which his case is pending. But it is not every apprehension of the litigant that the Superior Court has to take into consideration. The apprehension must be reasonable, *i e* such as a man of sound sense would regard as legitimately raising the inference of bias in the mind of the presiding judge. L. R. 2 Q B. 553, 20 Cal., 857, 2 Bom. L. R., 755, 23 Cal., 495. 19 All., 64, 25 Cal 727 referred to. SHER SINGH *v.* THAKUR DAS. **88 P. R. 1903=17 P. L. R. 1904.**

540 S. 24, *O, XVIII R. 15--S. 25, 191 (2)-Transfer of part-heard case from District Court —Jurisdiction of District Court to hear appeal --Change of presiding Judges.*

A suit was instituted in the District Court and after issues were settled the High Court transferred it to the Court of the Subordinate Judge. Appeal against the decree of the Subordinate Judge was heard by the District Court, but the Judge who heard the appeal was not the Judge who settled the issues. On second appeal it was contended on behalf of the appellant, (1), that the District Court had no jurisdiction to hear the appeal, and (2) that there was no jurisdiction to make the order of transfer.

Held, that the contention were not valid. PLANISAMI COWNDAN *v.* THONDAMA COWNDAN. **29 M. 595.**

540 (a) s. 24—*S. 24 "Court of Small Causes"*

Held that the Court of "Small Causes" referred to in S. 25 C. P. C., must be held to

Sup: Govt. Acts (V of 1908) *(Contd.)*

be a Court of Small Causes constituted under the Provincial Small Cause Courts Act and not to include a court vested with the powers of a Court of Small Causes under another Act. DALAL CHANDRA DEB *v.* RAM NARAIN DEB. **31 C. 1057 at 1062.**

541 s. 24. *S, 25- Mamlatdar's court.*

S, 25, C. P. C., does not apply to Mamlatdars' court, BHAGWANDAS *v.* JEDU. **3 B. L. R. 970 at 971.**

542 s. 24. *S. 25--Transfer of case from Civil Court exercising Small Cause Court powers--Appeal.*

A plaint in a suit cognizable by a Small Cause Court was presented to the District Judge, with a note that Munsiff invested with the powers of a Small Cause Court, who should try the case, was related to one of the parties and it should be sent to another Munsiff. The case was sent to a Munsiff, who was not invested with Small Cause Court powers. Against the decision of the Munsiff appeal was heard by the District Judge. It was contended in the Chief Court that the decree passed by the Munsiff was not appealable as under section 25 of the Civil Procedure Code the Munsiff who tried the case acted *qua* the case as a Small Cause Court.

Held, that the contention was right—*23 Bom. 382, dissented from. 13 All., 324, 5 All., 274, 80 P. R., 1887, 74 P. R., 1896, 58 P. R., 1897 referred to.* RALLIA RAM *v.* GOKAL CHAND. **154 P. L. R. 1903 = 83 P. R. 1903.**

543 S. 24—*S. 25—Judge personally interested in suit in his Court.*

Where a Judge feels himself to be personally interested in a case in his Court, the procedure prescribed by section 33 of the Lower Burma Courts Act, 1900, should be observed. *Loburi Domint and others* v. *Assam Railway*, (1884) I. L. R., 10 Cal. 915; *Aloo Nathu* v. *Gagubha Dipsangji*, (1895) I. L R., 19 Bom., 608, referred to. MAUNG MO *v.* PO MIN, **2 L. B. R. 1904, p. 281.**

543 a S. 24—*S. 25—Transfer of suit from Small Cause Court to High Court—Jurisdiction—Letters Patent s. 13.*

Under proper circumstances the High Court of Bombay has power to transfer to its own file a suit from the Small Cause Court of Bombay, and that jurisdiction is possessed by a single Judge sitting alone on the Original side of the High Court. MAGANLAL VIJBHUKHANDAS *v.* THE BOMBAY Co. LD. **7 B. L. R. 143.**

543 b s. 24. *S. 25—Appeal—Transfer of partly-heard appeal—Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), sections 10, 11, 22—District Judge—Jurisdiction.*

Held, that a District Judge is not competent to transfer an appeal which he has partly heard, to the Additional Judge for decision. Neither section 25, Civil Procedure Code, nor section 10, 11 and 22 of the Bengal, N. W. P. and Assam Civil Courts Act, give him jurisdiction to do so. BIDYAMOYEE DEBYA CHOWDHRANI *v.* MAHARAJA SURYA KANT ACHARYA BA-

Sup: Govt. Acts (V of 1908) *(Contd.)*

HADUR. **9 C. W. N. 205 = 32 C. 875.**

543 (c) S. 25—S. *25—Power of district Judge to transfer to subordinate Court a suit transferred by him to his own file.*

Held, that once the District Court withdraws the suit and transfers it to his own files for trial under section 25 of the Civil Procedure Code, it exhausts all its powers under the section, and is not competent to re-transfer it again to the Subordinate Court. 13 Bom. 654, followed, 21 All. 230 referred to. AMIR BEGAM *v.* PRAHLAD DAS. **A. W. N. 1902 p. 66.**

543 (d) S. 24—*S. 25.*

A Superior Court cannot make an order of transfer of a case unless the Court from which the transfer is sought to be made has jurisdiction to try it 13 I. A. 134, 16 A, 233, 7 B. 487, 18 B. 16 referred to. J. N. NANDI *v.* G. N. DASS. **U. B. R. 1905 p. 28.**

543 (e) S, 24, *O. I. R, 3, 4. (b) O. XXXIX. R. 1, 2,--Section 25, 98, 492, 493—Injunction. Suit for — Temporary injunction — Appeal— Transfer of suit—Retransfer.*

The plaintiff, a share-holder in the Murree Brewary Company Limitted, sued in the District Court of Rawalpindi, three out of the four Directors of the Company, in their individual capacity and the Head Brewer, for an injunction to restrain the defendants from entering into certain transactions by way of purchase or agreement to purchase a certain business or to invest money of the Murree Brewery Company amounting to 2 or 3 lakhs of rupees in shares of the said business when formed into a limited liability Company and from disposing of the money or funds of the Murree Brewery Company in pursuance of such transactions. A declaration that these transaction were *ultra vires* and not binding on the Murree Brewery Company or its share-holders was also prayed for.

Pending the hearing of the suit the counsel for the plaintiff obtained an *ad interim* injunction from Court to restrain the defendants from further proceeding in the matter.

The defendants appealed to the Chief Court against the grant of the temporary injunction.

On the date fixed for the hearing of the appeal it was seemingly agreed to by the counsel of the parties on the suggestion of the Court that the original suit should be transferred to the Chief Court so that the motion for the temporary injunction should be treated as the hearing of the suit and matter could be decided once for all by the Chief Court

The suit was accordingly transferred to the Chief Court. On the date of hearing of the case the counsel did not agree to the hearing of the appeal and the suit together as was suggested by Court and the Court decided to deal with each separately and in the ordinary course to dispose of in the first instance the appeal.

Sup: Govt. acts (V of 1908) *(Contd.)*

It was contended for the appellants that the order granting the temporary injunction was bad in law for, (1) it was passed without any affidavit and without the Court satisfying itself as to the correctness or otherwise of the facts put forward in the plaint (2) notice should have been issued to the appellants against the grant of the injunction and (3) the Murree Brewery Company not being made a party to the suit and the three directors of the Company being impleaded as defendants in their individual capacity and not as directors the grant of injunction would be entirely futile.

Held, that the contentions were valid.

The appeal of the Head Brewer was granted on the ground that in the capacity of a Head Brewer he had or could have had nothing to do with the transactions in question.

The suit was re-transferred to the District Court of Rawalpindi for the object of its transfer to the Chief Court was not attained.

In the case of a suit for an injunction it is practically impossible to grant a temporary injunction without to some extent forming an opinion on the merits of the case. Since it is the duty of the judge to satisfy himself that the plaintiff has made out a *prima facie* case. MR. E. W. PARKER *v.* KHAN BAHADUR SETH DHANJI BHOY, C. I. E. **53 P. L. R., 1907.**

544. S. 24, *O. XVIII. R. 15—25, 191 —(2) Transfer of part-heard case.*

A District Judge has jurisdiction to transfer a case from the file of a Subordinate Judge to his own file under section 191 (2) of the Code of Civil Procedure at whatever stage the case might arrive. The fact that the Subordinate Court has tried some of the issues in the case does not disentitle the District Judge from exercising the powers conferred on him by section 25 of the Code. 15 *Cal.*, 177, 26 *Mad.*, 595, 9 *W. N. Cal.*, 705 *referred to.* MAHADEO PRASAD SAHU *v.* GAJADHAR PERSAD SAHU. **10 C. W. N. 12.**

545. S. 24. *O. XXXIII. R. 2, S. 25, 403* et seq—*Power of District Judge to re-transfer a case to Subordinate Court after its withdrawal to his own file.*

An application to sue *in forma pauperis* was filed in the Court of the Subordinate Judge. The District Judge, acting under section 25 of the Code of Civil Procedure withdrew this application and decided it himself. After deciding the application he re-transferred the suit for trial to the Court of the Subordinate Judge.

Held, that the order of re-transfer of the case was *ultra vires* – *Weekly Notes, All., 1902, p. 66 referred to.* NANDAN PRASAD *v* W. C. KENNEY, **A. W. N., 1902, p. 92 =24 A. 356.**

546. S. 24. *O. XLI. R. 23, S. 25, 562 —Power of re-transfer of a suit once withdrawn to his own file.*

Sup. Govt acts (V of 1908) *(Contd.)*

A District Judge, having withdrawn a suit to his file for trial, is not competent under S. 25, C. P. C., to re-transfer it to the Court from which the case had been withdrawn, but he has inherent power to do so when the interests of justice require it. 10 C. W. N. 902; 13 B. 654; 24 A. 301 and 24 A. 356 ref. to.

Quære:—Whether S. 25 C. P. C. has application to a case remanded under S. 562 of the Code? 21 A. 230 ref. to —GURDEO SINGH *v.* CHANDRIKAH SINGH and CHANDRIKAH SINGH *v.* RASHBEHARI SINGH. **5 C. L. J. 611**

547. S. 25.—*S. 48—A suit is commenced by the presentation of the plaint.*—See Will —SRINIVASA MOORTHY *v.* VENKATA VARADA AIYANGAR. **1 M. L. T. 71= 16 M. L. J. 238 =29 M. 239.**

548. S. 26. *—Limitation Act (XV of 1877), Section 4 Court Fees Act (VII of 1870), Sections 6, 9, 10, 28—Plaint filed on the last day of limitation insufficiently stamped owing to requisite stamp not being procurable in time—Stamp procured later on during the day but not filed owing to Court rising early.*

A plaint was filed in the Court of the District Judge on the 14th April 1903, the last day of limitation for the suit. The plaintiff affixed an 8-anna court-fee stamp to his plaint and stated that the treasurer had no court-fee stamps of the proper denomination and the plaintiff was told by the treasurer to wait until the Treasury Officer should come down to the Treasury and open double locks. The District Judge recorded an order making over the case to the Subordinate Judge, 1st class, and adding a direction that the deficiency should be made up. The plaintiff on the same day procured the requisite stamp but on taking it to the District Judge's Court found that that officer had gone home. Nothing was done on the 15th April 1903. On the 16th the plaintiff filed the full stamp in the Court of the Subordinate Judge. It was contended that the suit was barred by limitation.

Held, by the Full Bench, that the contention was not valid, for the plaint must be treated as properly stamped on the 14th April 1903, when the plaintiff had procured the requisite stamps. *130 P. R., 1890, 3 P. R., 1893, 38 P. R.. 1900,* s. c. *P. L. R., 1900, p. 189 referred to.* MEHTAB RAI *v.* GOPAL RAI. **152 P. L. R. 1905.**

549. S. 26, *O. VII, R. 11 of O. VI—S. 48, 54—Insufficiently stamped plaint—Stamp duty made up subsequent to the period of limitation for the suit—Validity of the plaint—Court Fees Act, s. 28—Civil Procedure Code, Ss. 48 and 54.*

The word "presented" in the Explanation to S. 4 of the Limitation Act should be interpreted in accordance with the provisions of the Civil Procedure Code, S. 48. The Court Fees Act and the Civil Procedure Code should

Sup: Govt. acts (V of 1908) *(Contd.)*

be read together in regard to the presentation of plaints and the making up of the stamp duty, but not with the provisions of the Limitation Act, which is not an Act in *pari materia*, under S. 54 of the Civil Procedure Code, and S. 28 of the Court Fees Act, deficiency in stamps can be made good by order of Court, irrespective of the question, whether, on the date of filing them, the limitation for the suit has expired or not. Under S. 28 of the Court Fees Act, on the making up of the deficiency of stamp duty by order of Court, the plaint and all proceedings relative thereto are validated from the date of original presentation, even though the limitation for the suit had since expired. Once the stamps are taken by the Court, the order cannot be subsequently set aside, nor the validation of the original presentation annulled. (130 P. R. 1890, 74 P. R. 1903, 3 P. R 1893, 156 P. R. 1888, *app.*; 27 A. 411, 23 A. 423, *diss.*; 12 A. 129 (F. B.), 15 A. 65 (F. B), 24 A. 218, 19 C. 780, 27 C. 814, 31 C. 75, 15 M. 29, 15 M. 78, 22 M. 494, 27 B. 330, 11 A. 241 (P. C.), *refd. to.* SARF ALI KHAN *v.* FAZAL MEHDI KHAN. **82 P. W. R., 1907=3 M. L. T., 63=123 P. R., 1907.**

550. S. 34—*S. 209—'May'.*

It is entirely in the discretion of courts to allow or disallow interest from date of suit to date of decree. RAJA PEARY MOHUN MOOKERJEE *v.* NARENDRA NATH MOOKERJEE. **9 C. W. N., 421 at 437; 32 C. 582.**

551. S. 34—*S. 209.*

The Courts must be of competent jurisdiction for the operation of *res judicata*. The augmentation of the claim by accrual of interest will prevent the operation of S. 13, C. P. C., (S. 11). Mortgage suits do not form an exception to this rule. S. 209, C. P. C., (S. 34) does not apply to mortgage decrees. GRIYAR CHETTIAR *v.* SABHAPATI MADULIAR. **29 M. 65.**

552 S. 34—*s. 209—Interest after date of institution.*

Under S. 209 C. P. C.—(S. 34) the courts have a discretion in the matter of allowing interest after the date of institution. 12 C. 569, 3 B. 202, 12 M. 485, L. R. 7 I. A. 196, L. R. 17 I. A. 201 *referred to.* R. B. LALA ONKARDAS *v.* BRIJLAL. **17 C. P. L. R. 1904. P. 38.**

553 S. 34, *O. XX. R. 12—S. 209, 211, 212—Past and future mesne profits 33 C. 1232.*

See Act VII of 1870 S, 11, Col. 120.

554 s. 35 *(2)—220—Costs—Discretion.*

The fact that the defendant is protected under the provisions of Act XVIII of 1850 does not take away the discretion of the Court under section 220 of the Civil Procedure Code as to the award of costs. GANESH MAHADEV *v.* NARAYAN BALSHET. **4 B. L. R. 109.**

555 s. 35 *(2)—S. 220—Cost—Discretion of the Court.*

S. 220 of the Civil Procedure Code gives a Court full power to give and apportion costs in any manner it thinks fit, but the discretion thus conferred must be exercised according to general principles and not arbitrarily. *Daulat Ram* v. *Durga Prasad* (I. L. R. 15 All. 333) followed. WAHIDALI *v.* GHAFUR UNNISSA, **A. W. N. 1905. P. 75.**

555 (a) s. 35 *(2)—S. 220—Costs—General rule—Arbitration—Award silent as to costs—Appeal.*

In a suit filed in *forma pauperis* the whole case was referred to arbitration. The award allowed about one-third of the claim but was silent as to costs. The Court in passing decree in accordance with the terms of the award awarded full costs to the plaintiff.

Held, on appeal, that the order of the lower Court as to costs was wrong. The Chief Court ordered the parties to bear their own costs. KARTAR SINGH *v.* FAQIR SINGH. **35 P. L. R. 1906.**

555 (b). S. 35 (2)—*S. 220—Interest—Compound interest—Penalty—Delay in filing suit—Costs—53 P. L. R. 1904.*—See Act IX of 1872, S. 74, col. 344.

555 (c). s. 35·(2)—*S. 220—Costs—Appeal—Suit for possession of property against a person not in possession—Trial of issues raised on grounds set up by defendant found to be flimsy and unsubstantial.*

The mortgagee sued the mortgagor for possession of the property mortgaged to him and impleaded one *G.* also as a defendant who resisted the plaintiff's claim along with the mortgagor. The suit against *G* was dismissed on appeal on the ground that *G* was not found to be in possession of the mortgaged property and the Court ordered the plaintiff to pay *G's* costs.

Held, that the order as to costs was wrong, the plaintiff was entitled to his costs against *G* for he resisted the claim of the plaintiff on unsubstantial grounds and issues were framed and tried on the pleas raised by him. HIRA NAND *v.* RURE KHAN. **72 P. L. R., 1905.**

555 (d). s. 35 (2)—*S. 220—Construction of decree—Decree with costs in appellants' favour.*

Where a decree says that the appeal is dismissed or accepted with costs, its proper construction would be that only the appellate court's costs are awarded and not the costs of the Lower Courts. 45 P. R, 1877, *followed*; 19 Weekly Reporter, 152, *distinguished.* BAKSHI RAM *v.* GUMANO. **18 P. R. 1907.**

556 s. 35 *(2)—S. 220—Costs—Discretion of Court—Admission of debt by defendant—Suit filed after such admission—Appeal.*

The discretion of the Court under section 220 of the Code of Civil Procedure is one to be exercised with reference to general principles.

Where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, no omission or neg-

Sup: Govt. acts (V of 1908) *(Contd.)*

lect which would induce the Court to deprive him of his costs, the Court has no discretion and cannot take away the plaintiff's right to costs.

The fact that a defendant had previous to the institution of the suit admitted that the money sued for was due to the plaintiff affords no ground for depriving the plaintiff of his costs. KUPPUSWAMI CHETTY *v.* ZAMINDAR OF KALAHASH. **27 M. 341.**

557 s. 35 *(2)—S. 220—Costs—Suit for dissolution of marriage—Costs between party and party—Costs between Attorney and client—Liability of co-respondent—Damages—Divorce Act (IV of 1869), s. 45—Civil Procedure Code (Act XIV. of 1882), s. 220.*

Where a husband obtained an order for dissolution of marriage and costs but no damages were asked for by the petitioner against the co-respondent, it was ordered that the costs granted should include costs as between attorney and client—OUTHWAITE *v.* OUTHWAITE AND DIAZ, **I. L. R., 28 C., 84.**

558 s. 35 *(2)—S. 220—Costs—"Costs in the case," meaning of such order made in an interlocutory proceeding.*

Where, in an interlocutory proceeding, the order as to costs is that the costs thereof shall be "costs in the cause," these words do not mean that costs will follow the event, but that those costs remain to be dealt with by the Court at the hearing, the Judge at the trial having still power to deal with such costs.—TEMPLETON *v.* LAURIE **I. L. R., 25 B., 230.**

559 s. 37—*S. 649—Execution of Decree—Transfer of decree for execution—Court which passed the decree—Transfer of local jurisdiction—Civil Procedure Code (Act XIV. of 1882), S. 223, 649—Limitation Act (XV. of 1877), S. 14 Bona fide proceeding.*

The provisions of S. 649 of the Civil Procedure Code are permissive; if, after a Court has passed a decree, the local jurisdiction, in respect of the subject matter of the suit, is transferred by an order of the local Government to some other Court, the application for execution of the decree may be made either to the Court which passed the decree or to the Court to which the local jurisdiction has been transferred. *Lutchman Pandeh* v. *Madan Mohan Shye*, (I. L. R., 6. Cal, 513), followed. *Kalipoda Mukerjee* v. *Dino Nath Mukerjee*. (I. L. R., 25 Cal, 315) distinguished. A proceeding to enforce a decree taken in a Court which was erroneously believed by the decree-holder to have jurisdiction is a *bona fide* proceeding within the terms of S. 14 of the Limitation Act (XV. of 1877). *Hiralal* v. *Budri Dass* (I. L. R., 2. All, 792; I. R. 7. I. A., 167) followed.—JAHAR *v.* KAMINI DEBI, **I. L. R., 28 C. 238.**

560 s. 37—*S. 649—Order for refund of compensation money—Mode of execution—Award Appeal.* NABIN KALI DEBI *v.* BANALATA DEBI. **2 C. L. J. 595=32 C. 921.**

Sup: Govt. acts (V of 1908) *(Contd.)*

See Sup. Govt. Act 1 of 1894 sections 32, 54—

561. s. 37—*S. 649—Application for execution of decree made to another Court to which jurisdiction transferred.*

Held, that if after a Court has passed a decree, the local jurisdiction in respect to the subject matter of the suit is transferred by order of Govt. to some other Court, the application for execution of the decree may under section 649 be made either to the Court which pass the decree or to the Court to which the local jurisdiction has been transferred. 25 C. 315, 28 C. 238 referred to. MAKRAND *v.* RAM CHARAN. **9 O. C. 281.**

561 (a) *See s. 39—223—31 M. 537, 5 C. W. N. 150 Nos 672, 673 infra.*

662 s. 38—*S. 223—A Court executing a decree can not go behind it. 27 M. 118, 29 C. 810, 31 C. 179, 6 C. W. N. 796.* See section 47—S. 244 *infra.*

663 s. 38—*S. 223—31 C. 922.* See S. O. XXI R. 66, 70—S. 287.

664 s. 38—*S. 223—25 M. 357*—See Act IV of 1882 S. 89 Col. 680.

665. s. 39—*S. 223—Under S. 223 Court has power, on application of decree-holder, to transmit decree to another Court for execution.* PANCHAGNULA SUBRAHMANYAM AIYAR *v.* POLIPALLI RANGIAH. **17 M. L. J., 616.** *See execution of decree.*

666. s. 39—*Ss. 43, 223, 229—Scope of.*

Section 223 is not limited in its application to Courts established under and governed by the Bengal Civil Courts Act and the corresponding Act of the other Provinces. The necessary and sufficient test of the applicability of the section is whether the provisions of the Code regulate the procedure of the Court which makes the decree as also of the Court to which it is transferred for execution. MAHARAJA PRABHU NARAYAN SINGH BHADUR *v.* SALIGRAM SINGH. **6 C. L. J. 30=11 C. W. N. 622 =31 C. 576**

667. s. 39, *47—S. 223, 244—Rent. Decree for—Execution of decree—Transfer of decree for execution—Grounds of transfer—Question relating to execution—Appeal.*

An application for the transfer of a decree under section 223 of the Civil Procedure Code is an application which involves a question relating to the execution of the decree. And an appeal lies from an order passed by the Court which passed the decree declining to transfer it.

When a decree-holder applied for transfer of a decree for rent to a district in which the judgment-debtor resided and the Court passing the decree rejected the application on the ground that the property for the arrears of which the decree had been passed was situated within the jurisdiction of the Court and the order was reversed on appeal—

Held, that the transfer was rightly ordered by the appellate Court for the decree-holder had a right to ask for personal execu-

Sup: Govt. acts (V of 1908) (*Contd.*)

tion against the judgment debtor notwithstanding that he had also the power to sell the tenure in arrears. BHABANI CHARAN DUTT *v.* PRATAP CHANDRA GHOSH. **8 C. W. N. 575.**

668. S. 39, *47—223 and 244—Execution of decree—Jurisdiction of Court to attach and sell property situate outside its territorial jurisdiction—Questions relating to execution—Separate suit.*

In this case the suit was transferred from the Court of the District Judge of Amritsar to the Court of the District Judge of Lahore which passed a money-decree in favour of the plaintiff. After the final decision of the case by the Chief Court, the District Judge of Lahore, upon the application of the plaintiff attached and sold immoveable property belonging to the defendant situate in the Amritsar District. The present suit was filed by the judgment-debtor against the plaintiff for possession of the property sold and purchased by the plaintiff contending, *inter alia*, that the Court of the District Judge of Lahore had no jurisdiction to attach and sell property situate outside its territorial jurisdiction, and the order of attachment passed by it was a nullity.

Held, that the suit was barred by section 244 of the Civil Procedure Code and the order passed by the Court of the District Judge of Lahore was not a nullity.

The terms of section 223 Civil Procedure Code are not mandatory.

I. L. R., 15 All., p. 324, I. L. R. 15 Cal. p. 667, I. L. R. 19 Cal. p. 17, P. R. 9 of 1901, I. L. R. 20 Cal., p. 105, I. L. R. 18 Cal. p. 526, I. L. R. 22 Cal. p. 871, I. L R. 17 All. p. 478, I. L. R. 16 Mad., 447, I. L. R. 24 Cal. 62 referred to. I. L. R. 17 Cal. p. 699 F. B., distinguished. Sardar GURBACHAN SINGH *v.* RAM SAHAI. **163 P. L. R., 1901 = 8. P. R. 1902.**

669. S. 39, *44, 45,—S. 223, 229 (a) and (b)—Decree by a Court in British India—Execution thereof outside—Prior notification in the India Gazette—Want of—Mourbhunj—Tributary Mehals of Orissa—Jurisdiction.*

The Tributary Mehals of Orissa, of which Mourbhunj is one, do not form part of British India.

Under Sections 229 A and 229 B of the Code of Civil Procedure, no decree by a Court in British India can be sent for execution to a Court at Mourbhunj without prior notification in the *India Gazette*, as specified in these sections. *I. L. R.* 12 *Bom.* 280, *referred to.* KHATOO SAHOO *v.* RATAN MAHANTI. **6 C. W. N. 573.**

670. S. 39. *O. XXI. R. 22—S. 223, 248 Application for transmission of decree—Execution—Court which should issue notice.*

The notice under S. 248 of the Code of Civil Procedure may be served by the Court to which the decree is transmitted for execution and not necessarily by the Court which passed it and to which an application is made for transmission under S. 223 of the Code.

Sup: Govt. acts (V of 1908) (*Contd.*)

The Court has a discretion whether or not it will issue a notice before ordering transmission.

Ordinarily, in a case like the present, it should be left to the Court to which the decree is to be transmitted to issue the notice. RAJA SREENATH ROY *v* ROMESH CHANDRA ACHARYYA CHAUDHURI, **12 C. W. N. 897.**

671. S. 39, *73—S. 223, 295—Transfer—Original Court's powers—Application to the original Court for rateable distribution*—**1 C. L. J. 315.**

See S. *73*—S. *295 infra.*

672. S. 39, *37.—S 223, 649—Court which passed the decree—Transfer of jurisdiction—Limitation Act, Art. 179, Cl. 4—Step in aid—Application for transfer of decree.*

A Court which passed a decree for sale of certain properties does neither cease to be the Court which passed the decree nor to have jurisdiction to execute the decree by the fact that the territory in which the properties were situate was transferred to the jurisdiction of anothec Court subsequent to the decree; and consequently, the original Court which passed the decree is competent to execute it, the transfer not having the effect of depriving the Court of its jurisdiction to execute the decree.

Held, also that an application to the original Court to transfer the decree for execution to the new Court having jurisdiction over the area was a proper one and authorized by S. 223, C. P. C, and that such an application is a step in aid of execution within the meaning of Cl 4, Art 179. PANDURANGA MUDALIAR *v.* VYTHILINGA REDDI. **2 M. L. J, 466 = 17 M. L. J. 417; 31 M 537.**

673. S. 39, *37*—S. *223, 649.*

The decree sought to be executed was made by the Court of the Munsif of Nawabgunj, but the local jurisdiction in respect of the subject-matter of the suit was subsequently transferred to the Court of the Munsiff of Maldah.

Held, that the decree might be executed by either of the Courts at Nawabgunj or Maldah.

Held, also, that proceedings taken erroneously in a Court which had no jurisdiction but which was believed by the decree-holder to have jurisdiction are *bona fide* and section 14, Limitation Act, is applicable to such cases.

25 *Cal., 315,* 2 *All.,* 792, S. *C., L. R.* 167, 7 *I. A., referred to,* 6 *Cal.,* 513, *distinguished.* SHEIKH JAFAR *v.* KAMALINI DEBI. **5 W. N. C., 150.**

674 S. 38 *to 41 and 6—S. 223 and 6—Court executing a decree must be of competent jurisdiction as regards its pecuniary limits. 1 P. L. R. 1901.—9 P. R. 1901 see s. 6 supra.*

675 S. 42 *228—Execution of decree—Jurisdiction of execution—Court to question validity of decree—45 P. L. R. 1905—See Act VII. of 1859—S. 4 Col. 500.*

Sup: Govt. acts (V of 1908) *(Contd.)*

676 s. 42, *O. XXI. R. 16—s. 228, 232 Execution of decree—Assignment of decree—Question of validity of assignment—Jurisdiction of Court passing the decree.*

The question of the validity of the order under section 232 of the Civil Procedure Code allowing the assignment of the decree is a question to be determined by the Court that passed the decree, and not by the Court to which the decree has been transferred for execution, *5 Cal., 736, 21 Bom., 456 relied on. 7 All. 73 referred to.* LALA GOPAL DAS AND ANOTHER *v.* PANDIT PREM NATH. **156 P. R. 1905.**

677 s. 42, *O. XXI. R. 7, s. 47, s. 104. O. X. L, III.—s. 228, 225, 244, 588—Execution of decree—Jurisdiction of Court to which decree is sent for execution.*

Held, that when a decree is sent to a Court for execution it can, under section 225, Civil Procedure Code, go into the question of the jurisdiction of the Court passing the decree, if it sees reason to do so.

Held, also, that if the Court to which a decree is sent for execution, declines to become the executing Court, then this act of the Court is not an order under section 244 or under section 588 of Civil Procedure Code and is not appealable. BHAGVANT APPA RANGAPPA *v.* VISHWANATH. **6 B. L R. 342=28 B. 378.**

678 s. 43—S. 229 –34 C. 576 See S. 39, 43—223, 229 No. 666 *supra.*

679. s. 44, and 45—S. 229 (a) and (b)—6. C. W. N. 573—29. C. 400—See S. 39 No. 669 *supra.*

s. 47 s. 244—

(a) Applicability and scope of the section —See No. 680 to 693 *infra*

(b) Separate suits barred by this section—See No. 694 to 716 *infra.*

(c) Separate suits not barred by this section—See No. 717 to 741 *infra.*

(d) Parties to the suit or their representatives—See No. 742 to 781 *infra.*

(e) Questions relating to the execution, discharge or satisfaction of the decree or to the stay of its execution—See Nos. 782 to 804.

(f) Orders appealable—See Nos. 805 to 827

(g) Orders from which second appeals are allowed—See No. 828 to 829 *infra.*

(h) Orders from which appeals are not allowed—See No. 830 to 834 *infra.*

(i) Composite sections (*i. e.*) S 47 combined with other sections—See No. 835 &c. to the end of this section.

680. s. 47—*244—Scope of the section and its application.*

Where the decree itself is impeached on the ground of fraud or otherewise S. 244 (S. 47) would not apply and no appeal would lie from an order dealing with such objection. TALLA PRASADA SUNDARAPPA *v.* SREE RAMUDU **2 M. L. T. 300=17. M. L. J. 288=30. M. 402.**

681. s. 47.—*244.*

This section applies as well to a dispute arising between the parties after the decree has been executed, as it does to a dispute arising between them previous to execution.—*I. L. R., 17 All., 478; 22 All., 79; 2 All., 61, referred to; 7 All., 641, distinguished.*

An application for refund of purchase-money on sale in execution being set aside, falls within Section 244 of the Civil Procedure Code. COLLECTOR OF JAUNPUR *v.* BITHAL DAS. **A. W. N. 1902 P. 67=24 A. 291.**

682. S. 47.—*244—Decree, validity of—Execution of decree, scope of.*

No question touching the validity of a decree can be raised in the course of proceedings in execution of that decree. RASHBEHARI SINGH *v.* THAKUR JOYNANDA SINGH. **4 C. L. J. 475.**

683. s. 47. *O. XXI. R. 58—S. 244 and 278—Parties—Attachment—Objection by a defendant, who had been exonerated in the suit, that property attached was the property of the* tavazhi *and not of the judgment-debtor.*

Section 244 and not section 278 of the Civil Procedure Code applies to an objection made by a defendant, who was exonerated in the suit, to an attachment of property in execution of decree against the judgment-debtors on the allegation that the property was not the private property of the judgment-debtors but was the property of the *tavazhi* consisting of the judgment-debtors, the objector and other persons.

An appeal will lie against the order passed on such objection application. *23 Mad., 361 (F. B) followed.* RANGAN PATTAR *v.* LAKSHMI NEITHIAR. **14 M. L. J. 137.**

684. s. 47—S. *244*—

Cases in which judgment-debtors try to set aside effect to decree—Objection to sale that property directed to be sold by a mortgage-decree belonged, not to judgment-debtor, but to a stranger—Such question to be tried in regular suit, and not execution proceedings. *See* HINDU LAW (WILL), **8 C. L. J. 20.**

685. s. 47—S. *244—Execution of decree—"Parties to the suit in which the decree was passed."*

The decree-holders attached money belonging to the judgment-debtor and withdrew it from Court after the death of the judgment-debtor. The judgment-debtor's son having obtained a decree that the decree passed against his father was null and void applied for refund of the money attached and withdrawn by the decree-holders and the application was dismissed on the ground that after the decree obtained by the son he was no longer party to the former suit. The Court directed him to bring a fresh suit.

Held, that the order of the execution Court was wrong, the application lay under section 244 of the Civil Procedure Code, it being immaterial on which date the money

Sup: Govt. acts (V of 1908) *(Contd.)*

was withdrawn by the decree-holders. MUHAMMAD AHSAN KHAN *v.* HARAKH CHAND, **A. W. N. 1904 P. 55.**

686. S. 47—*Court's inherent power—S. 244 to correct its own mistake—Sale certificate including a property not sold, amendment of.*

Two properties were advertised for sale and one was sold but the sale certificate included both the properties and the purchaser got possession of both ;

Held, (1) that the Court had inherent power to rectify the mistake by amending the sale certificate and to direct that the delivery of possession of the second property be cancelled ;

(2) That the matter would also come under S. 244, C. P. C., the question being one between the decree-holder and the judgment-debtor and relating to the satisfaction or discharge of the decree. GOBINDA CHANDRA CHANDA *v.* ABHOY CHARAN BAGCHI, **12 C. W. N. 1027.**

687. S. 47—*S. 244—Execution-sale—Fraud—Application to set aside the sale after confirmation.*

An application to have a sale set aside on the ground of fraud can be made under S. 244, even after the sale is confirmed. *Mati Lal Chakrabutty* v. *Russik Chandra Bairagi* (I. L. R., 26 Cal. 326) and *Durga Charan Mandal* v. *Kali Prosonno Sarkar* (I. L. R., 26 Cal. 727) followed. *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (I. L. R., 19 Cal. 683) referred to—WAHID-UN-NISA *v.* GIRDHARI, **A. W. N. 1905, P. 162, 2 A. L. J. 464 = 27 A. 702.**

688. S. 47 S. *244, person not party to proceedings—Executing Court, power to commit for contempt.*

No doubt an attaching creditor does not by mere attachment acquire priority over other creditors coming in later (29 C. 428 and 26 M. 673 ref.) yet he acquires a right to have the whole of the attached property applied in satisfaction of his debt, if no other creditors come forward, and in any case, to have a rateable proportion so applied. In this sense, an attaching creditor has a charge on the attached property (5 C. 148, 12 M. L. J. 24 ref) and he has also the right to prevent the attached property passing by survivorship (4 M. 302 and 11 C. W. N. 163 refd.) Any one who interferes with that right, as by carrying away the crops attached, violates a legal right and commits an actionable wrong.

The amount of damages will depend upon the evidence, but cannot exceed the value of the attached property.

This section does not apply where the person violating the right of an attaching creditor is not a party to the original suit. (3 I. A. 241 *distinguished*).

An attaching Court has no inherent power in it to commit a person for contempt. (26 M. 494, *refd.*). SANKARALINGA REDDY. *v.* KANDASAWMI THEVAN. **17 M. L. J., 334.**

689. S. 47 (3).—*S. 244 (C)—Right of party to object to sale of property ordered to be sold by the decree.*

S. 244 (*c*) does not apply where the objection is not to the execution of the decree but to the decree itself. Where a party—defendant to a decree for sale of immoveable property—objected to the sale on the ground that since the decree he has been adopted into another family and became entitled to the property as member of the adoptive family to which the property belonged.

Held, that the objection was to the decree itself and not to the execution, discharge or satisfaction merely, and that S. 244 (*c*) did not apply to the case. CHINNASWAMY SERVAIGARAN *v.* SABAPATHY CHETTIAR **16 M. L. J. 544 = 30 M. 26.**

690. S. 47 (3).—*S. 244 (c)—Mortgage—Decree for sale—Jurisdiction.*

A judgment-debtor against whom a decree for sale has been passed as the legal representative of the mortgagor, is not entitled to object, in the execution proceedings to the property being sold on the ground that it was not the property of the mortgagor. S. 244 (c) of the Civil Procedure Code does not apply to a case where the judgment-debtor tries to set aside the effect of a decree. *Sanwal Das* v *Bismillah Begam* (I L. R., 19 All., 480); *Liladhar* v. *Chaturbhuj* (I. L. R., 21 All., 277) and *Hiralal Sahu* v. *Parmeshar Rai*, (I. L. R., 21 All., 356) followed. *Ram Chandra Mukerjee* v. *Ranjit Singh* (I. L. R., 27 Cal., 242) distinguished. KHETRAPAL SINGH ROY *v.* SHYAMA PROSAD BARMAN. **32 C. 265.**

691. S. 47. *S. 244—Scope and application of the section.* See S. 2 & 47, 28 C 81, 14 M. L. J. 436, 27 A. 330, 27 A. 31, 29 C. 644, 31 C. 373 *supra.*

692. S. 47—*Section 244—Applicability—Application to set aside auction sale.*

The judgment-debtor applied under Section 244 of the Civil Procedure Code to set aside the sale of property on the ground that it was brought about fraudulently by her agent who had purchased the property. The application was dismissed on the ground that the application did not come within the scope of Section 244, as no allegation of fraud was made against the decree-holder.

Held, upon appeal, that the contest regarding the sale between the judgment-debtor and the decree-holder related to the execution of the decree, it was strictly between the parties to the suit and the case fell under the provisions of Section 244 of the Civil Procedure Code. 19 Cal., 683; 18 Mad., 436; 3 C. W. N., 403; 2 C. W. N., 691, referred to.

In determining whether an application to set aside a sale comes within the scope of S. 244, C. P. C. or not, the point to be considered is whether there is a contest regarding the validity of the sale between the parties to the suit. ADHAR MANI DASSI *v.* MONMOTH NATH BOSE. **6 C. W. N., 279.**

693. S. 47.—*S. 244—Applicability.*

This section is inapplicable where the

question is between rival decree-holders and concerns them only. RAM CHANDER *v.* MUST. HAMIRAN. **6 C. L. J. 437 = 11 C. W. N. 433.** *See also 31 B. 207.*

694. S. 47.—*S. 244—Separate suit when barred—Public Demands Recovery Act (I of 1895, Bengal), Sections 7, 15, 31—Civil Procedure Code (Act XIV of 1882), section 244—Sale for arrears of rent—Suit to set aside sale. Grounds of.*

Under section 17 (1) (6) of the Public Demands Recovery Act a certificate shall not be cancelled except when no part of the amount stated in the certificate was due by the judgment-debtor under the certificate. A certificate can only be modified on such a ground provided that a suit for such purpose is not barred.

A sale held under the provisions of the Public Demands Recovery Act can be set aside on the ground of the invalidity of the proceedings which are alleged as the foundation of the sale and for fraud or irregularity in the execution proceedings themselves. If the sale is impeached on the ground of irregularity the judgment-debtor must proceed under section 20 of the act. In such a case section 244 of the Civil Procedure Code bars a separate suit. UMED ALI BHUYA *v.* RAJ LAKSHMI DEBYA. **1 C. L. J. 533 = 10 C. W. N. 130.**

695 s. 47, *O. XXI. R. 58, 63—244, 278, 283—Parties—Separate suit barred—Attachment. Objection against—Declaratory suit to establish title—Defendant exempted from liability.*

The respondents brought a suit against the appellants as the heirs of *V.* to recover money due on a bond executed by him. The Court passed a decree against the estate of the deceased *V.* exonerating the appellants from personal liability. The decree-holders in execution attached five fields as belonging to the deceased and as being in the possession of the appellants. The appellants applied for removal of the attachment with the result that the Court removed it as to two but rejected their application as to the other three fields. Thereupon the appellants brought a regular suit to remove the attachment,

Held, that as the appellants were parties to the previous suit, the question fell under section 244 of the Civil Procedure Code and could be decided by proceeding under that section and not by a separate suit. BHIMRAO RUMRAO *v.* AIYYAPPA. **6. B. L. R. 697.**

696 S. 47—*S. 244—Separate suit barred—Surety becoming liable for decree in a suit—Decree for plaintiff—Execution orders against surety—Suit by surety for declaration of non-liability as to portion of decree-amount—Maintainability—Proceeding in execution.*

The property of a defendant in another suit having been attached before judgment, the present plaintiff became surety for any sum that might be decreed. A decree was passed and an order was made for its execution against the present plaintiff, and that order was not appealed against. Prior to execution, plaintiff brought the present suit against the decree holders in the previous suit, for a declaration that they were not entitled to execute a portion of their decree as against him:

Held, that the suit did not lie, the matter being one to be litigated only in execution proceedings. The surety should be treated as a party to the suit, and as the question raised was one relating to the execution of a decree, s. 244 of the Code of Civil Procedure applied and the suit was barred.—LINGA REDDY *v.* HUSSAIN REDDY **14 M. L. J. 480 = 28 M 117.**

697. s. 47.—*S. 244—Parties—Separate suit barred.*

Under a decree, defendant, a transferee from the mortgagee, was declared the absolute owner of certain properties but a consession was granted to the plaintiff that if he could purchase the property from the defendant at a certain rate by a certain specified date he should be at liberty to do so, but that if he failed to do so by that date the defendant was to remain as absolute owner.

The plaintiff brought the present suit for a declaration that he was entitled to have certain specified plots of land mentioned in the decree conveyed to him on payment to the defendant certain sums of money and that the rights of the plaintiff under the consent decree may be ascertained and declared. It was contended for the defendant that the suit was barred under Section 244 of the Civil Procedure Code.

Held, that the suit was barred by Section 244 of the Civil Procedure Code, and that the relation of mortgagor and mortgagee no longer existed after the passing of the decree.

That the suit could not be treated as an application under Section 244.

That the effect of Section 244 cannot be evaded by merely adding other parties.

That the provisions of Section 244 should be strictly construed. NOWROJEE NUSERWANJI THOOTI *v.* BAPUJI DOSSABHAI. PATEL **5 B. L. R. 1036.**

698. s. 47—*S. 244—Parties—Separate suit barred—Delivery of possession—Auction purchased by decree-holder—Proceedings in execution.*

The court can under this section give final relief to contending litigants cheaply, and speedily and without the necessity of a fresh suit on the same matter. 19 C. 683 s.c. 19 I. A. 166 ref. to. Proceedings for the delivery of possession to an auction purchaser, who is himself the decree-holder, are proceedings in execution of the decree, and a question raised between him and a defendant in the suit is a question which ought to be decided under S. 244, C. P. C., 27 C. 34 ref. to. RAM

Sup: Govt. acts (V of 1908) *(Contd.)*

NARAIN SAHOO *v.* BANDI PERSHAD.—**31 C. 737 at 742.**

699 s. 47, *O. XXI R. 95—S. 244, 318—Separate suit barred—Execution of decree—Sale—Purchase by decree holder—Application for possession dismissed—Transfer to third party—Suit by third party against judgment-debtor.*

The decree-holder in a suit purchased certain lands at Court auction. An application made by him under section 318 of the Civil Procedure Code for delivery of possession was dismissed. After his death further applications were made by his heirs. These were also dismissed. The heirs sold the lands to the plaintiffs who brought the present suit against the judgment-debtors for recovery of possession.

Held, that the suit was barred by section 244 of the Civil Procedure Code. The question with respect to the delivery under s. 318 Civil Procedure Code of property purchased in a Court sale by the decree-holder is one relating to execution of the decree, and the purchaser of the property from the decree-holder is the representative of the decree-holder within the meaning of section 244 of the Civil Procedure Code. SANDU SAKUL MITHU THARAGANAR *v.* HUSSAIN SAHIB. **14 M. L. J. 474 = 28 M. 87.**

700. s. 47.—*S. 244—Separate suit barred—Execution-sale—Suit for cancellation, upon the ground of fraud, of sale held in execution of a decree—Proper remedy by application.*

Certain judgment-debtors brought a suit against the decree-holders and the auction-purchaser for cancellation of a sale held in execution of a decree, upon the allegations that the sale in question had been brought about by fraud, the decree having in fact been previously satisfied.

Held, that such a suit would not lie, the plaintiff's remedy being by application under s. 244 of the Code of Civil Procedure. *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal* (L. R., 19 I. A. 166); *Dhani Ram* v. *Chaturbhuj*, (I. L. R., 22 All. 86); *Daulat Singh* v. *Jugal Kishore*, (I. L. R., 22 All. 108); *Bhubon Mohan Pal* v. *Nunda Lal Dey*, (I. L. R., 26 Cal. 324) and *Moti Lal Chakerbutty* v. *Russick Chandra Bairagi*, (I. L. R., 26 Cal. 326), referred to.—MATHURA DAS *v.* LACHMAN RAM, **A. W. N. 1902 P. 49 = 24 A. 239**

701. S. 47. *O. XXI. R. 95.—244 and 318. Separate suit barred.*

When the decree-holder as purchaser of property sold in execution of his decree against the judgment debtor applied under Section 318 of the Civil Procedure Code to be put in possession of the property purchased by him and the application was dismissed as barred by limitation—

Held, that a fresh suit for possession was barred by Section 244 of the Civil Procedure Code.—*13 Mad., 504*; *24 Mad., 185; 27 Cal., 34; 25 Mad., 529, followed*—KUTTA-

Sup: Govt. acts (V of 1908) *(Contd.)*

YAT PATHUMAYI *v.* RAMAN MENON.—**26. M. 470.**

702. S. 47 O. *XXI. R. 90—S. 244 (C), 311 Separate suit barred—Execution-sale—Sale set aside but confirmed on appeal—Suit against purchaser for recovery of purchase-money.*

The judgment-debtor applied to have a sale set aside on the ground of irregularities in the conduct of the sale under S. 311 of the Civil Procedure Code. The application was granted and the purchase-money was returned to the purchaser. On appeal by the decree-holder, the order setting aside the sale was annulled and the sale was confirmed. The purchaser, however, did not re-pay the purchase-money, nor shewed any inclination to carry out the sale or to obtain possession of the property. The decree-holder brought this suit against the purchaser for recovery of the purchase-money.

Held, that the suit could not be maintained. The subject matter of the suit was clearly a matter coming within the purview of S. 244 (*c*) of Civil Procedure Code. *Gulzari Mal* v. *Madho Ram*, (A. W. N. 1904, P. 61) followed.—RAHIMUDDIN *v.* RAM LALL, **A. W. N. 1904 P. 205 = 27 A. 155.**

703. S. 47—*S. 244 cl. (c)—Separate suit barred—*Ijaradar *of judgment-debtor is his legal representative.*

Held that an ijaradar of a property of the judgment-debtor is his representative, within the meaning of this section, decree-holder cannot sue the judgment-debtor and his *ijaradar* for a declaration that the *ijara* was void, as the question should be determined in execution and not by a separate suit 19 A. 332, 16 A. 286, 21 A. 20, 24 *C.* 62 ref to.—MATHEWSON *v.* GOBARDHAN TRIBEDI. **5 C W. N 654 = 28 C. 492.**

704 S. 47—*S. 244—Separate suit barred—Dismissal of purchaser's application for possession—Right to fresh suit barred.*

A decree-holder purchaser of the property sold in execution of his decree applied under Section 318 of the Civil Procedure Code for delivery of the property purchased, but his application was rejected as barred by limitation having been made more than 3 years after the confirmation of the sale. He brought the present suit to recover possession of the land from the defendant who was the judgment-debtor.

Held, that the suit was barred by section 244 of the Civil Procedure Code. *13 Mad., 504, 24 Mad., 185, 27 Cal., 34, 25 Mad., 529 followed.* MURKANAT *v* PALAKHAL RAMAN MENON. **13 M. L. J. 237.**

705 s. 47—*S. 244—Separate suit barred—Suit against* karnavan—*suit to cancel order releasing property from attachment.*

Where the plaintiff obtained a decree against the *karnavan* of the defendants, as senior member and manager of the *tarvad*, and had *tarvad* property attached in execution thereof, which was released from attachment on the objection of the defen-

Sup: Govt. acts (V of 1908) (*Contd.*)

dants, and the plaintiff filed a suit for cancellation of the order releasing property from attachment, *held*, that the suit was barred by Section 244 (*c*) of the Civil Procedure Code. KAMAL KUTTI *v.* IBRAYI. **24. M. 658.**

706. s. 47 *S. 244—Separate suit barred—Suit to set aside compromise.*

The defendants in this suit were decree-holders who had obtained a simple money-decree against the plaintiff, and in execution had attached and purchased at an auction the plaintiff's interest in the lands in question. An objection to the sale was raised by the judgment-debtor on the grounds of irregularity in the conduct and publication of the sale. Whilst these proceedings were pending the judgment-debtor's son was alleged to have entered into a compromise with the decree-holders, whereby it was arranged that the decree-holders should take the village in question in full satisfaction of their debts instead of at the sale price and that the sale should be confirmed on these terms.

The judgment-debtor brought this suit to have it declared that certain proceedings relating to the compromise and the confirmation of the sale of property were collusive and invalid and were taken without any authority on the part of the plaintiff and that the sale should be set aside.

Held, that the suit was barred under Section 244 of the Civil Procedure Code. *L. R.* 19, *I. A*, 166, *referred to*. ADHAR SINGH *v.* SHEO PRASAD. **A. W. N. 1902 P. 18=24 A. 200.**

707. s. 47—*244—Separate suit barred—Execution of decree—Restitution.*

A suit for recovery of possession of lands taken in execution of a decree, when the decree did not award possession of those lands is barred by section 244 of the Civil Procedure Code. The plaintiff in such a suit cannot be treated as an application under section 244 of the Civil Procedure Code when at the date of filing the suit the application would be barred by limitation. ARJUN SINGH *v.* MACHCHAL SINGH. **3 A. L. J. 601=W. N. A., 1906, p. 233.**

708. s. 47—*244—See S. 11 29 B. 96 No. 489 supra.*

709. s. 47.—*S. 244—Separate suit barred—Landlord and tenant—Execution of decree—Sale of non-transferable holding—Knowledge of judgment-debtor—Confirmation of sale—Suit for recovery of possession by judgment-debtor.*

S. owned a non-transferable occupancy holding which was sold in execution of a decree against him, and one K. was the purchaser. K. transferred his right to the present plaintiff who instituted a suit for recovery of possession against S. who was still in occupation. It was contended that as S. had knowledge of the execution proceeding and did not object to the attachment or sale, he was incompetent to resist the purchaser after confirmation of the sale.

Sup: Govt. acts (V of 1908) (*Contd.*)

Held, that the contention was a sound one and the suit must be dismissed. 21 *Cal.*, 355 *not followed.* 26 *Cal.*, 727, S. C., 3 *C. W. N.*, 586 *followed.*

That as between the purchaser and S. the title to the property vested in the purchaser on the confirmation of sale. SHEIKH MURULLAH *v.* SHEIKH BURULLAH. **9 C. W. N. 972.**

710. S. 47.—*S. 244—Setting aside void sale, 33 C. 283.*—See T. P. Act IV of 1882, Ss. 90 and 67, col. 715, *supra.*

711. S. 47.—*S. 244—Separate suit barred—Decree against Hindu father for sale—Son's suit—Injunction—Sale carried out and confirmed—Mortgagor's suit to set aside sale.*

A and B mortgaged their property 4 *biswas* to C, who obtained a decree for sale.

The sons of A and B sued C for exemption of their shares. They obtained an injunction for staying the sale with the exception of 1½ *biswas.* But 1½ *biswas* were sold and the sale was confirmed. The claim of one son was decreed and one *biswa* was exempted. A and B brought this suit to set aside the sale of ½ *biswa* held during the pendency of their son's suits.

Held, that the sale was held under an absolute order which was in full force. Its being held during the pendency of a temporary injunction did not render the sale void *ab initio.*

Held, further, that the mortgagor judgment-debtors' remedy, if any, was by an application and not by a separate suit. HIMAT SINGH *v.* HARDIAL SINGH. **2 A. L. J., 694.**

712 s. 47—*244—Sale in contravention of S. 99 T. P. Act IV of 1882 S. 99—Remedy* ASHUTOSH *v.* BIHARILAL. **11. C. W. N. 1011—6. C. L. J. 320=35. C. 61 (F. B.).** —*See Transfer of Property Act IV of 1882 S. 67, 99 Col. 621.*

713. s. 47, 244—163, P. L. R., 1901—8, P. L. R. 1902—See s. 39 No. 663 *supra.*

714. S. 47—*244—Separate suit barred—Execution of decree—Question relating to execution—Claim for refund of amount realized in excess of what was allowed by decree.*

Where after the execution of a decree is completed the judgment-debtor applies that the decree-holder has realized from him more money than was allowed by the decree and refund be made to him of the amount due to him the application can be treated as a review and the order granting the same is appealable. In such a case the judgment-debtor is not required to file a separate suit for recovery of the money claimed by him. *P. R., 63 of 1901, S. C. 101 P. L. R. 1901, referred to.* KALU KHAN *v.* ABDUL LATIF. **113 P. L. R. 1901=45 P. R. 1901.**

715 s. 47—*S. 244—Separate suit barred.*

A defendant in a suit against whom no decree has been passed is still a party to the suit within the meaning of this section and is entitled to come in under it, if his rights are invaded in execution, 12 C. 453

Sup: Govt. acts (V of 1908) (*Contd.*)

distinguished, 11 A. 74, 18 A 52, 23 A. 346 discussed, 15 M. 226—12 M. 131, 23 M. 361, 17 B. 49 followed. VITHALMUKAND *v.* GANESH MAL. **15 C. P. L. R. 1902 P. 106.**

716 s. 47—*244—Separate suit barred—*
A suit to set aside certificate sale held under Public Demands Recovery Act 1 of 1895 (Bengal) is not maintainable. See s. 10 of that Act. ELOKESHI DASSI *v.* ABINASH CHANDRA BOSE. **5 C. L. J. 638.**

717 S. 47 *(3)—Section 244 (c)—Separate suit not barred—Auction-sale set aside on account of irregularity—Refund of purchase-money. Right of auction-purchaser for—Separate suit.*
The question of the auction-purchaser's right to obtain refund of the purchase-money on account of the auction sale having been set aside for some irregularity in conducting the sale, is not a question arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree. It cannot, therefore, be rightly held to come under clause (*c*) of section 244 of the Code of Civil Procedure; and hence a separate suit is maintainable for refund of the purchase money. JOTINDRA MOHAN TAGORE *v.* MAHOMED BASIR CHOWDHRY. **32 C. 332.**

718. S. 47, *244—Separate suit to set aside—Decree against minor without proper representative not barred.*
A suit to recover property from a decree-holder, who obtained his decree relating to the property against the plaintiff when a minor without proper representation in court or from such decree-holder's vendee is not barred under this section.—RAMCHANDAR *v.* CHHEDA LAL. **1905 A. W. N. 122 at 123.**

719 s. 47—*Section 244—Separate suit not barred—Suit for possession—Defendant agreeing to execute* kabuliyat—*Fresh suit for* kabuliyat.
The plaintiff sued the defendant No. 1 for *khas* possession. The suit was dismissed in accordance with the terms of a compromise under which the defendant No. 1 agreed to execute a *kabuliyat* in favor of the plaintiff.
The defendant No. 1 then assigned the land to the defendant No. 2 and the plaintiff again sued the defendant No. 1, making the defendant No. 2 a party defendant, for ejectment, on the ground that the defendant No. 1 by assigument of his interest in the land has forfeited his tenancy. The suit was dismissed. The plaintiff then instituted the present suit for specific performance of the contract to execute a *kabuliyat*.
Held, that the suit was not barred by section 244 of the Civil Procedure Code and the plaintiff was not precluded from suing for a *kabuliyat*. CHUNI LAL DUTTA *v.* HIRA LAL DUTTA. **7 C. W. N. 158.**

Sup: Govt. acts (V of 1908) (*Contd.*)

720. s. 47—*244—Separate suit not barred—Execution of decree—Fresh suit by puisne mortgagee—From of foreclosure decree—27. A. 325 (P. C.)*—See T. P. Act S. 74, 83, 86 Col. 635.

721. s. 47—*S. 244—Execution of decree—Appeal—Legal representatives of plaintiff—Jurisdiction of execution Court—Order suspending execution pending determination of the question as to who are the legal representatives of the judgment-creditor.*
The Execution Court has no jurisdiction to re-open the question as to whether certain persons brought on the record of the suit as representatives of the deceased plaintiff and as such made respondents in the appeal had been properly joined as parties or not. The matter once settled by the Appellate Court before passing its decree cannot be questioned in execution.
The order passed by the Execution Court rejecting the application to execute the decree until it had been decided in a separate suit as to who were the legal representatives of the original plaintiff is a decree and appealable as such. VENKATACHALA REDDI *v.* VENKATARAMA REDDI. **24 M. 665.**

722. s. 47, *73-244 and 295, 9. C. W. N. 989*—See T. P. Act IV of 1882 S. 73 Col. 632.

723. S. 47—*Section 244—Separate suit not barred—Suit to set aside sale held for arrears of cess under Public Demands Recovery Act.*
Section 244 of the Civil Procedure Code does not bar a separate suit to set aside a sale held for arrears of cesses under the Public Demands Recovery Act in cases to which Act I of 1897 B. C. is not applicable.
A suit to set aside a sale held for arrears of cesses on the ground that no notice of the certificate was served upon the plaintiff is maintainable in the Civil Court and the suit is maintainable even of the certificate has become absolute. 27 Cal. 698, 5 C. W. N. 521 *followed.* JANKI DASS *v.* RAM GOPAL SAHU. **28 C. 813.**

724. s. 47—*244 28 M. 64—See C. P. C. O. XXI R. 16—(S. 232) infra.*

725. s. 47.—*S. 244—Separate suit not barred—Mortgage—Redemption suit by one brother—Decree and possession—Subsequent separate redemption suit by other brothers.*
The father of *B* mortgaged certain lands with the defendant. *B.* brought a redemption suit. A consent-decree was passed in this suit to the effect that *B.* should obtain possession from the mortgagee and that Rs. 250 should be paid to the latter in a yearly instalment of Rs. 50. In default of payment of any one instalment *B* should hand over the possession of the lands to the mortgagee and if *B.* should pay the remaining sum at the end of any *Chaitra*, the mortgagee should deliver the possession to *B.* *B.* defaulted and the mortgagee entered into possession through Court. On the death of

Sup: Govt acts (V of 1908) *(Contd.)*

B. his other brothers brought a separate redemption suit. It was objected *inter alia* that this suit was not maintainable.

Held, that the objection was not valid. 16 *Bom.*, 656 *followed*. GOVINDA *bin* BAPUJI *v.* BABAJI *bin* ISHWARA. **6 B. L. R., 1100.**

726. S. 47.—*S. 244—Separate suit not barred—Insolvency Act, Section 7—Dismissal of petition after vesting order—Validity of acts of Official Assignee—Creditors. Right of.*

Section 7 of the Insolvency Act provides that in case after the making of any vesting order, the insolvent's petition should be dismissed, the vesting order shall from and after such dismissal become null and void subject, however, to the condition that all acts done by the Official Assignee prior to the dismissal of the petition shall be good and valid. The use of the phrase "null and void" in the section has the effect of re-vesting the property in the insolvent retrospectively from the date of the vesting order.

Held, that the composition-deed executed before the dismissal of the insolvent's petition and the re-vesting order was not inoperative to transfer the property comprised in the composition-deed to the plaintiff and other persons appointed as trustees under the composition-deed. It prevailed against the attachment made by a creditor, though such attachment was made subsequent to the composition-deed.

Held, also, that the suit of the trustees to raise the attachment was not barred by Section 244, C. P. C. KOTHANDARAMA ROUTH *v.* MURUGESA MUDALI. **13 M. L. J. 372=27 M. 7.**

727. S. 47.—*S. 244—Separate suit not barred—Suit to set aside a decree as fraudulent.*

A suit lies to have it declared that a decree and a sale in execution thereof were fraudulent and to obtain possession of the property sold—21 *Cal.*, 605, and 24 *Cal.*, 546. Such a suit can be brought in the Court within the local limits of whose jurisdiction the property is situate. KEDAR NATH MUKERJI *v.* PROSONNA KUMAR CHATTERJI. **V. W. N.. C., 1901, P. 559.**

728. S. 47.—*S. 244 and 278—Separate suit not barred—Different capacities—Decree against judgment-debtor personally and not as* Shebait *—Shebait's right to set aside a sale of debutter property.*

Where a decree is passed against the judgment-debtor personally and not in his character of *Shebait*, the trust property cannot be sold in execution of that decree, and the judgment-debtor as *Shebait* may successfully complain in a fresh suit which is not barred by section 244 of the Civil Procedure Code.—*XVII Cal.*, 711, *referred to.* RAM KRISHNA MAHAPATRA *v.* MOHUNT PADMA CHARAN DEB GOSWAMI. **6 C. W. N., 663.**

729. S. 42, *11—244 and 13—Separate suit not barred—Execution of decree—Possession—*

Sup. Govt acts (V of 1908) *(Contd.)*

Delivery of formal possession—Fresh suit for actual possession.

The delivery of formal possession in execution of a decree for possession gives a cause of action against a defendant, who remains in occupation of the property, which may be enforced in a regular suit. *11 Cal., 93; 24 Cal., 715; 19 All., 499, referred to.* JAGGAN NATH *v.* Seth MILAP CHAND. **A. W. N. 1905 P. 213 s. C. 29 A. 722; s. C. 3 A. L. J. 504.**

730. s. 47.—*244—Separate suit not barred—Insolvency—Suit on order for costs awarded by Insolvency Court—Limitation Act (XV of 1877), sch. II, art. 122—Interest.*

The plaintiff in this case sued to recover the amount of costs due under an allocatur issued by the Registrar of Calcutta High Court dated the 7th September 1902, in respect of certain costs which were awarded by the same Court in its insolvency jurisdiction on the 1st June 1892.

Held that the order of the High Court in its insolvency jurisdiction is a judgment of the High Court, and a suit based upon such order is maintainable and that art. 122, of sch. II of the Limitation Act applied to such suit.

Held also that the suit being based on the judgment or order as affording a new cause of action, and there being no other bar to the suit, statutory or otherwise, there was nothing in S. 244 of the Civil Procedure Code to take away any such right of suit.

Held further that as the order of the Insolvency Court did not provide for payment of interest, the plaintiff was not competent to claim it.—ANNADA PRASAD BANERJEE *v.* NOBO KISHORE ROY, **9 C. W. N. 952.**

731 s. 47 *S. 244 and 583—Seperate suit not barred—N. W. P., Rent Act (XII of 1881) —Execution-proceedings.*

Money recovered under a decree which has been reversed or superseded must be refunded by the decree-holder. *3 D. R. (P. C.), 11, referred to.*

Under section 583 of the Civil Procedure Code a party entitled to restitution should apply to the Court which passed the decree, and a seperate suit is barred by s. 244.

As there is no provision in the Rent Act, 1881, similar to those contained in s. 244 of the Civil Procedure Code and Chapter VII of the Rent Act must be deemed to contain all provisions relating to the execution of decree passed by a Court of Revenue, a judgment-debtor is entitled to bring a separate suit for recovery of money realised by the decree-holder in execution of a decree passed by a Revenue Court. MASIH-ULLAH KHAN *v.* MAJID-UN-NISSA, **A. W. N. 1903 P. 207.**

732. s. 47, *O. XXI R. 93—244, 315—Separate suit not barred—Suit for refund of purchase money by auction purchaser.*

Whilst section 315 Civil Procedure Code

Sup: Govt. acts (V of 1908) *(Contd.)*

provides a simple and summary procedure by which an auction purchaser can recover back his purchase money it does not contain any provision barring a Civil suit—*5 All., 577, 13 All., 383 and 11 Mad., 69 followed*—Such a suit is maintainable on the ground that the judgment-debtor had no saleable interest. HARI DOYALSINGH ROY *v.* SHEIKH SAMSUDDIN. **5 C. W. N. 240.**

733 S. 47 *S. 244—Separate suit not barred—Formal possession—Dispossession—Cause of action—Right of suit.*

Held following 11 *Cal.* 93 that the delivery of formal possession of execution of a decree for possession gives a cause of action against a defendant who remains in occupation of the premises which may be enforced in a regular suit. The defendant who remains in actual occupation notwithstanding execution must be regarded as a trespasser who commits a fresh act of dispossession which gives a fresh cause of action. *4 C. W. N., 419 S. C., 27 Cal., 34, 14 Cal., 605, 22 Cal., 483 referred to.* HASSAN RAJA CHAUDRY *v.* CAILAS CHANDRA SINGA. **8 C. W. N. 49.**

724 S. 47—*S. 244—Separate suit or pleadings not barred—Objection by defendant as to his title not decided in suit or execution proceeding.*

The holder of an occupancy-right (which was non-transferable by custom or usage) mortgaged the holding, and the mortgagee brought a suit against the mortgagor making the landlord parties, who pleaded that the holding was non-transferable. The Court declined to enter into the question of non-transferability and passed a decree directing the sale of the holding. The holding was sold and purchased by the mortgagee himself, who not getting actual possession brought the present suit against the landlords for its recovery.

The defendants pleaded that the holding was not transferable and the plaintiff got no title by purchase. It was contended by the plaintiff that the defendants were barred under sections 13 and 244 of the Civil Procedure Code from raising the plea.

Held, that the contention was not valid. DURGA CHARAN AGRADANI *v.* KARAMAT KHAN. **7 C. W. N. 607.**

725. S. 47—S. *244—Separate suit not barred—Execution of Decree—Agreement previous to decree.*

A obtained a decree for *khas* possession of certain land by ousting *B*. In execution thereof, *B* pleaded that there was an agreement between him and the decree-holder, previous to the decree, that he should not be ousted from the land and that permanent rights over the same would be granted to him by the decree-holder.

Held, that such a question could not be gone into under S. 244 of the Civil Procedure Code. [illegible] can only be inquired into under S. 244 when the existence of a decree which is susceptible and capable of execution is conceded, and it does not apply to a case where the object is to impugn the decree itself or to set up a case inconsistent with the decree which it is sought to execute. *Laldas Narandas* v. *Kishordas Debidas* (I. L. R. 22 Bom. 463) dissented from. *Benode Lal Pakrashi* v. *Brajendra Kumar Saha*, (I. L. R. 29 Cal. 810) and *Chhoti Narain Singh* v. *Rameshwari Koer*, (6 C. W. N. 796), followed.—HASSAN ALI *v.* GAUZI ALI MIA, **31 C. 179.**

726. S. 47-*S. 244—Separate suit not barred—Ganjam and Vizagapatam Agency Rule 20—Collector in execution of an order put plaintiff in possession of a wrong village—Order—'ultra vires'—Limitation Act, Art. 14:*

Under an order a person was entitled to be put into possession of a particular village and in execution of this order the Collector put him in possession under S. 265, C. P. C., of a wrong village:

Held, that such person could sue for possession of the village he was rightfully entitled to. The order of the Collector is a mere nullity and S. 14 of the Limitation Act has no application to such a suit.

Quære:—Whether a suit will be barred under S. 244, C. P. C., and whether the section applies to Agency tracts. Whether the agent dismisses a suit on the ground that it is barred and this ground is erroneous, there are "special" grounds within the meaning of Rule 20 for the High Court to interfere and direct the Agent to review his order.—MAHARAJAH OF VIZIANAGARAM *v.* SOMASEKARA. **2 M. L. J. 195=17 M. L. J. 147=30 M. 230.**

727 S. 47—*244—U. B. R. 1905. P. 36 see s. 11, 47—No 506 supra.*

723 S. 47—*S. 244—Separate suit not barred—Suit by purchaser for compensation for trespass by decree-holders, judgment-debtor and others.*

S. 244 (S. 447) C. P. C. does not bar a suit by the auction-purchaser in a Court sale for compensation for trespass committed by the decree-holder and judgment-debtor along with some others on the property purchased before he obtained possession. The question is not one arising out of the execution of the decree.—MAMA AMINA *v.* BEVACHI HAJI. **3 M. L. T. 97=17 M. L. J. 543.**

729 S 47—*244—Separate suit not barred—Execution of money decree—Application embodying agreement hypothecating immoveable property and granting time filed by parties in execution proceeding.*

Suit on the basis of the agreement for recovery of money, defendant setting up S. 257 A. and S. 244 as barring the suit—PARABH DIAL *v.* GURMUKH **18. P. L. 1903=93 P. R. 1902.**

See Act I of 1872—S. 91 Col. 197.

730 S. 47 *and O. XXI. R. 95—S. 244, 318—Separate suit not barred—Dispute between two judgment-debtors as to right to property sold in execution appeal.*

Certain property of the judgment-deb-

Sup: Govt acts (V of 1908) *(Contd.)*

tors A and B was sold, and was purchased by C and the sale was confirmed. C. applied under S. 318 of the Code asking that B might be substituted for the applicant and possession given to her. To this application A objected on the ground that she at some time prior to the execution of the decree and sale of the property had given a certain sum of money to B and that she had misappropriated this money and had purchased with it the property which was sold in execution of the decree.

Held, that no question was raised falling under S. 244, and no appeal would lie from the order allowing the auction-purchaser's application under S. 318.—KASTURI KUNWAR *v.* GAYA PRASAD **A. W. N. 1907=P. 29=29 A. 207.**

731. s. 47 *—244—Plaint treated as an application under S. 47 (244).* **8 O. C. 327.**

See T. P. Act IV of 1882 S. 99 col. 713.

732. s. 47 *& O. XXI. R. 96 S. 244, 319—Separate suit not barred—Wrong delivery of symbolical possession.*

Symbolical possession erroneously delivered under circumstances which do not make S. 319 applicable, give to the person so put in possession a fresh cause of action and places the judgment-debtor in the position of a trespasser. A suit by the assignee, decree-holder-purchaser for actual possession of the properties purchased is not therefore barred by S. 244. Symbolical possession delivered under circumstances under which S. 319 is not applicable is not a nullity. GOVIND BDIRAJI *v.* VENKATA SASTRULU. **17 M. L. J. 599.**

733. s. 47. *S. 244—Separate suit not barred—Section 244—Mesne profits—Execution proceedings—Separate suit—Appeal.*

Section 244 (c) of the Code of Civil Procedure does not authorize the executing Court to determine the amount of mesne profits due to the decree-holder in a case in which the decree did not mention mesne profits.

Where in a suit for possession of land valued at Rs. 3,000 for purposes of jurisdiction a decree was passed for possession on payment of Rs. 1,450 raised for necessity, and the execution Court awarded also mesne profits of value in excess of the pecuniary jurisdiction of the Divisional Court:

Held, that the suit was cognizable in appeal by the Divisional Court, and the fact that the decree holder wrongfully claimed, in execution proceedings, mesne profits in excess of the appellate jurisdiction of that Court, did not oust its jurisdiction to hold that such a claim did not lie—60 P. R. 1890; *I. L. R. VII All*, 170; *XVII Cal.*, 968; *XXII Cal.*, 443 (*P. C.*); 55 *P. R.* 1892, referred to. KHAZAN SINGH *v.* KHUSHAL SINGH. **29 P. R., 1908=83 P. L. R. 1908.**

734. s. 47—*S. 244—Separate suit not barred.—A suit to set aside a sale certificate on the ground of fraud is not barred by S. 244*

Sup: Govt. acts (V of 1908) *(Contd.)*

(S. 47) C. P. C. See Public Demands Recovery Act (Bengal) I of 1895, S. 19 (2) 1 C. L. J. 542=32 C. 1130 and See S. 10 of that Act. 2 C. L. J. 504.

735. S. 47.—*S. 244—Plaint converted into application—Decree itself impeached—Separate suit not barred*

This section does not apply to a case where the object is to impugn the decree itself. (31 C. 179. 4 C. L. J. 475 ref to) If a decree is tainted with fraud a suit will lie to set aside the execution sale even though the decree may have been previously set aside under S. 108 C. P. C., and there is no subsisting decree to be set aside in the suit in which the sale is impeached. 97 C. 197 ref. to. If a plaint is presented where an execution application will lie, the defect is one of form rather than of substance, and the plaint should be treated as an application. 19 W. R. 90. 14 C. 605; 22 C. 483, 3 C. W. N. 395, 18 A. 106 ref. to.—DEBENDRA NATH BHATTACHARJEE *v.* PRASANNA KUMAR CHAKRAVARTI. **5 C. L. J. 328.**

736. S. 47—*S. 244—Separate suit not barred—Wrongful delivery of possession of land, instead of equity of redemption as decreed—Suit by mortgagee for restitution of land so delivered.*

A regular suit is barred under this secsection where the question relating to execution of a decree is raised *bona fide*. But where the decree itself is wholly irrelevant to the question raised, and the wrong-doer pleads this section as a bar simply to shield his unlawful gain secured against the express orders of the executing Court, possibly in collusion with the officer executing the decree, and in the absence of the judgment-debtors, S. 244 would not apply. A sued B to enforce his right of pre-emption, in a property subject to mortgage, and got a decree directing delivery of possession of the equity of redemption therein, but, in execution of the decree, the Patwari delivered possession of the property itself, instead of the equity of redemption:

Held, that a regular suit by the mortgagee, claiming restitution of the property so wrongfully delivered, is not barred by S. 244, as the question raised in the suit does not relate to the execution, discharge or satisfaction of the decree 11 W.R. 516 followed. Even if there were any room for doubt on this point, the plaint may be treated as an application for execution of decree for claiming restitution of lands wrongfully delivered by the Patwari in executing the decree 22 C. 483, 22 A. 121, 28 M. 61, 32 C. 332, followed 5 M. 351, 7 M. 255, 23 M. 55, 16 M. 287, 4 M. 285, 12 W. R. 85, 14 W. R. 59, 12 B. 449, 9 A. 229, 8 C. W. N. 353, 9 P. R. 1889, 63 P. R. 1901, 6 P. R. 1904, refd. KARAM CHAND *v.* KHUDA BAKHSH. **40 P. W. R. 1907=5 P. R. 1907.**

737. S 47, *O. XXI R. 58 and 60 and 63, 244 278, 280 and 283—Separate suits not barred—Parties—Party against whom a suit is dis-*

Sup: Govt. acts (V of 1908) *(Contd.)*

missed—Objection to attachment by—Remedy by regular suit.

When an action is dismissed against one of the defendants, but decreed against the others, he should not be considered as a party to the suit within the meaning of clause (c) of section 244 of the Code of Civil Procedure. His objection to the attachment of any property claimed to be his own would fall under sections 278 and 280 of the Code, and not under section 244, and his remedy against any order passed against him would be by a regular suit under section 283 of the Code. 6 C. W. N. 10. followed; 17 Cal. 711; 12 Cal. 481; 23 All., 346, *referred to.* MOHAMED KAHIM-UD-DIN SARCAR *v.* LALL MEAH. **6 C. W. N. 727.**

738. S. 47, *O. XXI R. 58 and 63—244, 278 and 283—Separate suit not barred—Parties to suit.*

Held that where several persons were sued in an action, but some were released from liability, the persons so released were not parties to the decree within the meaning of Section 244 clause (c) of the Civil Procedure Code, and that as strangers their objection to the attachment would come under Section 278; and if their objection was disallowed, their only remedy was by a suit under Section 283. RAM PERSHAD (PROSAD PANDEY) *v.* JAGANNATH RAM (MARWARI). **6 W. N. C., 10=30 C. 134.**

739. S. 47.—*244—Separate suit not barred—Question relating to execution of decree—Jurisdiction of Court executing the decree.*

The rule that all questions relating to the execution of a decree shall be determined by order of the Court executing the decree has no application where the Court executing the decree has itself no jurisdiction and a separate suit is not barred in such cases. *11 B. 429, 21 C. 626, 25 W. R. 156 referred to.* SHRINIWAS RAO *v.* SARHA CHAMAR. **17 C. P. L. R. 1904 P. 51.**

740. S. 47.—*S. 244—Separate suit not barred—Question relating to discharge or satisfaction of the decree.*

A decree declared the plaintiff's right to build over a certain area and prohibits the defendant from interfering with such right. If the decree-holder makes any constructions contrary to the right which the decree has declared, that is a matter which does not relate to the execution, discharge or satisfaction of the decree and the court can not enter into it in execution proceeding. If the decree-holder has exceeded his rights the judgment-debtor's proper remedy is to bring a separate suit for the purpose. SAUDAGARMAL *v.* GOPI. **2 A. L. J 573**

741. S. 47.—*S. 244—Separate suit not barred—Insolvency court's order sued against.*

Where the order of an Insolvency Court was unsatisfied and a suit was instituted which did not concern with or relate to the execution of that order

Held that such a suit was maintainable. ANNADA PRASAD BANERJI *v.* NOBO KISHORE ROY. **9 C. W. N. 952 at 955.**

741 (a) S. 47—*244—Separate suit not barred—Suit for foreclosure—A portion of mortgaged property can not be foreclosed.—Transfer of Property Act (IV of 1882), S. 87—Execution of Decree.*

A and his father lived and jointly owned between them a six pies share. The father mortgaged this share to A by way of conditional sale, representing himself in the deed as the sole owner. A obtained a decree *nisi* for foreclosure. B was not made a party to that suit of A. A applied for an order absolute against B. whose father had died by this time. B objected so far as his half share in the property was concerned. The objection was allowed and an order was passed making the foreclosure absolute in respect of one-half only of the six pies share. A then sued for a declaration that B was bound by the foreclosure decree passed against his father, and that his interest in the property, which had been released, had become the property of the plaintiff, and that the foreclosure decree should be made absolute as regards that interest. That suit being dismissed A brought another suit for a decree for the payment of one-half of the amount due upon the mortgage at the date of the previous decree with further interest up to date and in default of payment foreclosure of defendant's right to redeem his interest in the property.

Held, that the suit is not barred by section 244, C. P. C., so far as regards the questions whether the mortgage made by his father is binding upon the defendant, and whether defendant is bound to pay his father's debt out of any family property which has passed to him by survivorship.

Held, also, that having regard to the penultimate clause of section 87 of the Transfer of Property Act, a mortgage cannot be foreclosed piece-meal, and that the suit was not maintainable.—RAJA RAM *v.* SHEOPAL SINGH, **7 O. C. 137.**

742. S. 47 (3).—*S. 244, Cl. (c)—Mortgage by husband—Decree against widow binding on heirs—Purchaser from widow.*

One who purchases property from a mortgagor after decree is obtained by the mortgagee is the representative of the mortgagor within the meaning of this section. (25 M. 529 not followed). A decree obtained against the widow as representing her husband's estate would bind, on the widow's death, the heir of the husband as a 'representative' within the meaning of S. 244. If in execution of such a decree, property is sold and purchased by the mortgagee, a claim by the private purchaser from the mortgagor or heir objecting to the delivery is one falling under S. 244, C. P. C. SIVA-

Sup: Govt. acts (V of 1908) *(Contd.)*

RAMA SASTRI *v.* SOMASUNDRA MUDALI. **28 M. 119.**

743. S. 47 (3).—*S. 244, Cl. (c)—Auction purchaser.*

One who purchases the judgment-debtor's interests in properties involved in the execution pending the execution proceedings is the debtor's representative in such proceedings. 24 C. 62 followed. AKOY KUMAR *v.* BEJOY CHAND. **29 C. 813.** *See B. T. A. VIII of 1885, S. 160 (g), 167.*

743 (a). S. 47.—*S.* 244—*Parties—Purchaser of judgment-debtor's interest before decree.*

Held, that under S. 244, C. P. C. the purchaser of a judgment-debtor's interest before decree is not his representatives. 12 C. 458 followed. KALU SHAH *v.* BHAGWATI DEBYA. **6 C. W. N. 217.**

744. S. 47 *(3)—S. 244 cl. (c)—Official—Representative of judgment-debtor.*

The Official Assignee is the representative of the judgment-debtor and could object that the property attached, though it belonged to the judgment-debtor, was not liable to be sold in execution of the decree by reason of a vesting order passed in the insolvency proceedings. 7 A. 752, 21 B. 205 ref. to MITTER *v.* LAKHIMONI DEBI. **5 C. W. N. 661=28 C. 419.**

745. S. 47 *(3)—244 (c)—Execution of decree—Auction purchaser—Representative.*

Held, that an auction purchaser at a sale held in execution of a simple money decree against a judgment-debtor whose property has been ordered to be sold at the suit of the mortgagees in a mortgage suit is a "representative" of the judgment-debtor within the meaning of section 244, sub-section (c) of the Civil Procedure Code. There is no distinction between the case of a purchaser who purchases by private agreement from a judgment-debtor whose property is the subject-matter of a suit for sale at the instance of a mortgagee and that of a purchaser who purchases at a judicial sale in execution of a simple money decree against such judgment-debtor. (8 A. 146, 16, A. 286, 19 A. 322, 21 A. 20, 22 A. 86, 22 A. 108 24 A 239, 9 B. 468, 19 C. 683, 26 C. 324, 26 C. 326, 24 C, 62 referred to.

The term "representative" as used in section 244 of the Code of Civil Procedure, when taken with reference to the judgment-debtor, does not mean only his legal representative, that is, his heir, executor, or administrator but it means his representative in interest and includes a purchaser of his interest who so far as such interest is concerned, is bound by the decree. GULZARI LAL *v.* MADHO RAM. **A. L. J.. 1904 P. 65=A. W. N. 1904 P. 61=26 A. 447 (F.B.)**

746. S. 47.—*Section 244—Execution of decree—Sale—Representative—Sale of* putni—*Auction-purchaser bound by subsequent decree against original* putnidar—*Landlord and Tenant.*

Where a *putni* was sold in execution of a money-decree obtained against the *putnidar* and was bought by the appellant, but the appellant did not obtain the registration of his name in the landlord's *sheristha*, and the landlord obtained a decree for rent against the original *putnidar* (the recorded tenant) and in execution caused his property to be sold and himself purchased it.

Held, that the appellant, purchasor of the original *putnidar's* interest, was bound by that decree and the sale which took place in execution thereof, and as such was a representative of original *putnidar* within the meaning of section 244 of the Civil Procedure Code. 24 Cal. 62; 9 W. N. C., 134 *followed.* SURENDRA NARAYAN SINGH *v.* GOPI SUNDARI DASI. **9 C. W. N., 824.**

747. S. 47-*S. 244-Legal representative—Execution of decree—Death of judgment-debtor—Execution of decree against legal representatives—Questions with regard to assets of judgment-debtor.*

Where a judgment-debtor dies after the passing of a decree and his legal representatives are brought on the record in execution proceedings to represent him in respect of the decree, questions which they raise as to property which they say does not belong to his assets in their hands, and as such is not capable of being taken in execution, are questions which under section 244 of the Code of Civil Procedure must be determined in the execution department and not by separate suit. KALI CHARAN *v.* JEWAR DUBE. **A. W. N., 1905 P. 180.**

748. S. 47.—*S. 244 cl. (c)—Purchaser from judgment-debtor pending attachment—Appeal.*

One who purchases property from the Judgment-debtor which it is under an attachment is the representative of the judgment-debtor and is entitled to appeal against an order passed for sale of property purchased by him. 19 A. 332 ref. to.—KAMAL NARAIN *v.* SAT NARAIN. **2 A. L. J. 265.**

748 a. S. 43—*O. XXI. R. 83—244, 305—Representatives.*

Following the dicta of the Privy Council that enjoin upon the courts the widest possible interpretation of section 244 Civil Procedure Code, a section expressly framed to prevent multiplicity of suits, *held* that a purchaser from a voluntary seller, who has sold with the consent and authority of the court under section 305, is a representative of the judgment-debtor within the meaning of section 244 (c) GOBARDHAN RAI *v.* BISHEN PRASAD. **23 A. 116.**

749. S. 47. *115, 244* (c) *& 62?—Revision—Order in matter relating to execution of decree—Force of—Sections 244 (c), 2.*

The High Court will not interfere in revision, under section 622 of the Code of Civil Procedure, where a way of remedy by appeal is or has been opened to the applicant

Sup: Govt. acts (V of 1908) *(Contd.)*

6 A. 269 referred to. HLA GYAU *v.* SIT YOU. **3 L. B. R., 1906, P. 131.**

750. S. 47—*244—Execution of decree—Objection as to validity of decree—Question of jurisdiction.*

If a decree is passed by a Court which had absolutely no jurisdiction to pass it even a party to the suit may impeach it as a nullity thought it had not been set aside in appeal or otherwise.

The mere fact that a decree is passed in the absence of evidence required to establish the case would not make it a decree passed without jurisdiction; and a party to the suit is precluded in execution from impeaching the decree which was passed without opposition and which has not been set aside. RANGASAMY NAICKEN *v.* THIRUPATI NAICKEN. **M. L. J., 1904, p. 413=28 M. 26.**

751. S. 47—*S. 244—Representative—Mortgage—Satisfaction by mortgagee of a decree for sale on previous mortgage at the request of mortgagor—Rights of mortgagor.*

U mortgaged two villages to *J.* who instituted a suit upon his mortgage and obtained a decree for sale and also an order absolute for sale. Subsequently *U.* mortgaged eight villages including the above two to one *T.* who at the request of *U.* paid off the amount due to *J.* upon his mortgage-decree out of the mortgage-money advanced by him. *T.* brought the present suit to recover the amount due upon her mortgage, by sale of the mortgaged property. It was contended for the mortgagor that *T.* being a representative of *J.* within the meaning of section 244 of the Civil Procedure Code, she could bring these two villages to sale only by executing *J.*'s decree, and not by means of a suit on her own mortgage.

Held that *T.* was not a representative of *J.* within the meaning of section 244 of the Civil Procedure Code and there was no reason why she should be driven to the cumbrous procedure of partially recovering her loan by executing the discharged decree formerly held by *J.* and as to the remainder of the loan by instituting a separate suit upon her own mortgage. 24 All, 179 *distinguished.* TUFAIL FATMA *v.* BITOLA. **A. W. N. 1904 P. 784.**

752. S. 47 and 115—S. 244, 622 and 310 A —*Question relating to execution of decree—Order dismissing application to have sale set aside—Revision—Appeal.*

The judgment-debtor's property was sold in execution of a decree for sale. He applied under s. 310A, for setting aside the sale. The Court dismissed the application holding that S. 310 A, C. P. C. did not apply to a decree for sale passed under the Transfer of Property Act.

Against that order he applied under s. 622, C. P. C.

Held, that the question whether judgment-debtors had a right to apply under S. 310A, to have the sale set aside and the other questions arising in the case were questions relating to the execution of decree contemplated by cl. (c), S. 244, C. P. C.

Held, also, that the decree-holder was a necessary party to the application of the judgment-debtors and that the questions were between them.

Held, further, that an appeal lay from the order dismissing the application and an application under S. 622 could not be entertained. LALTA *v.* DEPUTY COMMISSIONER, SITAPUR, AS MANAGER, COURT OF WARDS. **5 O. C., 377.**

Sup: Govt. acts (V of 1908) *(Contd.)*

753. S. 47—*S. 244—Parties to suit—20 P. L. R. 1903—90 P. R.; 1902.*

754. S. 47—*S. 244—Pre-emption—Right of re-purchase—Right of substitution—Representative.*

The right of pre-emption is not a right of re-purchase either from the vendor or from the vendee, involving any new contract of sale; but it is simply a right of substitution entitling the pre-emptor by reason of a legal incident to which the sale itself was subject to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. HAKIM SINGH *v.* INDER **49 P. L. R., 1902=46 P. R., 1902.**

755. S. 47.—*244—Pre-emption. Decree for —Payment of decretal amount into Court by pre-emptor—Sale declared invalid as against reversioner of vendor—Order allowing withdrawal of purchase-money—Appeal.*

The pre-emptors obtained a decree for pre-emption against the vendor and the vendee. The purchase-money, directed by the decree to be paid to the vendee, was deposited in Court. Subsequenly a reversious of the vendor obtained a decree, declaring that the sale was without necessity and did not affect his rights, except in respect of a part of the purchase-money, both the vendee and the pre-emptors applying that their names might be taken off the record The pre-emptors then put in a petition asking that their purchase-money should be returned to them, as they no longer wished to go on with the purchase, since their decree of pre-emption had been superseded by the declaratory decree. The Court ordered refund of the money. On appeal the Divisional Judge declined to interfere, on the ground that procedure for paying money into Court in pre-emption cases was not procedure in execution of a decree, and that he had no jurisdiction to hear an appeal from such an order. On appeal to the Chief Court—

Held, that the effect of the Original Court's order was to deprive the vendee of his money which he was entitled to under a decree of Court, and the order fell within the scope of clause (c) of section 244 of the Civil Procedure Code, and that an appeal lay from it as if from a decree.

Held, also, that the vendee was entitled to a refund of the money paid over to the pre-emptors.—19 *All.*, 253; *P. R.* 46 *of* 1902;

Sup: Govt. acts (V of 1908) *(Contd.)*

S. C., 49 *P. L. R.*, 1902; 7 *All.*, 775, *referred to.* ABDULLA *v.* AMIR-UD-DIN. **113 P. L. R., 1902=76 P. R. 1902.**

756. S. 47—*S. 244—Auction-purchaser—Parties—Auction-sale, reversal of—Refund of purchase-money, suit for.*

The right of an auction-purchaser to a refund of the purchase-money where the auction sale has been set aside for irregularity, is not a question arising between the parties to the suit or their representatives and relating to the decree, within the meaning of S. 244 (*c*) of the Civil Procedure Code; a separate suit for refund of such purchase-money is therefore maintainable. JOTINDRA MOHAN TAGORE *v.* MAHOMED BASIR CHOWDHRY. **32 C. 332.**

757. S. 47—*S. 244—Parties—Decree for permanent injunction—Decree-holder's vendee bringing a fresh suit for injunction.*

A's predecessor-in-title obtained a permanent injunction restraining the defendants from obstructing the former in his right of way. After the decree, A purchased the property with reference to which the right of way was enjoyed. He being again obstructed by the defendants using the way sued them. The lower Courts held that the plaintiffs remedy lay in executing the decree and not in filing a fresh suit.

Held, there was no bar to the plaintiff's suit, inasmuch as the injunction did not run with the land. JAMSEDJI MANEKJI KOTWAL *v.* HARIA DAYA. **10 B. L. R., 18.**

758. S. 47 *S. 244—Parties—Auction purchaser—Encroachment by judgment-debtor, decree-holder and other persons—His suit for compensation not barred by S. 244 as it did not relate to execution.* KOLINTAVITA ANTATHODAN MAMA AMINA *v.* KOLINTAVITA MUYYARIKANDI BEVACHI HAJI. **3 M. L T 97=17 M. L. J. 543.**

See No. 728 supra.

759. S. 47, O. XXI R. 89—*Ss. 244, 310-A—Parties—Question relating to the execution of the decree S. 310 A—Auction-purchaser in Court sale—Appeal.*

Held, that the question of setting aside a sale under S. 310-A relates to the execution of the decree. A transferee who has acquired the interest of the judgment-debtor after the Court sale is a representative of the judgment-debtor and is entitled to apply under S. 310-A and his application is rejected in an appeal against that order. MANIKKA ODAYAN *v.* RAJAGOPALA PILLAI. **17 M. L. J. 291.**

760. S. 47—*S. 244—Representative—Suit to obtain possession by assignee of auction-purchaser—Full Bench reference—Powers and duties of a Divisional Bench.*

In execution of a simple money decree certain property was sold and purchased by the decree-holder himself. After the confirmation of the sale he failed to obtain possession of the property which remained in the hands of the judgment-debtor.

Sup: Govt. acts (V of 1908) *(Contd.)*

Held, that a suit by an assignee of the decree-holder for possession of the purchased land was barred by S. 244. 3 A. L. J. 234 followed.

Semble.—A division Bench of the High Court made a reference to the Full Bench, but the Chief Justice refused to constitute a bench to hear the reference.

Held, that the devision Bench could rehear the case. BHANI MAL *v.* MAKKHAN LAL. **5 A. L. J. 285.**

761. S. 47. *S. 244—Parties—Puisne morgagee obtaining possession under his sale—Subsequent purchaser under decree of first mortgagee—Suit for possession by subsequent purchaser—Redemption.*

A decree was obtained by B, a puisne mortgagee, against the mortgagor without impleading the first mortgagee A. B bought the property in execution of his mortgage-decree, and got possession.

A then sued on his mortgage and bought the property in execution of his own mortgage-decree. A afterwards sued B, and claimed that B should either give up possession or redeem him.

Held, that the suit was not barred by this section (25 B. 631 refd.)

Two conditions must be fulfilled to apply S. 244:—

(*a*) the question must relate to the execution, discharge or satisfaction of the decree, or stay of execution thereof;

(*b*) the question must arise between parties to the suit or their representatives.

In the present case the question at issue arose only after the satisfaction of the original decree, and it was not between parties to the same suit or their representatives, but between representatives of the same party.

Held, also, that, the defendant being a puisne mortgagee, his only right was to redeem the plaintiff. (20 B. 390, 19 A. 527 and 33 C. 590 refd.) He was not concerned with the account taken in the plaintiff's suit to which he was not a party, nor was he concerned with the price paid by the plaintiff at his purchase. THAKURDAS WD. MULCHAN *v.* GANGARAM WD. TOLARAM. **1 S. L. R. 172.**

762. S. 47—*S. 244—Representative—Judgment-debtor, representative of—Putni—Unregistered purchaser—Execution—Application to set aside a sale in execution of a subsequent rent decree against the putnidar.*

A person who has purchased a putni holding at sale in execution of money decree, but has not had his name registered in the landlord's *sherista*, is bound by a subsequent decree for arrears of rent obtained by the landlord against the registered putnidar and by the sale in execution of such decree, and is therefore a "representative" of the judgment-debtor within the meaning of s. 244 of the Civil Procedure Code. *Ishan Chunder Sirkar v. Beni Madhub Sirkar* (I. L. R., 24 Cal. 62) and *Azgar Ali* v. *Azboddin Kazi*, (9 C. W. N. 134) followed. *Umed Rasai Saha* v. *Anath Bundhu Chowdhury* (6 C. W. N. 129)

Sup: Govt. acts (V of 1908) *(Contd.)*

distinguished. *Kameshwar Pershad* v. *Run Bahadur Singh* (I. L. R., 12 Cal. 458) followed. SURRENDRA NARAIN SINGH *v.* GOPI SUNDARI DASSI. **9 C. W. N. 824 =32 C. 1031.**

762 (a). S. 47.—*244—Parties—Legal representative—Questions to be determined in—Separate suit relating to property sold in execution.*

A, a Hindu widow having a limited interest in the property of her husband, mortgaged a part of it to B for certain sum of money. B sued A for the recovery of the mortgage-money by sale of the mortgaged property. A died pending the suit and the respondents were made defendants as her legal representatives. B obtained a decree against these defendants to be satisfied out of the personal estate of A which had come into their hands. B purchased at auction-sale a portion of mortgaged property which was put to sale in execution of this decree. The respondent sued B the appellant for possession of the purchased property on the ground that it did not belong to the widow's estate but to that of her husband.

Held, that, whether the property belonged to the widow's estate or to that of her husband was a question to be decided in execution proceedings under section 244 of the Civil Procedure Code and not by a separate suit.

Held, that the provisions of section 244, Civil Procedure Code, apply, with equal force, to the representatives brought on the record either before or after decree. GAJADHAR PRASAD *v.* AMBIKA SAHAI. **1 O. C. Sup., 60.**

762 (b). S. 47—*244—Parties to the suit—Execution of the decree.*

D. C. obtained a decree against R. K. from the Rent Court, which he realized from a sum standing in deposit to the credit of R. K. and full satisfaction was entered upon the decree. Subsequently C. and others sued D. C. alleging that they also were entitled to a portion of the deposit-money and they got a decree against D. C. R. K. was a party to that litigation. After this D. C. again applied for execution of his decree against R. K. admitting part payment.

Held, that, S. 244, Civil Procedure Code, applies as well to a dispute arising between the parties contemplated by that section, in relation to the exection of the decree, after it has been executed, as it would to a dispute between such parties relating to the execution of a decree before it had been executed. RAM KUMAR *v.* DEPUTY COMMISSIONER, GONDA, MANAGER, RAM NAGAR ESTATE. **2 O. C., 366.**

762 (c). S. 47—*244—Suit to determine legal representative of deceased decree-holder—Stay of execution—Appeal.*

A decree-holder died pending his application for execution. A dispute arose between the appellants and the respondents as to who was the legal representative of the deceased. The Court executing the decree referred the parties to a regular suit and stayed execution. The respondent A, having instituted suit and obtained decree, asked her name to be brought on the record for the deceased decree-holder, the appellants contended that an appeal having been preferred from that decree, the respondent should not be brought upon the record.

Held, that S. 244, C. P. C., does not contemplate the determination of the question of the legal representative by the Court of appeal but only by the Court of first instance, and therefore A was the legal representative of the decased. MUKIM-UN-NISSA *v.* AZIZ-UN-NISA. **5 O. C., 133.**

763. S. 47.—*Section 244—Representative—Mortgage decree. Execution of, against the successor of the judgment-debtor—Fresh suit, if necessary, when successor claims by survivorship under the* Mitakshara *Law.*

A mortgagee is entitled to execute his mortgage decree against a successor of the judgment-debtor even when he holds the property by survivorship under the *Mitakshara* Law, without bringing a suit for a declaration that the property in his hands is liable to be sold in execution of the mortgage decree. It is open to the successor to take the very defences in execution proceedings which he might take in a fresh suit. *Misc. App. No. 7 of 1905, followed.*—CHANDER PERSHAD *v.* SHAM KOER. **3 C. L. J., 131=33 C. 676.**

764. S. 47. *S. 244—Parties—Person against whom claim abandoned.*

The plaintiff abandons his claim against a person not being able to serve him with notice.

Held, that such a person is not party to the suit within the meaning of this section.—VENKATAPATHY NAIDU *v.* SUBRAYA MUDALI. **17 M. L. J. 416.**

765. S. 47.—S. *244—Parties—Hindu father and sons.*

The term "representative" used in this section has not a limited signification and means a representative in interest. 24 C. 62; 9 C. W. N. 134, referred to. The sons of a Hindu father succeeding to his property by survivorship are therefore the father's representatives. The test of a person's being a representative is this:—Can the decree be executed against the person sought to be made representative and will he be affected by the sale thereof? PEARI LAL SINGH *v.* CHANDI NARAIN SINGH. **5 C. L. J. 80= 11 C. W. N. 163.**

766. S. 47—*S. 244—Representative—Purchaser at execution sale.*

A *puisne* mortgagee purchaser, at a sale held in execution of his decree on his second mortgage, is liable under S. 244, to be joined as a representative of the judgment debtor, by the first mortgagee decree-holder in execution of his decree. GOKALSING SURATSINGH *v.* AWATMAL SOBHANMAL. **1 S. L. R., 158.**

767. S. 47—*S. 244—Parties—Beneficial owner a representative.*

Sup: Govt. acts (V of 1908) *(Contd.)*

The predecessor of the judgment-debtors was the *benamidar*, for a person.

Held, that such a person is really interested in protecting the property, and is a "representative" of the judgment-debtors within the meaning of S. 244.

The "representative" has a wide import, and includes not only heirs and executors, but also assignees or legal representatives in the strict sense of the words, that is, persons interested in saving the property from being sold, and whose interest would be jeopardized if the sale were not set aside. SHIB KUMAR LAL PANDAY *v.* MAIDHUR GAZI. **7 C. L. J., 299.**

768. s. 47—*S. 244—Representative.*

An attaching creditor of a judgment-debtor is not his representative, but an attaching creditor of a decree-holder may be a representative of the decree-holder. 29 M. 318; 16 M. 20 ref. to. RAM CHUNDER *v.* MUSTT. HAMIRAM. **11 C. W. N., 433.**

See No. 865 infra.

769. S. 47—*S. 244—Representative attacher.*

A person attaching a decree is within the meaning of this section a representative of the decree-holder. 15 C. 371 foll. BROJO NATH SAHA *v.* GAYA SUNDARI DASSYA. **6 C. L. J. 141.**

770. S. 47—*S. 244—Representative—Auction-purchaser.*

A person who purchases an auction in Court sale is a representative of the decree-holder within the meaning of this section. MANIKKA ODAYAN *v.* RAJAGOPALA PILLAI. **17 M. L. J. 291; 30 M. 507.**

771. S. 47.—*S. 244, 335—Representative—Judgment-debtor—Mortgagee.*

A mortgagee from the judgment-debtor after attachment is the representative of the judgment-debtor within the meaning of this section. NARAYANASAWMI NAICK *v.* SESHAPPIER. **17 M. L. J., 321.**

772. s. 47—*S. 244—Representative—Rent sale of occupancy-holding—Mortgagee's application to set aside sale.*

The mortgagee of a transferable occupancy-holding before its sale in execution of a rent decree is a representative of the judgment-debtor within the meaning of this section and may apply to set aside the sale under it. 24 C. 62 F. B. and 9 C. W. N. 134 foll. SRIMITI NISSA BIBI *v.* RADHA-KISHORE MANIKYA. **11 C. W. N. 312.**

773. s. 47—*S. 244, 291—Representative—Auction-purchaser in execution of mortgage-decree on a puisne mortgage—Deposit in Court by auction purchaser under S. 291.*

A person who is the auction-purchaser in execution of a puisne mortgage-decree is the representative of the puisne mortgagee judgment-debtor in a decree on a prior mortgage and is entitled to make a deposit under S. 291, C. P. C., though the purchase had not been confirmed. 24 C. 62; 27 C. 966 refd. to. RADHA KISHUN MARWARI *v.* HEM CHANDRA BOSE. **11 C. W. N. 495.**

Sup. Govt acts (V of 1908) *(Contd.)*

774. s. 47—*S. 244—Representative—Question as to representative capacity.*

The mortgagees from a Hindu widow of the property of her husband sued for and obtained a decree and an order absolute for sale against her. She died before execution, and the decree-holders then applied to bring on to the record as her representatives the reversionary heirs of her husband. These persons resisted the application upon the ground that they were not the legal representatives of the widow, and the lower appellate Court decided that they were not and dismissed the decree-holders' application for execution.

Held that, inasmuch as the reversionary heirs had repudiated the notion of their being legal representatives of the mortgagor from the outset and established to the satisfaction of the Court that they were not such representatives, the order of the Court was correct. (21 A 277 distinguished). KHUMAN SINGH *v.* MAKHAN SINGH. **A. W. N. (1908), 92=5 A. L. J., 550.**

775. s. 47—*S. 244—Representative—Purchaser at court auction not a representative of decree-holder.*

One who purchases at a Court auction, does not purchase from the decree-holder, nor does he derive title from him and is not a representative of the decree-holder within the meaning of this section (14 C. 644 followed, 28 M. 87 dist., 30 M. 407 dissented). KRISHNA SATAPASTI *v.* SARASWATULA SAMBASIVA ROW PANTULU. **3 M. L. T. 306=31 M. 177.**

776. s. 47—*S. 244—Representative—Mortgagee under the judgment-debtor.*

A mortgagee under the judgment debtor must be regarded as a representative of the judgment debtor for the purpose of this section (17 M. L. J. 321 followed). KUKKIL KURUDAKARAM NAIR *v.* PANOIKKAT NARAYANA NAMBI. **4 M. L. T. 85.**

777. s. 47—*S. 244—Representative—Auction-purchaser at sale in execution of decree against transferee of occupancy holding.*

A person who purchases at an auction held in execution of a decree against the unregistered transferee of an occupancy holding is a 'representative' of the recorded tenant within the meaning of S. 244 and can apply for the setting aside of a sale in execution of a rent decree against the recorded tenant, on the ground of fraud, 24 C. 62 followed HARADHAN RAKSHIT *v.* GRISH CHANDRA MUKHERJI. **8 C. L. J. 327.**

778. s. 47.—S. *244—Parties—Representative of judgment-debtor—Rent decree obtained by landlord against recorded tenant—Transferee of portion of holding before decree.*

Where the landlord of an occupancy holding obtains a decree for rent against his recorded tenant, an unregistered transferee of the tenant into whose hands a portion of the holding had previously passed is bound by the decree and is therefore a representative of the judgment-debtor within the

Sup: Govt acts (V of 1908) *(Contd.)*

meaning of section 244 of the Civil Procedure Code. GOPI NATH CHOTTOPADHYA *v.* SAJANI KANTA SINGH. **10 C. W. N. 240.**

779 S. 47—*S. 244—Parties—Property sold in violation of s. 99, T. P. A. and purchased by a stranger—Suit to set aside sale barred*—MUTHOO *v.* KARRUPAN. **17 M. L. J., 163 = 30 M. 313.** *See T. P. Act IV of 1882, s. 99, col 711.*

780. S 47.—*S. 244—Representative—Death of judgment-debtor—Questions with regard to assets of judgment debtor.*

Where a judgment-debtor dies after the passing of a decree and his legal representatives are brought on the record in execution proceedings to represent him in respect of the decree, questions which they raise as to property which they say does not belong to his assets in their hands, and as such is not capable of being taken in execution, are questions which under section 244 of the Code of Civil Procedure, must be determined in the execution department and not by separate suit. KALI CHARAN *v.* JEWAT DUBE. **A. W. N., 1905, P. 180 = 28 A. 51.**

781. S. 47.—S. *244—Parties—Simple money-decree against father—Son's objection to execution—Suit against sons instituted on this objection—Estoppel.*

The sons of judgment-debtor objected to the execution of a decree obtained against the judgment-debtor, on the ground that the property, being ancestral, could not be sold in execution of a simple money-decree obtained against their father, and that a fresh decree should be obtained against them. The Court dismissed the application for execution on that ground. The decree-holders brought a fresh suit against the sons.

Held, that the defendants were not entitled to plead S. 244 of the Code as bar to a subsequent suit instituted on the strength of their former plea; and it matters nothing that the suit as framed was not exactly the suit suggested by the plea of the defendants. JAGANNADHA ROW *v.* KURMAYYA. **17 M L J, 314.**

782. S. 47.—*S. 244—Question relating to execution.*

Any question relating to an order absolute for sale of mortgage property is not a question relating to the execution of a decree under this section. HATIM ALI *v.* ABDUL GHAFUR. **8 C. W. N. 102.** *See T. P. Act IV of 1882, s. 89, col. 687.*

783. S. 47—*O. XXI R. 95, 97 and 98—244 (c), 318 and 334—Question relating to execution—Sale subject to prior charge—Purchase by decree-holder—Application for possession dismissed—Appeal against the order dismissing application.*

The decree-holder in execution of his decree which directed the sale of certain properties (mortgaged to him by defendants Nos. 1 and 3 and the ancestors of defendants Nos. 2, 4, 5, 6 and 7) subject to a

Sup: Govt. acts (V of 1908) *(Contd.)*

prior charge thereon in favour of the 12th, 13th and 16th defendants became the purchaser and sought to recover possession of the properties purchased under Sections 318 and 334, Civil Procedure Code, from the 12th and 13th defendants and the legal representatives of the 16th defendant. His petition was dismissed. The question was raised whether under the terms of the decree he was entitled to be put into possession without paying the amount of the prior charge.

Held, that the order dismissing the petition was appealable under Section 244 (c) of the Civil Procedure Code, the question raised between the decree-holder and the defendants related to the execution of the decree against these defendants, and the order appealed against was not the less an order under Section 244, Civil Procedure Code, because it was also passed under Sections 318 and 334, neither of which is specified in Section 588.

Held, also, that according to the right construction of the decree, the decree-holder purchaser could not enforce the decree against the defendants in possession by ousting them without redeeming the prior charge. KASHI NATHA AIYAR *v.* UTTUMANSA. **12 M. L. J. 1 = 25 M. 529.**

784. S. 47, *96—S. 244 and 540—Question relating to execution—Decree—Court deciding question relating to execution before order absolute for sale is made—No application for execution before Court—Appeal.*

When a Court decides a question relating to the discharge or satisfaction of a decree it may be said to be executing the decree in the sense of Section 244 of the Civil Procedure Code, although no formal application for execution may have been made to it; and the decision is a decree within the meaning of Section 2 and appealable under Section 540. 11 Bom. 57, 14 Mad. 99 *referred to.* RAM KAMLESSURI PERSHAD SINGH *v.* SUKHAN SINGH. **7 C. W. N. 172.**

785. S. 47—*244—Contribution against an auction purchaser of a part of mortgaged property—Purchase by the mortgagee the whole property—Suit by mortgagee purchaser for possession. I. A. L. 564—See T. P. A. IV of 1882 S. 43 col. 566.*

786. S. 47—*S. 244 (c)—Question relating to execution—Execution of decree—Judgment-debtor cannot question the effect of decree passed against him.*

A judgment-debtor against whom a decree for sale has been passed as the legal representative of the mortgagor, is not entitled to object, in the execution proceedings, to the property being sold on the ground that it was not the property of the mortgagor.

Section 244 *(c)* of the Civil Procedure Code does not apply to a case where the judgment-debtor tries to set aside effect of a decree. KHETRAPAL SINGH ROY *v.* SHAYAMA PROSAD BARMAN. **62 C. 265.**